

1959

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Re The Inquests Ordinance	[1959] 1 EA 1091 (HCT)
R v Bubu (Dumb Man)	[1959] 1 EA 1094 (HCT)
Chief Nehemia Gotonga v Stephen Kinyanjui	[1959] 1 EA 1096 (CAN)

Murgian & Sons Ltd and others v Transport Appeals Tribunal [1959] 1 EA 1 (SCK)

Division: HM Supreme Court of Kenya at Nairobi

Date of judgment: 14 January 1959

Case Number: 160/1958

Before: Rudd and Mayers JJ

Sourced by: LawAfrica

[1] Certiorari – Transport licensing – Application to quash judgment of Appeals Tribunal – Document before Tribunal not seen by parties – Whether prejudice caused to applicants.

Editor’s Summary

The applicants applied for an order of certiorari to bring up and quash a judgment of the Transport Appeals Tribunal setting aside the issue by the Transport Licensing Board of certain licences to transport

petroleum products. The applicants contended that the Appeals Tribunal had acted contrary to the principles of natural justice in that they took into account certain observations contained in a circular dated December 17, 1958, addressed by the chairman of the Transport Licensing Board to the members of that board without affording to the applicants an opportunity of seeing that circular and advancing such arguments in relation thereto as they might think proper. It was conceded on behalf of the applicants that the circular in question was in fact entirely favourable to them. It was also argued that a statement in the judgment of the Appeals Tribunal that the applicants were warned when they took out their licences that they would only be able to do so for a limited period, was factually inaccurate. The licences in question were for the year 1958 and expired on December 31 of that year.

Held –

- (i) the chairman's circular complained of "was not information prejudicial to the interests of the applicants and therefore was not information upon which the Appeals Tribunal was not entitled to act unless and until the applicants had had an opportunity of being heard upon that information". *R. v. Denbighshire Justices* (1853), 17 J.P. 312; 109 E.R. 916, applied.
- (ii) the allegation of factual inaccuracy was not supported, as in the court's view it ought to have been, by an affidavit, and in the absence of argument the court refrained from expressing a concluded opinion.

Application dismissed with costs.

Cases referred to in judgment

- (1) *Errington v. Minister of Health*, [1935] 1 K.B. 249; [1934] All E.R. Rep. 154.
- (2) *Local Government Board v. Arlidge*, [1915] A.C. 120.
- (3) *Board of Education v. Rice*, [1911] A.C. 179.
- (4) *R. v. Denbighshire Justices* (1853), 17 J.P. 312; 109 E.R. 916.

Judgment

Rudd J: read the following judgment of the court: By this application the applicants seek an order for the issue to the Transport Appeals Tribunal (hereinafter referred to as “the Tribunal”) of a writ of certiorari to bring up and quash a judgment of the Tribunal delivered in writing on November 7, 1958, setting aside the issue by the Transport Licensing Board of certain licences to transport petroleum products.

Mr. Harris, who appears for the applicants, relied upon two substantial contentions. First he argued that the Tribunal acted contrary to the principles of natural justice in that they took into account certain observations contained in a circular dated December 17, 1958, addressed by the chairman of the Transport Licensing Board to the members of that board without affording to the applicants an opportunity of seeing that circular and advancing such arguments in relation thereto as they might think proper. In support of the contention that conduct of the above nature constitutes a contravention of the principles of natural justice which ought to be corrected by the issue of a writ of certiorari, Mr. Harris relied upon the statement in Halsbury’s Laws of England (3rd Edn.), Vol. 11 at p. 66:

“If a tribunal receives from a third party a document relevant to the subject matter of the proceedings, it should give both parties an opportunity of commenting on it.”

and on the decision in *Errington v. Minister of Health* (1), [1935] 1 K.B. 249. The facts in *Errington’s* case (1) were that a public inquiry having been held by an officer of the Ministry of Health, with a view to determining whether or no a slum clearance order made by the Jarrow Corporation under the Housing Act, 1930, should be confirmed, correspondence ensued between the town clerk of Jarrow and the Ministry of Health in the course of which additional evidence was supplied from the Jarrow medical officer of health and as a result of which, ultimately, a representative of the Ministry had an interview at Jarrow with members of the Council and certain of their officers, in the course of which the area, the subject of the proposed clearance order, was inspected by the representative of the Ministry and the Corporation officers in the absence of any representative of the opponents to the confirmation of the order. Thereafter the town clerk again wrote to the Ministry requesting the confirmation of the order and going on to state that the Jarrow Council

“are advised by the engineer that it is not practicable even if it were right to do so to deal with the houses individually by way of closing order . . . as the engineer advises that the foundations and structure of the houses, generally speaking, precluded the possibility of their reconstruction into dwelling houses reasonably fit for human habitation”.

In the course of his judgment, Greer, L.J., after reviewing the facts, says at p. 264:

“Now it seems to me that if, as I think, the Ministry were acting in a quasi judicial capacity, they were doing

what a semi-judicial body cannot

do, namely, hearing evidence from one side in the absence of the other side, and viewing the property and confirming their own views about the property without giving the owners of the property the opportunity of arguing that the views which the Ministry were inclined to take were such as could be readily dealt with by means of repairs and alterations. Whether the surveyor was one of the officials or whether the borough engineer was one of the officials (who were present at the meeting and the inspection of the site subsequent to the public inquiry) we do not know; but we do know this, that by a letter of February 24, 1934, which was sent by the town clerk to the Ministry of Health, the views of the borough engineer were put before the Minister before the Minister gave his decision. The borough engineer had not been called at the public inquiry. Those who represented the owners had not had the opportunity of cross-examining him, testing the value of his opinion, and representing to the Minister through the inspector that no weight should be attached to his view.”

It seems to us that the circumstances in *Errington's* case (1) are clearly distinguishable from those of the instant case. There certiorari was issued because in effect evidence as to matters of fact in which term we include opinions of a technical nature, were placed before the authority entrusted with a quasi judicial function by one party without the adverse party having any opportunity to deal with those allegations of fact. In the instant case, however, the document, the subject of complaint, is not a document emanating from one of the parties to an inquiry but from the chairman of the board which was charged with the quasi judicial function and giving reasons for the board's decisions in the present matter and in other applications. Presumably the officer by whom inquiries are actually held under the English Public Health Act is not necessarily, if indeed he ever is, the officer who confirms or disallows slum clearance orders on behalf of the Minister. It could hardly be contended that the officer who actually exercises the power of confirming or disallowing an order on behalf of the Minister ought, before acting upon expressions of opinion contained in the report of the officer by whom the inquiry was actually held, afford to either party the opportunity of being heard upon those expressions of opinion.

Furthermore, Greer, L.J., at p. 265, cites with approval the observations of Viscount Haldane, L.C., in *Local Government Board v. Arlidge* (2), [1915] A.C. 120. In *Local Government Board v. Arlidge* (2), Lord Haldane cited with approval the observations of Lord Loreburn in *Board of Education v. Rice* (3), [1911] A.C. 179, where he says:

“The board had no power to administer an oath and need not examine witnesses. It could, he thought, obtain information in any way it thought best, always giving a fair opportunity to those who were parties in the controversy to correct or contradict any relevant statement prejudicial to their view.”

The words “prejudicial to their view” are of primary importance in the instant case because Mr. Harris freely concedes that the circular of the chairman of the board, which he says the parties should have had an opportunity of seeing and upon which they ought to have been heard, was in fact entirely favourable to the contention of the applicants, in other words, it was not information prejudicial to the interests of the applicants and therefore was not information upon which the Appeal Tribunal was not entitled to act unless and until the applicants had had an opportunity of being heard upon that information. So too, *R. v. Denbighshire Justices* (4), (1853) 17 J.P. 312, appears to be clear authority for the proposition that where a quasi judicial authority improperly

has before it information in favour of one party that party cannot seek to set aside the decision of the authority upon the ground of its having taken into account matters which it ought not to have taken into account.

For the foregoing reasons even were we prepared to hold that the Tribunal acted improperly in referring to the chairman's circular, which we are not, we would not consider that by reason of the Tribunal having referred to that circular, certiorari ought to issue at the instance of these applicants.

Mr. Harris's second contention was that the statement in the penultimate paragraph of the judgment of the Tribunal, that the transporters were warned when they took out their licences that they would only be able to do so for a limited period, was factually inaccurate. All that it is necessary to say as regards this argument is that the allegation of factual inaccuracy is not supported, as in our view it ought to have been, by any affidavit.

Finally, although as to this in the absence of argument we do not express any concluded opinion, it appears at least doubtful whether even if the applicants were entitled to be heard upon the chairman's circular and even if the statement in the judgment that they were warned that they would only be able to take out licences for a limited period is factually inaccurate, certiorari ought to issue in the instant case inasmuch as the judgment sought to be brought up and quashed in effect set aside licences which were expressed to expire on December 31, 1958, and therefore it does not appear that any useful purpose would now be served by quashing that judgment. The application will therefore be dismissed with costs.

Application dismissed with costs.

For the applicants:

JPG Harris

Robson, Harris & Co, Nairobi

For the respondent:

JS Rumbold (Crown Counsel, Kenya)

The Attorney-General, Kenya

For Commissioner of Transport:

JC Summerfield (Deputy Legal Secretary, East Africa High Commission)

The Legal Secretary, East Africa High Commission

Farrab Incorporated v The Official Receiver and Provisional Liquidator [1959] 1 EA 5 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	5 January 1959
Case Number:	77/1958
Before:	Forbes V-P, Gould JA and Sir Owen Corrie Ag JA

Sourced by: LawAfrica

Appeal from: H.M. Supreme Court of Kenya–MacDuff, J

[1] *Court of Appeal – Jurisdiction – Effect of failure to extract order – Whether defect procedural or going to jurisdiction – Eastern Africa Court of Appeal Rules, 1954, r. 62 and r. 72.*

[2] *Practice – Whether decision of Supreme Court on appeal from provisional liquidator’s rejection of proof of debt a decree or order – English Companies (Winding-up) Rules, 1929, r. 5, r. 8, r. 131, r. 141 – Companies Ordinance (Cap. 288), s. 220 and s. 354 (K.) – Civil Procedure Ordinance, s. 2 and s. 79 (K.) – Civil Procedure (Revised) Rules, 1948, O. 41 and O. 42 (K.).*

Editor’s Summary

The appellant company claimed to be a creditor of Phoenix Productions Ltd., a company of which the Official Receiver was the Provisional Liquidator, and sought to prove in the winding-up for “a sum of not less than twenty-five thousand pounds”. The appellant’s proof was rejected by the Provisional Liquidator under r. 141 of the English Companies (Winding-up) Rules, 1929, which apply in Kenya. The appellant then applied to the Supreme Court for an order reversing the Provisional Liquidator’s decision but his application was refused and he was ordered to pay costs. The appellant then brought this further appeal. At the hearing the court drew attention to the fact that no formal order embodying the decision of the Supreme Court was included in the record and the question in issue was whether the decision of the Supreme Court was a judgment giving rise to a decree, or was a ruling resulting in an order. If it was the latter, the appeal would be incompetent unless the formal order had been extracted. Counsel for the appellant company submitted that the Supreme Court’s decision was a decision given on appeal and therefore a decision in a “suit”, that is, a judgment which would result in a decree, and further that the appeal to the Supreme Court had been brought in accordance with the Civil Procedure (Revised) Rules, 1948, and not under r. 5 and r. 8 of the Winding-up Rules. It was also argued for the appellant that the decisions relating to the necessity to extract the formal order before an appeal would lie all dated from before the coming into force of r. 72 of the Eastern African Court of Appeal Rules, 1954, which gave the court power to waive an irregularity and that therefore, if the decision of the Supreme Court was an “order”, the failure to extract the formal order was an irregularity which could be waived under r. 72.

Held –

- (i) the appeal to the Supreme Court under r. 141 of the English Winding-up Rules was brought under and in accordance with the procedure prescribed by r. 5 and r. 8 of those Rules and not in accordance with any procedure prescribed by the Civil Procedure Ordinance and Rules; therefore
- (ii) the proceedings were not a “suit” within the definition in s. 2 of the Civil Procedure Ordinance and it followed that the decision was an order and not a decree.

Dictum of Sir Newnham Worley, P., in *Bhagat Singh v. Chauhan and Others* (1956), 23 E.A.C.A. 178 at p. 188. explained.

Mansion House Ltd. v. Wilkinson (1954), 21 E.A.C.A. 98; *Rene Dol v. The Official Receiver of Uganda* (1954), 21 E.A.C.A. 116; and *Mityana Ginners Ltd. v. Public Health Officer, Kampala*, [1958] E.A. 339 (C.A.), discussed.

- (iii) in this case the failure to extract a formal order before the appeal was lodged was a defect going to the jurisdiction of the court and could not be waived under r. 72. *Motel Schweitzer v. Cunningham* (1955), 22 E.A.C.A. 252, discussed and distinguished. *Mohamedbhai & Co. Ltd. v. Ghani* (1952), 19 E.A.C.A. 116, discussed.

Appeal dismissed with costs as incompetent.

Cases referred to in judgment

- (1) *Mansion House Ltd. v. Wilkinson* (1954), 21 E.A.C.A. 98.
- (2) *Mohamedbhai & Co. Ltd. v. Ghani* (1952), 19 E.A.C.A. 38.
- (3) *Rene Dol v. The Official Receiver of Uganda* (1954), 21 E.A.C.A. 116.
- (4) *Bhagat Singh v. Chauhan and Others* (1956), 23 E.A.C.A. 178.
- (5) *Mityana Ginners Ltd. v. Public Health Officer, Kampala*, [1958] E.A. 339 (C.A.).
- (6) *In re National Wholemeal Bread and Biscuit Co.*, [1892] 2 Ch. 457.
- (7) *Motel Schweitzer v. Cunningham* (1955), 22 E.A.C.A. 252.

January 5. The following judgments were read:

Judgment

Forbes VP: This is an appeal from the Supreme Court of Kenya. Phoenix Productions Ltd. is a company in liquidation, and the respondent, the Official Receiver, is Provisional Liquidator. The appellant claims to be a creditor of Phoenix Productions Ltd., and sought to prove in the winding-up for “a sum of not less than twenty-five thousand pounds”. The appellant’s proof was rejected by the Provisional Liquidator under r. 141 of the Companies (Winding-up) Rules, 1929 (hereinafter referred to as the Winding-up Rules), which apply in Kenya by virtue of s. 354 of the Companies Ordinance (Cap. 288). The appellant then applied to the Supreme Court by way of chamber summons for an order reversing the Provisional Liquidator’s decision. The learned judge who heard the application refused the order sought and ordered the applicant (the appellant) to pay the Provisional Liquidator’s costs. Against this decision the appellant has appealed.

No formal order embodying the decision of the learned judge of the Supreme Court was included in the record. At the commencement of the hearing the court drew attention to this omission and queried its jurisdiction to entertain the appeal, referring to *Mansion House Ltd. v. Wilkinson* (1) (1954), 21 E.A.C.A. 98.

After a short adjournment the court heard argument on the preliminary point, which argument was based on the decision in the *Mansion House* case (1). Subsequently further argument was heard at the invitation of the court as to the effect of certain decisions of the court not mentioned at the first hearing, namely: *Mohamedbhai & Co. Ltd. v. Ghani* (2) (1952), 19 E.A.C.A. 38; *Rene Dol v. The Official*

Receiver of Uganda (3) (1954), 21 E.A.C.A. 116; *Bhagat Singh v. Chauhan and Others* (4) (1956), 23 E.A.C.A. 178; and *Mityana Ginners Ltd. v. Public Health Officer, Kampala* (5), [1958] E.A. 339 (C.A.).

In this case there is no question as to the existence of a right of appeal to this court. That right is clearly conferred by s. 220 of the Companies Ordinance which reads as follows:

“Appeals from any order or decision made or given in the matter of the winding-up of a company by the court may be had in the same manner and subject to the same conditions as appeals from any order or decision of the court in cases within its ordinary jurisdiction.”

The point at issue here is whether the decision of the learned judge of the Supreme Court was a judgment giving rise to a decree, or was a ruling resulting in an order. If it was a ruling resulting in an order, it seems clear (subject to the question whether the irregularity could be waived under r. 72 of the Eastern African Court of Appeal Rules, 1954, with which I will deal presently) that on the authority of the cases cited above the appeal would be incompetent unless the formal order had been extracted.

Mr. Bechgaard for the appellants submitted that the learned judge's decision was a decision given on appeal, and therefore a decision in a "suit", that is, a judgment which would result in a decree. He based this argument on *Bhagat Singh's* case (4) and on the wording of r. 141 of the Winding-up Rules, the material part of which reads as follows:

"The chairman" [of a meeting of creditors] "shall have power to admit or reject a proof for the purpose of voting, but his decision shall be subject to appeal to the court."

Mr. Bechgaard submitted that since r. 141 confers a right of appeal, the Supreme Court decision must be an appellate decree. He relied principally on the following passage from the judgment of Sir Newnham Worley, P. (at p. 188), in *Bhagat Singh's* case (4):

"Where there is an appeal to the Supreme Court from an order made under a special or local law and within s. 79 (b)" [of the Civil Procedure Ordinance], "the Supreme Court's final determination of the appeal is a decree and so appealable as of right, unless the special or local law expressly excludes further appeal."

And he argued that in the instant case the appeal to the Supreme Court had been brought in accordance with the Civil Procedure (Revised) Rules, 1948, and not under r. 5 and r. 8 of the Winding-up Rules, and that those rules did not apply. As I have already indicated, the right of appeal to this court in this case is conferred by s. 220 of the Companies Ordinance. I am, however, unable to accept the submission that r. 5 and r. 8 of the Winding-up Rules do not apply to appeals to the Supreme Court against rejection of a proof under r. 141. Those rules read as follows:

"5.(1) The following matters and applications in the High Court shall be heard in open court:

- (a) Petitions.
- (b) Appeals to the High Court from the Board of Trade and from the Official Receiver when acting as Official Receiver and not as Liquidator.
- (c) Applications under s. 285 of the Act.
- (d) Applications under s. 294 of the Act.
- (e) Applications for the committal of any person to prison for contempt.
- (f) Such matters and applications as the judge may from time to time by any general or special orders direct to be heard in open court.

"(2) Examinations of persons summoned before the High Court under s. 214 of the Act, shall be held in court or in chambers as the court shall direct.

"(3) Every other matter or application in the High Court under the Act to which the Rules apply may be heard and determined in chambers."

"8.(1) Every application in court other than a petition shall be made by motion, notice of which shall be served on every person against whom

an order is sought, not less than two clear days before the day named in the notice for hearing the motion, which day must be one of the days appointed for the sittings of the court.

- “(2) Every application in chambers shall be made by summons, which, unless otherwise ordered, shall be served on every person against whom an order is sought, and shall require the person or persons to whom the summons is addressed to attend at the time and place named in the summons.”

Under r. 131 of the Winding-up Rules the chairman of a meeting of creditors summoned by the Official Receiver or the Liquidator shall be the Official Receiver or Liquidator or his nominee, and in the instant case the chairman who rejected the appellant’s proof under r. 141 was in fact the Official Receiver and Provisional Liquidator. In rejecting the proof the Official Receiver and Provisional Liquidator was acting in his capacity as Provisional Liquidator and therefore the appeal against his decision does not fall within para. (b) of sub-r. (1) of r. 5 of the Winding-up Rules. (*In re National Wholemeal Bread and Biscuit Company* (6), [1892] 2 Ch. 457.) It does, however, in my opinion, fall within sub-r. (3) of r. 5. The rule is clearly intended to be exhaustive, and sub-r. (3) relates in terms to every matter or application in the High Court other than those specifically mentioned in sub-r. (1) and sub-r. (2). Accordingly, sub-r. (2) of r. 8 applies, which prescribes the method of application to the court. This method is entirely different from the procedure for bringing appeals prescribed in O. XLI and O. XLII of the Civil Procedure (Revised) Rules, 1948. It is interesting to note that though Mr. Bechgaard argued that the matter had not been brought before the court under r. 5 and r. 8 of the Winding-up Rules, the procedure adopted was in fact that prescribed by those Rules. The application was by chamber summons intituled

“IN THE MATTER OF PHENIX PRODUCTIONS LIMITED
(In Liquidation)
and
IN THE MATTER OF THE COMPANIES ORDINANCE
(Cap. 288)
and
IN THE MATTER OF THE COMPANIES (WINDING-UP)
RULES, 1929
and
IN THE MATTER OF PROOF No. 40.”

Mr. Bechgaard did at one stage suggest that the application had been made under O. L of the Civil Procedure (Revised) Rules, 1948. This is hardly consistent with his contention that the application is an “appeal”, and in any case r. 1 of O. L provides that all applications to the court shall be by motion, save where otherwise expressly provided in the Rules. I am aware of no express provision in the Civil Procedure Rules governing applications under r. 141 of the Winding-up Rules.

In so far as matters and applications in the Supreme Court are concerned, r. 5 and r. 8 of the Winding-up Rules do, in my view, provide a code of procedure which is different from the procedure prescribed by the Civil Procedure Ordinance and Rules. Consequently, I am of opinion that an appeal under r. 141 of the Winding-up Rules (assuming that a decision of the chairman under that rule is an “order”, of which I am not entirely convinced) does not come within s. 79 (b) of the Civil Procedure Ordinance, which reads as follows:

- “79. The provisions of this Part relating to appeals from original decrees shall, as far as may be, apply to appeals—
- (a) from appellate decrees, and
 - (b) from orders made under this Ordinance or under any special or local law in which a different procedure is not provided.”

Accordingly, I am of the opinion that the dictum in *Bhagat Singh’s* case (4) referred to above is not applicable in the instant case.

In the *Mansion House* case (1) it was said (at p. 101 and p. 102):

“This makes it clear that the Supreme Court may have to entertain proceedings which are not ‘suits’ within the meaning of the Ordinance. I next consider whether this proceeding was a ‘suit’ in that sense. In s. 2 of the Ordinance ‘suit’ is defined to mean ‘all civil proceedings commenced in any manner prescribed’. One might imagine that this would mean ‘prescribed by any written law’: but it does not, for ‘prescribed’ is again defined by the same section to mean ‘prescribed by rules’ and ‘rules’ are defined to mean ‘rules and forms made by the rules committee to regulate the procedure of courts’. The rules committee is clearly that created by s. 81 of the Ordinance. Accordingly a ‘suit’ is any civil proceeding commenced in any manner prescribed by rules and forms made by the rules committee to regulate the procedure of courts under s. 81 of the Ordinance.

“Mr. Khanna contended that ‘suit’ must for the purposes of this appeal be construed in a more liberal sense, under the overriding provision against repugnancy which governs the whole of s. 2. Without giving reasons at the moment, I would say that it is here that I must differ from his views. I am unable to discover any repugnancy whatever, and I consider that ‘suit’ must for the purposes of these proceedings have its precise and statutorily defined meaning.”

.....

“The importance of this is at once apparent on considering in detail the definition in s. 2 of the Ordinance of ‘decree’. A decree means ‘the formal expression of an adjudication . . . with regard to . . . matters of controversy in the suit . . .’. I put in immediate juxtaposition the definition of ‘order’ in the same section. ‘Order’ means ‘the formal expression of any decision of a civil court which is not a decree, and shall include a rule nisi’. It seems clear that, whereas decrees arise only in suits, orders may arise in proceedings which are not suits, to which class of proceedings I have referred above. If, therefore, as I believe, the application to the Supreme Court was not a ‘suit’, it could not result in a decree, but only in an order.”

This passage was cited and relied upon in the *Mityana Ginnars* case (5). In that case the question for consideration was whether the decision of the resident magistrate on an appeal against a notice under the Public Health Ordinance requiring work to be done was an order or a decree. After setting out the passage from the *Mansion House* case (1) which I have quoted above, Briggs, V.-P., continued:

“In this case I find it impossible to say that the appeal to the District Court was commenced in any manner prescribed by rules made by the Rules Committee to regulate the procedure of courts. It seems to have been commenced by a method invented by common-sense to fill a deplorable gap in those rules. In consequence I think the appeal was not a ‘suit’, and the decision of the District Court could not in law be a decree, but was an order.”

In the instant case, as I have already said, I am of opinion that the appeal to the Supreme Court under r. 141 of the Winding-up Rules is brought under and in accordance with the procedure prescribed by r. 5 and r. 8 of those Rules and not in accordance with any procedure prescribed by the Civil Procedure Ordinance and Rules. The proceedings accordingly were not a “suit” within the definition in s. 2 of the Civil Procedure Ordinance, and it follows that the decision of the learned judge was an order and not a decree.

I derive some support for the view I have expressed from the following passage from the judgment of Briggs, J.A. (as he then was) in the *Rene Dol* case (3), though, of course, so far as r. 141 of the Winding-up Rules is concerned the view expressed was obiter. At p. 118 the learned justice of appeal said:

“Here the right of appeal springs from s. 222” [of the Companies Ordinance of Uganda which is in similar terms to s. 220 of the Kenya Companies Ordinance]. “If there were no special provisions in s. 222 as to the procedure on such appeals, they would be governed by s. 82 (b), but I think s. 222 by its own terms imports the procedural provisions of the Civil Procedure Ordinance and Rules and it is not necessary to rely on s. 82.

“I have felt some doubt whether the conjunction of the words ‘order or decision’ in s. 222 affects this question. I find it unnecessary to decide whether the rule in *Ex parte Whitton* applies in Uganda, though I would point out that it depended on the historical development of bankruptcy appeals in England, and there is in England no provision of law analogous to r. 6 (2) of the East African Court of Appeal Rules, 1925. I think that the words ‘or decision’ do not affect the situation that every decision of the court in winding-up is in Uganda, as in Kenya, in law an order, and an appeal requires the extraction of a formal sealed order. See *Mansion House Ltd. v. Wilkinson*, ante p. 98. If such a ‘decision’ could be a judgment resulting in a decree it would be appealable without leave, but I can think of no circumstances in which that could arise. This was not only an order in the general sense: it was clearly also an ‘order’ within the very wide definition in s. 2 of the Civil Procedure Ordinance.”

If I am right and the decision of the learned judge of the Supreme Court is an order, it is clearly an order within the sense of the definition in s. 2 of the Civil Procedure Ordinance, and on the authority of the cases cited above no appeal can lie unless the formal order has been extracted.

Mr. Bechgaard argued, however, that the decisions relating to the necessity to extract the formal order before an appeal would lie all dated from before the coming into force of r. 72 of the Eastern African Court of Appeal Rules, 1954, and that, therefore, if the decision of the learned judge of the Supreme Court was an “order”, the failure to extract the formal order was an irregularity which could be waived under r. 72; and he referred to *Motel Schweitzer v. Cunningham* (7) (1955), 22 E.A.C.A. 252. I think the answer to this argument clearly emerges from the following passages from the judgment of the learned president in *Motel Schweitzer* (7):

“It has been contended that this appeal does not lie by reason of the fact that no decree or order was in existence at the date of the filing of the memorandum of appeal. Accordingly the appellant had failed to comply with r. 56 of the Eastern African Court of Appeal Rules, 1954.”

.....

“It has been submitted . . . that the provisions of r. 56 are mandatory, so that the position is that on the date the memorandum of appeal was

filed the appeal was incompetent because a condition precedent had not been fulfilled.”

.....

“Mrs. Kean concedes that a right of appeal had come into existence before the memorandum of appeal was filed because under the municipal law of Kenya a judgment of the Supreme Court in a civil matter is appealable notwithstanding the fact that a formal decree in pursuance of the judgment may not have been drawn up (vide proviso to s. 2 (b) of the Civil Procedure Code). On account of this provision this case is distinguishable from cases also emanating from the Supreme Court of Kenya where this court ordered the dismissal of the appeals on the ground that, since those appeals purported to be appeals against orders, and no order had in fact been extracted, the right of appeal had never come into existence. The leading case of this character is *Mohamedbhai & Co. Ltd. v. Ghani* reported at 19 E.A.C.A. 38.”

The essential difference between *Motel Schweitzer* (7) and the instant case is that in *Motel Schweitzer* (7) “by the municipal law of Kenya a right of appeal did exist as soon as the judgment was delivered” whereas in the instant case by the municipal law of Kenya no right of appeal had come into existence at the date the appeal was filed. While, therefore, the defect in *Motel Schweitzer* (7) could be waived as being a procedural defect only, the defect in this case goes to the jurisdiction of the court, and, in my opinion, cannot be waived under r. 72. It was pointed out that a formal order was in fact extracted on September 18, 1958. The appeal, however, was filed on September 5, 1958, and at that date there was nothing in existence from which an appeal could be preferred. Incidentally, the time for lodging the appeal expired on September 7, 1958, which also was before the extraction of the formal order. As was said in *Mohamedbhai & Co. Ltd. v. Ghani* (2) (1952), 19 E.A.C.A. 38 at p. 41:

“... learned counsel for the appellant informed us that he had obtained a formal expression of the order against which he was appealing and he asked us for permission to file it. Whilst we appreciated Mr. Nowrojee’s industry and his desire to put himself right with the court we were unable to comply with the request for the reason that the subsequent obtainment of a formal order did not cure the defect that existed when this memorandum of appeal was filed, which was the appeal before us, for it did not disclose on the face of it a matter concerning which, by the municipal law of Kenya, an appeal could lie.”

For the reasons I have given I think this appeal is incompetent and must be dismissed with costs.

There is a related appeal, No. 78 of 1958, between the same parties in which the same point arose. The argument in the instant case covered both appeals, though they were not formally consolidated, and my conclusion on appeal No. 78 must be the same as my conclusion in this appeal.

Gould JA: I agree and have nothing to add.

Sir Owen Corrie Ag JA: I also agree.

Appeal dismissed with costs as incompetent.

For the appellant:

K Bechgaard

K Bechgaard, Nairobi

For the respondent:

J Gledhill

Gledhill & Co, Nairobi

R v Dishon Odinga and others
[1959] 1 EA 12 (SCK)

Division: HM Supreme Court of Kenya at Nairobi
Date of judgment: 12 January 1959
Case Number: 730/1958
Before: Sir Ronald Sinclair CJ and Rudd J
Sourced by: LawAfrica

(By way of Case Stated.)

[1] *Criminal law – Unlawful assembly – Construction of word “meeting” in Police Ordinance, 1948, s. 30 (K.).*

[2] *Case stated – Procedure – Case stated incomplete as regards facts found by magistrate – Proper contents of a case stated – Criminal Procedure Code, s. 375 (K.).*

Editor’s Summary

The respondents were charged in the resident magistrate’s court with taking part in an unlawful assembly contrary to s. 30 (8) (a) of the Police Ordinance. In the particulars of offence it was stated that the respondents took part “in an unlawful assembly, namely, a meeting which took place at a place of public resort, to wit at the public park outside Nairobi railway station without a licence issued under the provisions of s. 30 (2) of the Police Ordinance”. The facts found by the magistrate were that on October 1, 1958, the four respondents, by prior agreement with each other, went together to the Nairobi railway station for the purpose of exhibiting there to the view of Sir Roy Welensky certain political placards which they had beforehand prepared. After arrival together at the public car park outside the railway station, they separated. They had no connection with any other persons there gathered nor had the other persons at the railway station come there with the knowledge or at the request of the respondents. The magistrate was not satisfied that there was any danger or likelihood of a breach of the peace. He further held that this was not a meeting within s. 30 (8) (a) of the Police Ordinance, and expressed the view that the mischief aimed at and the type of meeting intended was one in the nature of a common law unlawful assembly. He accordingly acquitted the respondents. The attorney-general thereupon asked the magistrate to state a case for the opinion of the Supreme Court for the determination of the following questions, namely,

- (i) was the learned trial magistrate correct in law in holding that the word “meeting” in s. 30 (8) (a) of the Police Ordinance, 1948, means a meeting in the nature of a common law unlawful assembly?
- (ii) was the learned trial magistrate correct in law in his interpretation of the meaning of the word “meeting” in s. 30 (8) (a) of the Police Ordinance?
- (iii) was the learned trial magistrate correct in law in holding that the actions of the accused persons did not constitute a meeting under s. 30 (8) (a) of the Police Ordinance.

At the hearing of the appeal there was at first a dispute as to some of the relevant facts which were not particularised in the case itself, and not clearly found in the judgment, but the facts were later agreed upon by both the parties and the appeal proceeded to hearing.

Held –

- (i) a case stated should normally be complete in itself and reference to the judgment or the record of the evidence should not be necessary to ascertain the facts found by the trial court or the decision of the court. As a general rule only the facts as found should be stated, and not the evidence upon which the trial court's finding is based.

- (ii) the court was unable to answer the first question as it was unable to decide what the magistrate meant by the expression “a meeting in the nature of a common law unlawful assembly”.
- (iii) the word “meeting” in s. 30 (8) (a) of the Police Ordinance should not be given its widest possible meaning.
- (iv) s. 30 (8) (a) of the Police Ordinance was intended at least to prevent the dissemination, demonstration or expression of views in public unless the meeting, assembly or procession formed for that purpose was previously licensed in accordance with the section.
- (v) the pre-arranged gathering together of the respondents at the car park for the purpose of exhibiting there placards of a political nature in view of members of the public constituted a meeting within the meaning of the section.

Case remitted to the trial magistrate with a direction to convict and thereafter to deal with appellants according to law.

Case referred to in judgment

- (1) *Cowlishaw v. Chalkley*, [1955] 1 All E.R. 367.

Judgment

Sir Ronald Sinclair CJ: read the following judgment of the Court: This is an appeal by the attorney-general by way of case stated against the decision of the resident magistrate, Nairobi, acquitting the four respondents on a charge of taking part in an unlawful assembly contrary to s. 30 (8) (a) of the Police Ordinance, 1948.

The case as stated is as follows:

“Crown counsel having on the 10th day of November, 1958, on behalf of the Honourable the Attorney-General applied to this court to state and sign a case for the opinion of the Supreme Court in respect of count 1 in the above case this resident magistrate’s court states and signs a case as follows:

“(A) Count 1. Statement of Offence.

“Taking part in an unlawful assembly contrary to s. 30 (8) (a) of the Police Ordinance No. 79 of 1948.

“Particulars of Offence.

“Dishon Odinga s/o Dodo, Elijah Omolo s/o B. Agar, Musa Nyandosho s/o Ondongo and Jafetha Mbaja s/o Onyangi on or about the 1st day of October, 1958, at Nairobi in the Nairobi Extra Provincial District took part in an unlawful assembly, namely, a meeting which took place at a place of public resort, to wit at the public car park outside Nairobi railway station without a licence issued under the provisions of s. 30 (2) of the Police Ordinance.

“(B) The facts alleged in this case are set out in the evidence a copy of which is annexed hereto and the facts found by the court are set out in the judgment of the court a copy whereof is also annexed hereto. In particular in respect of count 1 the court found the following facts:

- (1) The accused by prior agreement with each other went to Nairobi railway station for the purpose of exhibiting there to the view of Sir Roy Welensky certain placards which they had beforehand prepared.
- (2) The four accused had no connection with any other persons there gathered nor had the other

persons at the railway station come there with knowledge or at the request of the accused.

“(C) The submissions of law made on behalf of the Crown were:

- (1) That the presence of the accused at the railway station constituted a public meeting. That there was no definition of meeting in the Ordinance and must be given the meaning of a coming together of more than one person.

Sharp v. Dawes (1876), 2 Q.B.D. 26.

“(D) The submission of law made on behalf of the accused was:

- (1) That the meeting finished when the accused agreed to go to the railway station and there express their views.

Halsbury (2nd Edn.) Vol. 9, p. 312.

“(E) This court found that there was no meeting at the railway station within the meaning of s. 30 (8) (a) of the Police Ordinance, No. 79 of 1948. This decision was based upon the reasonings set out in the judgment.

“(F) The questions of law upon which the Honourable the Attorney-General desires to be submitted for the opinion of the Supreme Court are:

- (1) Was the learned trial magistrate correct in law in holding that the word ‘meeting’ in s. 30 (8) (a) of the Police Ordinance, 1948, means a meeting in the nature of a common law unlawful assembly?
- (2) Was the learned trial magistrate correct in law in his interpretation of the meaning of the word ‘meeting’ in s. 30 (8) (a) of the Police Ordinance?
- (3) Was the learned trial magistrate correct in law in holding that the actions of the accused persons did not constitute a meeting under s. 30 (8) of the Police Ordinance?”

At the hearing of the appeal there was at first a dispute as to some of the relevant facts which were not particularised in the case itself, and not clearly found in the judgment. If counsel for the respondents had not later conceded that certain relevant facts had been proved and were not in dispute, it would have been necessary to send the case back for restatement.

A case stated should be complete in itself and reference to the judgment or the record of the evidence should not be necessary to ascertain the facts found by the trial court or the decision of the court. There is no room for argument if the facts found are clearly set out in the case. Section 375 of the Criminal Procedure Code provides that a case stated shall set out, *inter alia*, “the facts found by the subordinate court to be admitted or proved”. As a general rule only the facts as found should be stated, and not the evidence upon which the trial court’s finding is based. Exceptions to this rule occur where the question on which the opinion of the court is sought is whether there was no evidence to support the decision or whether a decision that there was no case to answer is correct in law. In those instances it is convenient to attach a copy of the record of the evidence so as to form part of the case stated. It is essential that at the hearing of an appeal by case stated the court should have before it in an undisputed form all the material required by both parties for the determination of the question on which the opinion of the court is sought. In *Cowlishaw v. Chalkley* (1), [1955] 1 All E.R. 367, Lord Goddard, C.J., said:

“We also desire to say that as a rule it is better practice, though it cannot be insisted on, that where justices agree to state a case, if they state it themselves or cause their clerk to draft it, it should be submitted to both parties, and in case of any complication it should be left to the parties themselves to draft the case and submit it to the justices for their consideration, and then a point like this would not arise.”

We, too, wish to say that, in suitable cases, that practice could be followed with advantage in Kenya.

The facts found by the learned trial magistrate, or now admitted, are as follows. On October 1, 1958, the four respondents, by prior agreement with each other, went together to the Nairobi railway station for the purpose of exhibiting there to the view of Sir Roy Welensky certain placards which they had beforehand prepared. They carried two placards, one of which read "To Hell with Federal Constitution—give Africans their Rights or Quit" and the other "Down with British Imperialism". After arrival together at the public car park outside the railway station, they split up. The respondents had no connection with any other persons there gathered nor had the other persons at the railway station come there with the knowledge or at the request of the respondents. The trial magistrate was not satisfied that there was any danger or likelihood of a breach of the peace.

Sub-section (8) of s. 30 of the Police Ordinance, 1948, provides:

"Any meeting, assembly or procession—

- (a) which takes place in a public road or street or at a place of public resort without a licence issued under the provisions of sub-s. (2) of this section; or
- (b) in which three or more persons taking part neglect or refuse to obey any order given or issued under the provisions of sub-s. (1) or sub-s. (6) of this section;

shall be deemed to be an unlawful assembly, and every person taking part in such meeting, assembly or procession, and, in the case of a meeting, assembly or procession in a public road or street or at a place of public resort for which no licence has been issued, every person taking part in convening, collecting or directing such meeting, assembly or procession, shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding one year."

and sub-s. (2) of that section reads:

- "(2) Any person who is desirous of convening or collecting any meeting or assembly, or of forming any procession, in any public road or street or at any place of public resort, shall first make application for a licence in that behalf to the district commissioner of the district in which such meeting, assembly or procession is to be held; and if, subject to the concurrence of the police officer in charge of the force in the aforesaid district, the district commissioner is satisfied that the meeting, assembly or procession is not likely to cause a breach of the peace, or to prejudice the public safety or the maintenance of public order, or to be used for any subversive or unlawful purpose, and that the holding thereof would not for any other reason be contrary to the public interest, he shall issue a licence in such form as the Minister for Internal Security and Defence may approve, specifying the name of the licensee and defining the conditions subject to which such meeting, assembly or procession is permitted:

"Provided that the district commissioner, subject to the concurrence of the aforesaid police officer may refuse to grant a licence if—

- (i) the applicant, or any person or organisation or body of persons associated directly or indirectly with the application or intended or likely, in the opinion of the district commissioner, to be associated with or concerned in the holding of the meeting, assembly, or procession, has, in the course of or in relation to any meeting, assembly or procession, recently contravened the provisions of this

- Ordinance or of any other written law or any condition of a licence issued under this section; or
- (ii) the meeting, assembly or procession has been advertised or otherwise publicised in contravention of the provisions of sub-s. (5) of this section”.

The magistrate said in his judgment:

“There is no definition in the Ordinance of the words meeting, assembly or procession. On the primary rules of interpretation it would be given its ordinary meaning if it has a clear single meaning. To give it its widest meaning of a coming together of two or more persons by accident or design would have the result that practically every person in the Colony would be committing this offence numerous times each day and the offence could not be proved as everyone at the scene—including police officers—would be accomplices.

“However, this is a Penal Statute and should be strictly construed. From the fact that a licence is required and that failure to obtain one constitutes the meeting an unlawful assembly, it is clear to my mind that the mischief aimed at and the type of meeting intended is one in the nature of common law unlawful assembly. This view is reinforced by looking at s. 30 (2) of the Ordinance, which sets out the principles to be considered in deciding whether a licence should be granted. Further, sub-s. (8) refers to a meeting, assembly or procession. Clearly what is intended is a meeting in the nature of an assembly or procession. The words meeting, assembly and procession must each be given a separate meaning, though of the same nature.

“A meeting means a number of people coming together for the purpose of consulting together or expressing views to each other or to receive the views of someone else. If they merely come together to express their views to someone else that is not a meeting, as a meeting is a composite body complete in itself. The word assembly is somewhat wider as it connotes a gathering of people for a common purpose. It does not connote the same internal unity as the word meeting.

“To put it tersely, a meeting is for the purposes of the members inter se. An assembly is for the purposes of the members inter se but further for the purposes inter alios. In this present case the accused did not come together at the railway station for the purpose of exchanging views with each other or consulting each other. They did not come for purposes inter se. They came there in order to express views on certain matters to other persons. It follows that this was not a meeting within my understanding of the section, though it may have been an assembly.”

We now turn to the questions for decision in the case of which the first is:

- “(1) Was the learned trial magistrate correct in law in holding that the word “meeting” in s. 30 (8) (a) of the Police Ordinance, 1948, means a meeting in the nature of a common law unlawful assembly?”

With respect to the learned magistrate we are unable to decide what he meant by the expression “a meeting in the nature of a common law unlawful assembly.” We are therefore unable to answer this question simply yea or nay.

An unlawful assembly is defined in s. 76 of the Penal Code as follows:

“When three or more persons assemble with intent to commit an offence, or, being assembled with intent to carry out some common purpose, conduct themselves in such a manner as to cause persons in the neighbourhood

reasonably to fear that the persons so assembled will commit a breach of the peace, or will by such assembly needlessly and without any reasonable occasion provoke other persons to commit a breach of the peace, they are an unlawful assembly.

“It is immaterial that the original assembling was lawful if, being assembled, they conduct themselves with a common purpose in such a manner as aforesaid.

“When an unlawful assembly has begun to execute the purpose for which it assembled by a breach of the peace and to the terror of the public, the assembly is called a riot, and the persons assembled are said to be riotously assembled.”

We consider that this definition accords closely with the common law. In our opinion s. 30 of the Police Ordinance cannot have been intended to apply merely to meetings, assemblies and processions which would amount to unlawful assemblies under s. 76 of the Penal Code. Such meetings could never be licensed. It is clear, therefore, that the object of s. 30 of the Police Ordinance must be to prohibit or control certain meetings, assemblies and processions which would not necessarily have amounted to unlawful assemblies under s. 76 of the Penal Code which corresponds to the common law. If this were not so there would be no object in enacting s. 30.

We find it convenient to answer the other two questions together. They are:

“(2) Was the learned trial magistrate correct in law in his interpretation of the meaning of the word ‘meeting’ in s. 30 (8) (a) of the Police Ordinance ?

“(3) Was the learned trial magistrate correct in law in holding that the actions of the accused persons did not constitute a meeting under s. 30 (8) (a) of the Police Ordinance?”

We agree with the learned magistrate that the word “meeting” in the section should not be given its widest possible meaning. It could not have been the intention that any casual concurrence of two or more people in a place of public resort should be punishable merely because a licence had not previously been obtained. Nor do we think it was the intention of the section to prohibit, except under licence, ordinary meetings which occur in the ordinary way for the purpose of normal private business or social intercourse.

We do not consider it necessary or desirable in this appeal to attempt to set out an exhaustive catalogue of the gatherings which could come within the meaning of the words “meeting, assembly or procession” as used in the section, nor do we propose to set out a complete statement of the intention of the legislature when it enacted the section. We are dealing with these matters only in so far as it is necessary to do so for the purposes of this appeal.

Although it is no doubt true that the words meeting, assembly and procession do not all mean exactly the same thing we think that it is wrong to attempt to give a separate and distinct meaning to each of these words. An assembly could constitute both a meeting and a procession in certain circumstances and we consider it by no means impossible for one gathering of people to constitute a meeting, an assembly and a procession.

In our opinion the section was intended at least to prevent the dissemination, demonstration or expression of views in public unless the meeting, assembly or procession formed for that purpose is previously licensed in accordance with the section. It is immaterial whether the persons to whom the views are demonstrated or expressed are connected with those holding or taking part in the meeting, assembly or procession. Applying this test to the facts found it is, in our view, clear that the pre-arranged gathering together of the respondents

at the car park for the purpose of exhibiting there placards of a political nature in view of members of the public constituted a meeting within the meaning of the section.

In our view, therefore, on the facts found the charge on the first count was proved.

The case is accordingly remitted to the trial magistrate with a direction to find the charge on the first count proved, and thereafter to deal with the appellants according to law.

Case remitted to the trial magistrate with direction to convict and thereafter to deal with the appellants according to law.

For the appellant:

AP Jack (Deputy Public Prosecutor, Kenya)

The Attorney-General, Kenya

For the respondents:

S Cockar

Cockar & Cockar, Nairobi

Mwandikwa s/o Mutisya v R **[1959] 1 EA 18 (SCK)**

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	4 February 1959
Case Number:	717/1958
Before:	Sir Ronald Sinclair CJ and Rudd J
Sourced by:	LawAfrica

[1] Criminal law – Attempt – Accused interrupted when forcing open a locked car – Whether such act immediately connected with attempt to steal – Penal Code, s. 389 (K.).

Editor's Summary

The appellant was convicted by the resident magistrate, Nairobi, of attempted theft of articles which were in a locked car. The facts found by the trial magistrate were that the appellant tried to unlock the door of the car and that his purpose was after an entry had been forced, to steal the articles in the car. The appellant was interrupted before he was able to force open the door of the car. The substantial point taken on appeal was whether the attempt to open the car was, in the circumstances, immediately connected with his attempt to steal, since, as the offence occurred at night, the appellant might not have known exactly what was in the car, or if he did, he might not have intended to steal all the articles in the car.

Held – it was an act which was immediately and not remotely connected with the intended theft and it was an act which went far beyond mere preparation.

Appeal dismissed.

Cases referred to in judgment

(1) *R. v. Eagleton* (1855), Dears C.C. 515.

(2) *R. v. Robinson*, [1915] 2. K.B. 342.

(3) *R. v. Roberts* (1855), Dears C.C. 539.

(4) *R. v. Bloxham*, 29 Cr. App. R. 37.

(5) *R. v. Cheeseman* (1862), Le. & Ca. 140.

(6) *R. v. Laitwood*, 4 Cr. App. R. 248.

Judgment

Sir Ronald Sinclair CJ: read the following judgment of the court: The appellant appeals from a conviction of attempted theft of articles which were in a locked car. So far as the facts are concerned, there was ample evidence to justify the finding of the trial magistrate that the appellant tried to unlock the door of the car with a piece of wire and that in using the wire to gain entry into the car his purpose was, after an entry had been forced, to steal the articles in the car. The appellant was interrupted before he was able to force open the door of the car.

The articles which the appellant is charged with attempting to steal were set out in the charge sheet as a raincoat, a pair of pocket binoculars, a pair of sun-glasses and a seat cushion which were the contents of the car. The offence occurred at night in a car park and it may well be the case that the appellant did not know exactly what was in the car, or if he did it might not have been his intention to steal all the articles that were in the car, but these are not matters which afford any defence. It is clear from the pickpocket cases that even if the car was completely empty, nevertheless if the appellant did not know that and had opened the car with intent to steal some of the contents which he expected it would contain, he would be guilty of attempted theft as would a pickpocket who put his hand, for the purpose of theft, into a pocket which turned out to be empty.

The only point of any difficulty in this case, is whether or not the attempt to open the door of the car was, in the circumstances, immediately connected with his attempt to steal, so as to amount in the circumstances to an attempt at theft.

“Attempt” is defined in s. 389 of the Penal Code as follows:

“389. When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

“It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

“It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.”

Every part of this definition can be supported by decisions under the common law, but the second paragraph of this definition makes it clear that as a general rule the true test is not whether there was any further act on the part of the prisoner remaining to be done before the completion of the crime which was intended to be committed. This was the test which was applied according to the judgments in the English cases of *R. v. Eagleton* (1) (1855), Dears C.C. 515, and *R. v. Robinson* (2), [1915] 2 K.B. 342. But without in any way desiring to question the correctness of those decisions, with which indeed we respectfully agree, there are a number of other English decisions mentioned in Archbold (33rd Edn.), p. 1490, of which *R. v. Roberts* (3) (1855), Dears C.C. 539, is a notable example, which suggest that the test applied in *Eagleton* (1) and in *Robinson* (2) is not the true test of general application even in England.

Eagleton (1) and *Robinson* (2) were both cases of alleged attempts to obtain money by false pretences. In *Eagleton* (1) the false pretence was actually made to the party intended to be defrauded and all that remained was for the money

to be paid to the appellant. The conviction was therefore upheld. Whereas, in *Robinson* (2), the intention was to obtain money from an insurance company but no claim was actually submitted and a claim might never have been submitted to the insurance company. What the appellant did in that case was to pretend to have been bound and robbed by burglars and the fraud was discovered before he could claim the sum insured on his stock. It was not a case in which it was established that the further acts necessary to complete the intended offence would have followed immediately upon the act actually done so as to form with it one continuous uninterrupted transaction. The conviction was set aside.

Similarly in *R. v. Bloxham* (4), 29 Cr. App. R. 37, where the offence alleged was an attempt to steal a refrigerator, all that was proved was that the appellant agreed to sell a refrigerator that was not his and had received a cheque for the agreed amount but he made no attempt to take and carry away the refrigerator and there was nothing to show that he intended to carry out the bargain which he had made.

As Wightman, J., said in *Roberts* (3):

“Every case must be taken with its own particular circumstances.”

In the instant appeal we consider that the circumstances show that if the appellant had not been discovered, the attempt to open the door of the car with intent to steal some or all of its contents, was an act which would have been followed immediately and as part of the same continuous uninterrupted transaction, by an actual theft. The appellant’s attempt to open the door of the car was done with the intent of then and there committing theft.

In our opinion, it was an act which was immediately and not merely remotely connected with the intended theft and it was an act which went far beyond mere preparation. It was an attempt to carry out and complete his intention, which would indeed have been completed if he had not been interrupted by being discovered by the owner.

The true general principle can be gathered from the judgment delivered by Tucker, J., in *Bloxham* (4), from which we take the following extracts:

“In *Robinson* (*supra*), the Lord Chief Justice (Lord Reading) quotes the well-known statement by Baron Parke in *Eagleton*, which is as follows:

“The mere intention to commit a misdemeanour is not criminal. Some act is required, and we do not think that all acts towards committing a misdemeanour are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are’ . . . It is common ground that in many cases the difficulty arises in the application of that principle to the particular facts, and it is very often very difficult to distinguish between acts which are merely remotely leading towards the commission of an offence and those which are to be considered as attempts to commit it, being acts immediately connected with it . . . The very essence of the offence of larceny is the asportation, and if the appellant had done anything which could amount to an attempt to take and carry away the refrigerator, he would of course have been guilty of the offence with which he was charged. But the fact is that he took no step whatever connected either immediately or remotely with taking and carrying away this refrigerator.”

It is clear that if Bloxham had been proved to have taken any step immediately connected with taking and carrying away the refrigerator his conviction would have been upheld.

In *R. v. Cheeseman* (5) (1862), Le. & Ca. 140, Blackburn, J., observes:

“There is no doubt a difference between preparation antecedent to an offence and the actual attempt, but if the actual transaction has commenced

which would have ended in the crime if not interrupted there is clearly an attempt to commit the crime.”

and in *R. v. Laitwood* (6), 4 Cr. App. R. 248 at 252, Pickford, J., dismissing the appeal, said:

“... there was here an act done in order to commit an offence which formed part of a series which would have constituted the offence if not interrupted . . .”

We think that the same can be said of the present case.

Reverting to the definition in the Penal Code, we are satisfied that the appellant intended to steal and that he began to put his intention into execution by means adapted to its fulfilment and that he manifested his intention by an overt act, namely, the attempt to force open the door of the car. This act was immediately and not merely remotely connected with the offence which he intended to commit. For these reasons we dismiss the appeal against conviction.

The sentence of six months’ imprisonment is not excessive and the appeal is dismissed.

Appeal dismissed.

The appellant did not appear and was not represented.

For the respondent:

DD Charters (Crown Counsel, Kenya)

The Attorney-General, Kenya

Hamood Mohamed Robaidi v R [1959] 1 EA 21 (CAA)

Division:	Court of Appeal at Aden
Date of judgment:	19 January 1959
Case Number:	212/1958
Before:	Sir Kenneth O’Connor P, Forbes V-P and Gould JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Aden–Campbell, C.J

[1] *Currency control – Failure to offer gold for sale to an authorised dealer – Whether retention of gold without use unlawful – Meaning of “gold” – Exchange Control Ordinance (Cap. 59), s. 2 (1), s. 3 (1), s. 4 and s. 28 (1) (A.) – Exchange Control Act, 1947 (U.K.).*

[2] *Practice – Exchange control offence – Whether provision of specific remedy in case of offence precludes criminal proceedings against offender – Exchange Control Ordinance (Cap. 59), s. 28 (1) (A.) – Exchange Control Act, 1947, s. 26 (U.K.).*

Editor's Summary

The appellant had been convicted in the magistrate's court of the offence of "being a person entitled to sell gold, to wit 248 sovereigns, and not being an authorised dealer, he failed to offer it or cause it to be offered for sale to an authorised dealer" contrary to s. 4 (1) of the Exchange Control Ordinance. His appeal to the Supreme Court having been dismissed, he appealed to the Court of Appeal. At the hearing of the second appeal counsel for the appellant made the following submissions: (a) that the phrase "retention and use" in relation to the consent of the Financial Secretary in sub-s. (1) of s. 4 implied that mere retention without use was not a contravention of the mandatory requirements of the section, for if the section was intended to apply to a person who wished only to retain gold or foreign currency the appropriate words would have been "retention or use", (b) that "gold" in the context of s. 4 (1) should be construed to mean gold acquired as foreign exchange and (c) that

since sub-s. (5) of s. 4 provides a remedy where a person has not complied with s. 4 (1) in that “the Governor may direct that that gold or currency shall vest in the Financial Secretary” subject to payment of money as specified in the sub-section, the Crown is precluded from taking criminal proceedings against offender.

Held –

- (i) s. 4 (1) read in the context of the Ordinance, is a clear provision that all persons in the Colony who are entitled to sell gold (which is defined as gold coin or gold bullion) must offer it for sale to an authorised dealer, and that it can neither be retained nor used without the consent of the Financial Secretary.
- (ii) in view of the definition provided, “gold” in the context of s. 4 (1) could not be construed to mean gold acquired as foreign exchange; the purpose of the section, read with other related sections, is to give the Financial Secretary control over the available resources of the Colony in gold and foreign exchange.
- (iii) sub-s. (5) of s. 4 is clearly auxiliary to and not in substitution for the penal provisions of the Ordinance.

Appeal dismissed.

No Cases referred to in judgment in judgment

Judgment

Gould JA: read the following judgment of the court: The appellant was charged before a magistrate that on April 14, 1958, at Crater in the Colony of Aden being a person entitled to sell certain gold, to wit 248 sovereigns, and not being an authorised dealer, he failed to offer it or cause it to be offered for sale to an authorised dealer contrary to s. 4 (1) of the Exchange Control Ordinance (Cap. 59). Having heard the evidence for the prosecution the magistrate found as a fact that the appellant was not offering the gold for sale and that his mere possession of it was not an offence under the section. On August 20, 1958, he dismissed the charge without calling upon the defence to lead evidence. The Crown appealed to the Supreme Court when the learned Chief Justice, after hearing argument, allowed the appeal and sent the case back to the magistrate with a direction that a *prima facie* case was made out and that the appellant (at that stage the respondent) should be called upon for his defence.

The matter came before another magistrate, who, on September 25, 1958, heard the defence and found the appellant guilty. He came (rather surprisingly, as he had only the written record of the evidence for the Crown) to a conclusion differing from that of the magistrate at the original trial, namely, that the appellant had offered the gold for sale. The appellant in turn appealed to the Supreme Court but his counsel did not rely upon the point that a different magistrate had completed the hearing of the case and the appeal was dismissed on November 14, 1958. The further appeal to this court was heard on January 12, 1959, and at the conclusion of the hearing we dismissed the appeal and indicated that we would give our reasons in writing.

At the beginning of his argument counsel for the appellant, no doubt having regard to s. 245 of the Criminal Procedure Ordinance, stated that he took no objection on the ground that two magistrates had

taken part in the trial and conceded that if the point of law which he proposed to argue was held not to be a valid one, the different finding of fact by the second magistrate would be of no avail to him. He then made submissions as to the meaning of s. 4 (1) of the Exchange Control Ordinance (Cap. 59) which is in the following terms:

“Every person in the Colony who is entitled to sell, or to procure the sale of, any gold, or any foreign currency to which this section applies,

and is not an authorised dealer, shall offer it, or cause it to be offered, for sale to an authorised dealer, unless the Financial Secretary consents to his retention and use thereof or he disposes thereof to any other person with the permission of the Financial Secretary.

“The foreign currency to which this section applies is such foreign currency (hereafter in this Ordinance referred to as ‘specified currency’) as may from time to time be specified by order of the Governor.”

Counsel argued that the phrase “retention and use” in relation to the consent of the Financial Secretary implied that mere retention without use was not a contravention of the mandatory requirements of the section. He submitted that if the section were intended to apply to a person who wished only to retain gold or foreign currency the words appropriate to the question of the consent of the Financial Secretary would have been “retention or use”. We are quite unable to agree with this construction. The section, read in the context of the Ordinance, is a clear provision that all persons in the Colony who are entitled to sell gold (which is defined as gold coin or gold bullion) must offer it for sale to an authorised dealer. Counsel also argued that “gold” in the context of s. 4 (1) should be construed to mean gold acquired as foreign exchange. In view of the definition of gold we do not think such a construction can be sustained. The purpose of the section, read with other related sections is to give the Financial Secretary control over the available resources of the Colony in gold and foreign exchange. Exemption from the requirement that gold, as defined, and such foreign currency as may be specified by order, shall be offered for sale in terms of the section, may only be had by obtaining the consent of the Financial Secretary to its retention and use. That means in our view that it can be neither retained nor used without consent. Whether the Financial Secretary could give his consent to mere retention without use it is not necessary to consider, though it would seem unlikely in any event that he would be inclined to do so.

Counsel based a second argument, which was not advanced in the court below, upon the presence in s. 4 of sub-s. (4) and sub-s. (5). They are as follows:

- “(4) Where a person has become bound under this section to offer or cause to be offered any gold or specified currency for sale to an authorised dealer, he shall not be deemed to comply with that obligation by any offer made or caused to be made by him, if the offer is an offer to sell at a price exceeding that authorised by the Financial Secretary, or without payment of any usual and proper charges of the authorised dealer, or otherwise on any unusual terms.
- “(5) Where a person has become bound under this section to offer or cause to be offered any gold or specified currency for sale to an authorised dealer and has not complied with that obligation, the Governor may direct that that gold or currency shall vest in the Financial Secretary, and it shall vest in the Financial Secretary accordingly free from any mortgage, pledge or charge, and the Financial Secretary may deal with it as he thinks fit, but the Financial Secretary shall pay to the person who would but for the direction be entitled to the gold or currency such sum as he would have received therefor if he had sold it to an authorised dealer in pursuance of an offer made under this section at the time when the vesting occurred.”

Counsel relied in particular upon sub-s. (5) which, he said, provided a specific remedy available in cases where a person had become entitled to sell gold or foreign currency and had failed or neglected to offer it for sale to an authorised dealer. This remedy, he argued, being provided for the particular offence, precluded the Crown from taking criminal proceedings against the offender under Pt. II of the Fifth Schedule to the Ordinance, cl. 3 of which provides

that an offender may be fined or imprisoned (or both) and also that a court may, if it thinks fit, order the gold or other subject matter of the offence to be confiscated. An order for confiscation was in fact made in the present case.

Whether or not this is a valid argument is a question of the construction of the Ordinance. It is necessary to consider firstly the particular provisions relating to penalties and secondly the object of the Ordinance and of the particular sub-section upon which the argument is based. There is no ambiguity in the wording of the penal provisions in Pt. II of the Fifth Schedule. Section 1 (1) thereof provides that any person in or resident in the Colony who contravenes any restriction or requirement imposed by or under the Ordinance shall be guilty of an offence. Although counsel for the appellant made a submission to the contrary, failure to comply with the requirements of s. 4 (1) of the Ordinance is in our view so clearly a contravention of a requirement imposed by the Ordinance as not to permit of any argument or necessitate any discussion. Furthermore, there appears to be no valid reason for exempting from penal proceedings those who transgress by failing to offer gold or foreign currency for sale, when persons who contravene s. 3 (1) of the Ordinance by actual sale without permission of the Governor are clearly so liable. Section 4 (6) of the Ordinance also contains an implication which is contrary to the construction contended for by counsel for the appellant. The sub-section is as follows:

“(6) In any proceedings in respect of a failure to comply with the provisions of this section, it shall be presumed, until the contrary is shown, that the gold or currency in question has not been offered for sale to an authorised dealer.”

This provision given its ordinary meaning must embrace proceedings under s. 4 (1) which can only be penal, though it might also be construed so as to include proceedings consequent upon a direction of the Governor under s. 4 (5).

It may be asked why a person prosecuted for breach of the section should be subjected to the possibility of having his gold or currency forfeited without compensation when the Financial Secretary, if he proceeds under s. 4 (5), must pay a prescribed price for it. The answer to this, as we see it, lies in the object and scope of the Ordinance, which is, with only minor differences, in the same terms as the Exchange Control Act, 1947, and is part of far-reaching legislation designed to control the export of capital from the sterling area. The main object of Part I of the Ordinance, which includes s. 4, is to secure control of gold and foreign currency within the Colony, and s. 4 (5) is designed to provide machinery whereby in case of need such control may be asserted without waste of time. It would also serve to ensure control in cases in which, though court proceedings have been taken, the court has in the exercise of its discretion, thought fit not to order confiscation.

Reference should also be made to s. 28 (1) of the Ordinance which, in furtherance of its general object, gives the Financial Secretary power, when, in breach of s. 4 (1) currency which should have been offered to an authorised dealer has been otherwise disposed of, to direct the sale of the property which represents that currency, and to dictate the terms of the sale. This is, in relation to sale, a provision parallel to s. 4 (5) in relation to failure to offer for sale. The English provision equivalent to s. 28 is s. 26 of the Exchange Control Act, 1947, with regard to which the editors of Halsbury's Complete Statutes of England (Vol. 40) at p. 644 have made the following note:

“The section clearly operates without prejudice to the criminal liability involved by a breach of the terms of the Act.”

This is an observation which applies, in our opinion, equally to s. 4 of the

Ordinance. We consider that s. 4 (5) is clearly auxiliary to and not in substitution for the penal provisions thereof, and for these reasons we rejected the argument of counsel for the appellant and dismissed the appeal.

Appeal dismissed.

For the appellant:

PK Sanghani

PK Sanghani, Aden

For the respondent:

RJ Holmes (Crown Counsel, Aden)

The Attorney-General, Aden

Yousuf Abdulla Gulamhusein v The French Somaliland Shipping Co Ltd [1959] 1 EA 25 (CAA)

Division:	Court of Appeal at Aden
Date of judgment:	19 January 1959
Case Number:	100/1958
Before:	Sir Kenneth O'Connor P, Forbes V-P and Gould JA
Sourced by:	LawAfrica
Appeal from:	Supreme Court of Aden—Campbell, C.J

[1] *Practice – Interest – Power of court to award interest from institution of suit until payment – Civil Courts Ordinance, s. 32 (A.) – Indian Code of Civil Procedure, s. 34.*

Editor's Summary

This case is reported only on the question whether the court has power to award interest prior to decree. The appellant had claimed a sum of Shs. 4,114/- in respect of overpaid shipping charges and also interest on this sum at the rate of six per cent. from the date of filing suit until the date of payment. In allowing the appeal from the Supreme Court, the Court of Appeal specially dealt with the claim for interest in view of the decision in *David D. Nadel v. Paul Ries & Sons (Aden) Ltd.*, E.A.C.A. Civil Appeal No. 79 of 1957 (unreported).

Held –

- (i) it is clear that under s. 32 of the Civil Courts Ordinance the court has a discretion to make the order asked for. *Bengal Nagpur Railway Co. v. Ruttanji Ramji* (1938), A.I.R. P.C. 67, considered.

- (ii) in the case of *David D. Nadel v. Paul Ries & Sons (Aden) Ltd.* (*supra*), s. 32 of the Civil Courts Ordinance was not brought to the notice of the court and in so far as it relates to interest for the period after the institution of the suit the opinion expressed was per incuriam.

Appeal allowed. Judgment for the appellant and interest as claimed.

Cases referred to in judgment

(1) *David D. Nadel v. Paul Ries & Sons (Aden) Ltd.*, E.A.C.A. Civil Appeal No. 79 of 1957 (unreported).

(2) *Bengal Nagpur Railway Co. v. Ruttanji Ramji* (1938), A.I.R. P.C. 67.

Judgment

Gould JA: read the following judgment of the court: This appeal was brought from a judgment and decree of the Supreme Court of Aden dated July 29, 1958, dismissing with costs an action by the appellant

against the respondent for a refund of shipping charges in respect of a consignment of pulses. At the conclusion of the appeal the court indicated that it would be allowed with costs here and in the court below, that written reasons would be given and that, at the same time an incidental question relating to interest would be dealt with:

The action was concerned with an agreement made by the appellant with the respondent that the latter would ship 4,208 bags of pulses from Aden to Goa per s.s. “Mabruk”. There is no dispute as to the freight, but the question in the action concerned the rate which was orally agreed between the parties for shipping charges. That in turn hinges upon a reference which was made during negotiations to the tariff of the Aden Shipping Conference of which some ten shipping firms (but not the respondent company) are members and which has a “Tariff” of landing and shipping charges for the Port of Aden. The appellant, in his plaint, pleaded that the agreement was for Shs. 10/15 per ton, provided that the Aden Shipping Conference charges would not be more than that figure. The respondent denied this in its written statement of defence and pleaded that they had at all times made it clear that their shipping charges would be at the rate of Shs. 20/30 per ton. The appellant paid this rate under protest and reserved their right to claim, as they did in the action, a refund of the difference, which amounted to Shs. 4,114/-.

At the hearing in the court below evidence was given only on behalf of the appellant – the respondent called none. Yousuf Abdulla Gulamhusein, a member of the appellant firm, said that the arrangement he made with the respondent was that the Conference rate would be accepted. He also told the respondent’s representative that the Conference rate was Shs. 10/15 per ton for cereals and pulses. This evidence was not challenged in cross-examination, though another witness, Paul Fidele, later gave evidence that he made a similar contract with the respondent at the same time and that nothing was said about the shipping charges: he understood it would be Conference tariff rates which he knew to be Shs. 10/15 per ton for pulses. It would appear from the evidence that these two witnesses were together when they made their respective arrangements, though Gulamhusein spoke with a Mr. Sfeir and Fidele with a Mr. Layousse in Mr. Sfeir’s presence. There was ample and uncontroverted evidence before the court that the rate charged by the Conference members for pulses was the same as that for cereals, viz. Shs. 10/15 per ton. Mr. Nunn, counsel for the respondent, at the close of the case for the appellant said, according to the note made by the learned Chief Justice, “I admit defendants agreed to charge Conference tariff rates”. He then went on to submit that pulses were not cereals and relied upon the following extract from what was called the Conference’s “Tariff”:

“Extract from ‘Private Wharf and Lighter Owner’s Tariff of landing and shipping charges for the Port of Aden, as compiled by the Aden Shipping Conference’ No. 7, issued January, 1956, and as subsequently amended – page 11.

Bagged Cargo

Cereals (excluding rice)	E.A. Shs. 10/15 per B/L Ton
Rice	E.A. Shs. 17/40 per B/L Ton
Sugar	E.A. Shs. 15/55 per B/L Ton
All other bagged cargo (including	
Attals)	E.A. Shs. 20/30 per B/L Ton”

In this court, counsel for the respondent pursued the same line of argument. He said that the Conference’s “Tariff”, as a document, contained no reference to pulses; pulses were not cereals; therefore pulses fell within the item “all other bagged cargo” and were chargeable at Shs. 20/30 per ton.

The learned Chief Justice, having considered the evidence, came to a conclusion which he expressed as follows:

“I have come to the conclusion on the verbal testimony that what was agreed was that the defendants accepted to ship the plaintiff’s goods at the ‘Conference Tariff rates’. This is corroborated by the letter dated September 9, 1957, from the plaintiff to the defendants wherein he says, ‘You will recollect when you have personally agreed to abide by the rates to be quoted by Aden Shipping Conference’.”

He then went on to consider the question whether pulses could properly be regarded as cereals and found that they could not. This question has not been argued before us but we have no reason to dissent from his finding. The next passage in the judgment is as follows:

“A body of evidence from Aden merchants was, however, tendered that shipping firms invariably charge the same for ‘cereals’ as ‘pulses’ and never charge Shs. 20/30 per ton as ‘other bagged cargo’. Can it be successfully contended that by reason of mercantile custom in Aden the word ‘cereal’ must be taken to include the word ‘pulses’?

“I think that this cannot be done for two reasons. Firstly, custom was not pleaded by the plaintiff: thereby enabling the defendants to bring rebutting evidence if they could, and no application to amend the plaint was made. Secondly, I do not think that what I have heard regarding the rates which merchants customarily pay as shipping charges on pulses can be constructed as a custom having the legal effect of compelling the defendants to charge the same in this case. I have not found that the agreement was to charge the customary rate for pulses: the agreement was to charge the tariff rate. The fact that in the past shippers may have mistakenly thought that cereals were pulses and therefore only charged accordingly does not mean that the tariff rate has been varied by custom. In my view it has remained at E.A. Shs. 20/30 per ton, and that is the price the plaintiffs must pay.”

With great respect to the learned Chief Justice, we think that he adopted a wrong approach to the problem before him. It was necessary for him, in considering this oral contract, to arrive at the true intention of the parties. Pulses are a very common cargo in Aden as is shown by the evidence of Paul Galleno, a shipping agent and merchant but not a member of the Conference, who said that he had shipped thousands of tons, and also by the familiarity of the other witnesses with the cargo and the rate ordinarily charged for it.

The evidence of witnesses whose firms were members of the Conference and others who were not members, shows plainly that the rate charged by the Conference members for pulses was well known, if indeed, in a port the size of Aden, evidence is needed to show that shipping firms are at all times well aware of the charges made by their competitors and in particular by an association of firms such as the Aden Shipping Conference. In these circumstances we regard it as inevitable that this contract made between a mercantile firm and a shipping company to pay, as the learned Chief Justice found, “Conference Tariff rates” referred, not to a written schedule of rates, but to the actual rate known to all to be habitually charged by the Conference members for the particular cargo. It is not a matter which involves the interpretation or modification of the terms of a written contract by reference to mercantile custom, but a question of the true intent of the parties when they made their bargain. That intent, in our opinion, was clearly to make a contract with reference to actual rates and, in our view, the learned Chief Justice misdirected himself in addressing his mind to the strict interpretation of the extract from

the written “Tariff” above set out. The fact that the respondent did not think fit to give any evidence does nothing to detract from, but, on the contrary, impliedly supports, the view which we have expressed.

For these reasons we indicated that the appellant was entitled to judgment, and the only remaining question is whether the interest claimed in para. 8 of the plaint should be included. The prayer is for interest at six per cent. from the date of filing the suit until the date of payment. It is clear that, under s. 32 of the Civil Courts Ordinance, the court has a discretion to make the order asked for, and in our opinion there is in the present case no ground for refusing to do so. The matter would need no comment were it not for a portion of the judgment of this court in the case of *David D. Nadel v. Paul Ries & Sons (Aden) Ltd.* (1), E.A.C.A. Civil Appeal No. 79 of 1957 (unreported). The passage is as follows:

“The claim for rent has now been satisfied, but there was a claim for interest on the rent unpaid between the date on which it became due and the date of the decree. It was admitted that there is no local statutory power to award such interest, and that it would not be recoverable at common law; but it was submitted that the Law Reform (Miscellaneous Provisions) Act of 1934 should be held to be a statute of general application in force in Aden by virtue of s. 41 of the Interpretation and General Clauses Ordinance (Cap. 83). We felt that this claim was put forward more from intellectual curiosity than from acquisitiveness, and we think it will be no grave disappointment to the appellant that it must be disallowed. There is in our opinion no power to allow interest prior to decree in Aden, except in cases where it would be recoverable at common law or under the rules of equity. The Act referred to is not one of general application.”

It seems likely that the court’s attention was directed particularly towards the claim for interest from the dates when the rents fell due up to the suit, without distinguishing between the institution thereof and the decree. Section 32 of the Civil Courts Ordinance was not brought to the court’s notice and it is clear that in so far as it relates to the period after the institution of the suit the opinion expressed was per incuriam. Section 32 is as follows:

- “32. (1) Where and in so far as a decree is for the payment of money, the court may, in the decree order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged, from the date of the decree to the date of payment or to such earlier date as the court thinks fit.
- “(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have refused such interest, and a separate suit therefor shall not lie.”

This section is in exactly the same terms as s. 34 of the Indian Code of Civil Procedure as set out in the fifth edition of the Commentary by Chitaley and Rao at p. 434. Section 34 of the Indian Code was considered by the Privy Council in the case of *Bengal Nagpur Railway Co. v. Ruttanji Ramji* (2) (1938), A.I.R. P.C. 67, and it was indicated by their lordships that the section has no application to interest prior to the date of the suit, which is a matter of substantive law. It was also indicated that the power conferred is to order interest

upon the principal sum adjudged from the date of suit to the date of the decree, but from that date to the date of payment it may be ordered to be paid upon the aggregate of principal and interest as at the date of the decree. In the present case the prayer for interest is confined to interest upon the principal sum of Shs. 4,114/- from the institution of the suit until payment and, as this is rather less than could have been claimed, we think the order should be limited to what was asked.

The appeal has already been allowed with costs here and in the court below and the judgment to which the appellants are entitled will include, as well as the basic claim of Shs. 4,114/-, interest thereon at the rate of six per cent. from the date of the filing of the suit until payment.

Appeal allowed. Judgment for the appellant and interest as claimed.

For the appellant:

PK Sanghani

PK Sanghani, Aden

For the respondent:

EW Nunn

EW Nunn, Aden

Fazal Tyabali Dhanji and another v R [1959] 1 EA 29 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	3 February 1959
Case Number:	170/1958
Before:	Sir Kenneth O'Connor P, Forbes V-P and Gould JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya–Rudd Ag C.J, Connell and MacDuff, J.J

[1] Practice – Criminal law – Appeal heard by two judges who disagreed – Rehearing – One of two judges who first heard appeal sitting as member of court on re-hearing – Whether court improperly constituted – Criminal Procedure Code, s. 358 (K.) – Indian Code of Criminal Procedure, s. 429 – Eastern African Court of Appeal Order in Council, 1950, s. 15.

Editor's Summary

The appellants who had been convicted by the resident magistrate at Mombasa had appealed to the Supreme Court. The two judges who heard their appeals were unable to agree, so under s. 358 of the

Criminal Procedure Code the appeals were re-heard by three judges who dismissed the appeals. The appellants now appealed to the Court of Appeal on the sole ground that the court which re-heard the appeals was improperly constituted because it included one of the judges who had sat on the court which first heard their appeals, and it was argued that natural justice demanded that either both the judges who sat on the hearing of the appeal should sit on the re-hearing or that neither should so sit.

Held – the court was certainly not prepared to say that the decision of the appellate court on the re-hearing was invalid.

Per curiam – “. . . we think that it may be better, for the sake of appearances, where this is possible and not very inconvenient, that both judges who first sat, or neither, should sit on the re-hearing pursuant to s. 358 . . .”

Appeal dismissed.

Cases referred to in judgment

- (1) *R. v. Lovegrove*, [1951] 1 All E.R. 804.
- (2) *R. v. Bennett and Newton*, 9 Cr. App. R. 146.

Judgment

Sir Kenneth O'Connor P: read the following judgment of the court: On May 10, 1958, the appellants were convicted by the resident magistrate, Mombasa, on a charge of being jointly in unlawful possession of game trophies and were sentenced. They each appealed to the Supreme Court. The appeals were heard by two judges. The two judges were unable to agree and, under s. 358 of the Criminal Procedure Code of Kenya, ordered that the appeals be re-heard by three judges. The appeals were re-heard by three judges and dismissed on September 22, 1958. The appellants now appeal to this court. The sole ground of appeal is that the court which re-heard the appeals was improperly constituted because it included among its members one of the judges who had sat on the court which first heard the appeals.

On January 7, 1959, we dismissed the appeals to this court. We now give our reasons.

Section 358 of the Criminal Procedure Code of Kenya reads:

“358. Appeals from subordinate courts shall be heard by two judges of the Supreme Court except when in any particular case the Chief Justice shall direct that the appeal be heard by one judge of the Supreme Court.

“If on the hearing of an appeal the court is equally divided in opinion the appeal shall be re-heard before three judges.”

It was common ground that there is no statutory provision in the Code or elsewhere in the law of Kenya which prescribes how the court which re-hears an appeal pursuant to s. 358 is to be constituted, or which disqualifies either or both of the judges who sat on the first hearing of the appeal from sitting again on the re-hearing. It was argued, however, on behalf of the appellant, that natural justice demanded either that both the judges who sat on the hearing of the appeal should sit on the re-hearing or that neither should so sit.

We do not think that either the Indian or the English authorities cited to us are in point. Section 429 of the Indian Code of Criminal Procedure is very different in its provisions from s. 358 of the Kenya Criminal Procedure Code.

In *R. v. Lovegrove* (1), [1951] 1 All E.R. 804, it was held that there was no objection to the trial judge sitting as a member of the Court of Criminal Appeal in England on an appeal from a verdict of a jury. That position would not arise in these territories, where s. 15 of the Eastern African Court of Appeal Order in Council applies. The present is not a case of a judge sitting on an appeal from a court of first instance presided over by himself.

While we think that it may be better, for the sake of appearances, where this is possible and not very inconvenient, that both judges who first sat, or neither, should sit on the re-hearing pursuant to s. 358, we are certainly not prepared to say that the decision of the appellate court on the re-hearing is invalid if that course is not followed. As was said by Darling, J., in *R. v. Bennett and Newton* (2), 9 Cr. App. R. 146, it

is

“a great mistake to suppose that the trial judge would be inclined to set up his view against the opinions of his brethren”

or “to fight for his own hand”. Still less is it to be supposed that a member of the first appellate court would “fight for his own hand” on the re-hearing. In any event his opinion would be only one of three. We thought that the appeal failed.

Appeal dismissed

For the appellants:

J O’Brien Kelly

J O’Brien Kelly, Nairobi

For the respondent:

DS Davies (Crown Counsel, Kenya)

The Attorney-General, Kenya

Kerto v Omach
[1959] 1 EA 31 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	13 January 1959
Case Number:	9/1958
Before:	Sir Kenneth O’Connor P, Forbes V-P and Gould JA
Sourced by:	LawAfrica

[1] *Practice – Privy Council – Jurisdiction – Leave to appeal out of time – Whether Court of Appeal has power to extend time – Eastern African (Appeal to Privy Council) Order in Council, 1951, s. 3, s. 4 and s. 5.*

Editor’s Summary

The applicant moved the court for conditional leave to appeal to the Privy Council from a judgment of the court dismissing an appeal brought by the applicant from a judgment of the High Court of Uganda. The relevant portion of s. 4 of the Eastern African (Appeal to Privy Council) Order in Council, 1951, which lays down the mode for applying for leave to appeal to the Privy Council reads as follows:

“Applications to the court for leave to appeal shall be made by motion or petition within sixty days from the date of the judgment to be appealed from, and the appellant shall give all other parties to the appeal notice of his intended application.”

The judgment of the court from which leave to appeal was sought was given on June 10, 1958, so that the last day for filing the application was August 9, 1958. The applicant filed his notice of motion on or about August 13, 1958, and notified the respondent of the application for the first time by letter dated

September 3, 1958. At the hearing the respondent took two preliminary objections, namely: (a) that the application was out of time and (b) that no notice of the application had been given to the respondent as prescribed by s. 4.

Held –

- (i) the terms of s. 4 are mandatory and confer no jurisdiction on the court to extend the time during which application may be made as distinct from s. 5 (a) and (b) which are directory and not mandatory.

M. K. Shah v. The Jethabhai Oil Mills and Soap Factory Limited (1955), 22 E.A.C.A. 305, approved and followed. *Fazal Kassam Velji v. M. Takim & Co.* (1955), 22 E.A.C.A. 53, and *Tisdale-Jones v. Sargent*, [1957] E.A. 613 (C.A.), discussed and distinguished.

- (ii) the respondent's second objection appeared also to be valid.

Hubble v. Commissioner for Transport (1952), 19 E.A.C.A. 153, followed.

Application dismissed.

Cases referred to in judgment

- (1) *M. K. Shah v. Jethabhai Oil Mills and Soap Factory Ltd.* (1955), 22 E.A.C.A. 305.
- (2) *Fazal Kassam Velji v. M. Takim & Co.* (1955), 22 E.A.C.A. 53; [1955] A.C. 617 (P.C.).
- (3) *Tisdale-Jones v. Sargent*, [1957] E.A. 613 (C.A.).
- (4) *In the matter of the Petition of Soorjmukhi Koer* (1877), 2 Cal. 272.
- (5) *Burjore and Pershad v. Bhagana* (1884), 10 Cal. 557.
- (6) *Fazul-un-Nissa Begum v. Mulo* (1884), 6 All. 250.
- (7) *Hubble v. Commissioner for Transport* (1952), 19 E.A.C.A. 153.

January 13. The following judgments were read by direction of the court:

Judgment

Gould JA: The applicant in these proceedings moved this court, pursuant to s. 3, s. 4 and s. 5 of the Eastern African (Appeal to Privy Council) Order in Council, 1951, for conditional leave to appeal to the Privy Council from a judgment of this court dismissing an appeal brought by the applicant from a judgment of the High Court of Uganda. The judgment in question was the dismissal of an application for a rule nisi calling upon the respondent to shew why an information in the nature of quo warranto should not be exhibited against him to shew by what authority he claimed to exercise the office of Chief of Jonam County, West Nile, Uganda. It is unnecessary to state the facts of the case as, when the application was heard by this court, counsel for the attorney-general who represented the respondent, took two preliminary objections which were in our opinion of such force and validity as to leave us with no option but to dismiss the application. We now give our reasons for doing so.

The mode of applying for leave to appeal to the Privy Council is laid down in s. 4 of the Order in Council above mentioned. The first, and only relevant, portion of the section is as follows:

“Applications to the court for leave to appeal shall be made by motion or petition within sixty days from the date of the judgment to be appealed from, and the applicant shall give all other parties to the appeal notice of his intended application.”

The first objection taken by counsel was that the application was out of time as not having been brought within the sixty-day period specified. The judgment of this court from which leave to appeal was sought was given on June 10, 1958, and the last day for filing the notice of motion was therefore August 9, 1958: it was not filed until August 13. Had we considered we had power to enlarge the period of sixty days we should have been inclined to do so as the matter in issue is probably one of some importance in the locality in which the parties reside, but in our view the terms of s. 4, above quoted, are mandatory, and confer upon this court no jurisdiction to extend the time during which application may be made.

The question of the construction of s. 4 has already been considered by this court in *Shah v. The Jethabhai Oil Mills and Soap Factory Ltd.* (1) (1955), 22 E.A.C.A. 305, in which it was held that this

court had no power to extend the prescribed period. The applicant in that case appeared in person, but counsel before us did not advance any argument which tended in any way to show that the court had come to a wrong conclusion. Mention must be made, however,

of two other decisions of this court, which were not cited in argument, but in which a different interpretation was placed upon sub-s. (a) and sub-s. (b) of s. 5 of the Order in Council, which are as follows:

- “5. Leave to appeal under s. 3 of this Order shall, in the first instance, be granted by the court only—
- (a) upon condition of the appellant, within a period to be fixed by the court not exceeding ninety days from the date of the hearing of the application for leave to appeal, entering into good and sufficient security to the satisfaction of the court in a sum not exceeding £500 for the due prosecution of the appeal and the payment of all such costs as may become payable by the applicant in the event of his not obtaining an order granting him final leave to appeal, or of the appeal being dismissed for non-prosecution, or of His Majesty in Council ordering the appellant to pay costs of the appeal (as the case may be); and
 - (b) upon such other conditions (if any) as to the time or times within which the appellant shall take the necessary steps for the purposes of procuring the preparation of the record and the dispatch thereof to England as the court, having regard to all the circumstances of the case, may think it reasonable to impose.”

In *Fazal Kassam Velji v. M. Takim & Co.* (2) (1955), 22 E.A.C.A. 53, it was held that the terms of s. 5 (a) were directory, not mandatory, and that the period of ninety days for entering into security could, for cogent reasons, be extended. The second case is that of *Tisdale-Jones v. Sargent* (3), [1957] E.A. 613 (C.A.), in which the court held that it had a discretion (which it exercised against the applicant) to enlarge the time originally fixed by an order made under s. 5 (b) for filing the record. The President in his judgment (with which the other members of the court agreed) said that he thought that *Velji's* case (2) should govern their decision and that although the full text of the Indian Acts and authorities relied on in that case was not available to the court he was satisfied that he should not differ from it: he was not persuaded that it was wrongly decided. The court in *Velji's* case (2) made reference to the fact that, if their decision was wrong, it could be corrected by the Privy Council; the report of the appeal itself, however, in [1955] A.C. 617, makes no reference to any preliminary objection having been taken and if it was, it was obviously overruled, for the appeal was heard and decided on its merits. It is, therefore, necessary to look with care at the reasons for the decision of this court in *Velji's* case (2).

It was acknowledged that *prima facie* the terms of s. 5 (a) were mandatory.

At p. 54 of the report is the following passage from the order of the court:

“*Prima facie* the above provisions would seem to be mandatory rather than directory. At least it is clear that this court in fixing a time within which security is to be entered cannot initially give the appellant longer than ninety days. Does it follow that where there has been a failure to comply with the order for a good and reasonable cause this court cannot grant relief? We have been unable to discover any reported instance where their lordships have had this question before them in the case of a colonial appeal.”

The court then proceeded to consider three cases. The first was *In the matter of the Petition of Soorjmukhi Koer* (4) (1877), 2 Cal. 272, in which it was held by the full bench in Calcutta that the words of the Act then under consideration relating to the giving of security were directory only. Though the text of the provision in question differed from s. 5 (a) of the Order in Council the provision

for giving security was in equally mandatory terms. The decision of the full bench received the approval of the Privy Council in *Burjore and Pershad v. Bhagana* (5) (1884), 10 Cal. 557, but in neither case is there any discussion of the reasons underlying the decisions. The court then referred to and quoted from the judgment in the case of *Fazul-un-Nissa Begum v. Mulo* (6) (1884), 6 All. 250, in the following passage (1955), 22 E.A.C.A. at p. 55):

“In 1884, a year after the decision of the Privy Council a full bench of the High Court of Allahabad attempted, in *Fazul-un-Nissa Begum v. Mulo and Another*, 6 I.L.R. All. 250, to analyse that decision. After stating that the words of s. 602 were *prima facie* mandatory, the court found indications in three subsequent provisions from which it could be inferred that s. 60 was intended to be read as directory only. The passage is as follows:

“ ‘But the meaning of this section is considerably modified if we read it, as I think we may, with s. 603, s. 604 and s. 605. Section 603 provides that: “When such security has been completed and deposit made”, not as before provided, but “to the satisfaction of the court, the court may declare the appeal admitted, etc.”. Then by s. 604 it is provided that “at any time before the admission of the appeal, the court may upon cause shown, revoke the acceptance of any such security and make further directions thereon”. Then s. 605 is still more significant, providing as it does, that: “If at any time after the admission of the appeal, but before the transmission of the copy of the record, except as aforesaid, to Her Majesty in Council, such security appears inadequate, or further payment is required for the purpose of translating, transcribing, printing, indexing, or transmitting the copy of the record, except as aforesaid, the court may order the appellant to furnish, ‘not within six months or six weeks’, but ‘within a time to be fixed by the court, other and sufficient security, or to make within like time the required payment’.”

Later ((1955), 22 E.A.C.A. at pp. 55, 56) the court went on to say:

“In s. 8 of the Order in Council there is provision that during the preparation of the record this court may give such directions as the justice of the case may require on any disputed question. Admittedly this section does not relate specifically to the furnishing of security, but we think that it may reflect a directory meaning on s. 5 (a). Section 11 contains provisions somewhat similar to those of the Indian s. 604, and s. 5 (b) is somewhat analogous to s. 605. In spite of the wide differences of wording, we think the general situation of an apparently mandatory provision bearing a modified meaning by reason of subsequent related provisions obtains here, as it did in India, and we think that the Allahabad full bench must have described correctly the reasoning underlying the decision of the Privy Council in *Burjore’s* case. It is worth observing that, although in India the Code of Civil Procedure and not an Order in Council governed the matter, it was not suggested that any general power given by the Code to extend time could modify the effect of s. 602. Had that been the case, the authorities would clearly not have been relevant for our purposes.”

It is clear therefore that the court, having decided that the wording of s. 5 (a) was *prima facie* mandatory, considered that the strict meaning of the words used was to be regarded as modified by subsequent related provisions. It may also have been influenced to some extent by the presence of the words “in the first instance” in the early part of the section. None of these considerations applies to the matter of the construction of s. 4 of the Order in Council, which is the one with which the court is concerned in the present case. The wording is clearly mandatory and there are no subsequent provisions which could be

said in any way to modify its meaning. It is of interest to note that in *Fazul-un-Nissa Begum v. Mulo* (6) the Chief Justice had in mind a similar distinction. He said (at p. 251 of the report):

“In an application for leave to appeal to the Privy Council from a decree of this court in the case of *Jawahir Lal v. Narain Das* (1) and which application came on for disposal before Spankie, J., and myself, I was of opinion—and my judgment was acquiesced in—that the limitation period of six months could not be extended beyond that period . . .

“This reference, however, raises a different question, viz. whether the court has a discretion to extend the term of six months allowed by s. 602 of the Civil Procedure Code for giving security for the costs of the respondent . . .”

In our view strict compliance with the requirements of s. 4 of the Order in Council is necessary to institute the appeal and confer jurisdiction upon this court, which is quite a different matter from the observance of procedural requirements, such as are dealt with in s. 5, within the framework of the appeal once instituted. The case of *Velji v. Takim & Co.* (2) being plainly distinguishable we considered that *Shah v. The Jethabhai Oil Mills and Soap Factory Ltd.* (1) was rightly decided and that we had no power to extend the time within which application for leave could be made.

The second preliminary objection was also based on s. 4 of the Order in Council and was to the effect that the applicant had not fulfilled the requirements of the words

“and the applicant shall give all other parties to the appeal notice of his intended application”.

Counsel for the respondent indicated, and it was not contested, that the attorney-general was notified of the application for the first time by a letter dated September 3, 1958, whereas the application had been filed on or about August 13, 1958. In view of our opinion, expressed above, upon the first objection we do not deem it necessary to discuss this question in detail, but it would appear that on the authority of the decision of this court in *Hubble v. Commissioner for Transport* (7) (1952), 19 E.A.C.A. 153, by which we are bound, this also is a valid objection. In that case, in which exactly the same point was in issue the court said:

“We hold that this submission is a correct one. The section clearly requires not merely that the other party to an application made under it should be served with a copy of the motion, but that the other party should first be notified that the applicant intends to make the application. Since this is the case and such notice was not given in the present instance we are bound to uphold the preliminary objection and to dismiss the application which is now before us.”

It would appear therefore that this matter is concluded by authority against the applicant.

For the foregoing reasons we dismissed the application for leave to appeal.

Application dismissed.

For the applicant:

GL Binaisa

GL Binaisa, Kampala

For the respondent:

MT Maloney (Crown Counsel, Uganda)

The Attorney-General, Uganda

A S Folkes & Company v Karsandas Purshottam Thakrar and another
[1959] 1 EA 36 (CAK)

Division: Court of Appeal at Kampala
Date of judgment: 16 January 1959
Case Number: 68/1958
Before: Sir Kenneth O'Connor P, Forbes V-P and Gould JA
Sourced by: LawAfrica
Appeal from: H.M. High Court of Uganda–Lyon, J

[1] Evidence – Admissibility – Guarantee – Whether evidence admissible to prove guarantee signed before the date it bears – Evidence Ordinance, s. 78, s. 90, s. 91 (6) and s. 113 (U.) – Indian Evidence Act, 1872, s. 91.

[2] Guarantee – Whether the words “your giving goods on credit” capable of referring to giving goods on credit in the past as well as in the future – Contract Ordinance (U.) – Indian Contract Act, 1872, s. 127 and s. 144.

Editor’s Summary

The appellant had sued Bugabula Traders Ltd. and the respondents, as guarantors, for a sum of Shs. 20,025/65 in respect of two consignments of flour delivered to the company on April 18 and May 11, 1956. It was alleged that the respondents who were two of the directors of the company had on April 18, 1956, guaranteed payment of all moneys due by the company for goods supplied to them by the appellant and promised to sign a written guarantee within a few days and that such a written guarantee was delivered on May 22, 1956, bearing the same date. At the trial the appellant sought to establish that the written guarantee had been signed, not on May 22, but in April before the delivery of the first consignment of flour, and that it was preceded by an oral guarantee. The trial judge ruled that such evidence was inadmissible. The appellant had also contended at the trial that even if the written guarantee were taken as signed on May 22, 1956, yet on the wording the guarantee should be held to apply to moneys due in respect of past as well as future transactions. The trial judge in dismissing the suit rejected this construction and held that the guarantee was intended to be effective only from May 22, 1956. He also upheld the respondents’ contention that the guarantee was not binding on them because there were altogether four directors of the company and while the proposal had been that all four directors should sign the guarantee, yet in fact only the two had signed it. The appellant appealed against the judge’s ruling that evidence was not admissible to prove that the written guarantee was signed before May 22, 1956, and also against the decision that it did not relate to credits prior to May 22, 1956, and that it was not in any case binding on the respondents. It was contended for the appellant that the written guarantee covered both past and future credits and that the consideration for the guarantee was the promise of future credit.

Held –

- (i) (a) since the trial judge had not made a finding on the question whether the respondents only agreed to be bound by the guarantee *if* all four directors signed, it was open for the Appeal Court to review the evidence and reach its own conclusion; (b) the signatures of the respondents to the written guarantee were not attached solely on the condition or on the faith of expectations that the other two directors would also sign and be bound by the guarantee;
- (ii) the trial judge was wrong in treating the date written at the top of the written guarantee as a “term of the contract”;
- (iii) it was open to the appellant to call oral evidence to show that the date written on the written guarantee was not in fact the date of execution;

- (iv) the guarantee was intended to cover moneys due on goods already delivered on credit as well as moneys which might become due on goods delivered in the future; and
- (v) the guarantee was not void for want of consideration.

Appeal allowed with costs. Judgment and decree of the High Court set aside.

Cases referred to in judgment

- (1) *Evans v. Brembridge*, 169 E.R. 741.
- (2) *Browne v. Burton* (1848), 17 L.J. Q.B. 49.
- (3) *Edwards v. Jevons* (1850), 19 L.J. C.P. 50.
- (4) *Wood v. Benson*, 149 E.R. 40.
- (5) *Morrell v. Cowan* (1877), 7 Ch. D. 151.

January 16. The following judgments were read:

Judgment

Forbes V-P: This is an appeal from a decree of the High Court of Uganda.

The appellant, who was the original plaintiff, sued Bugabula Traders Ltd. (a limited liability company against whom an interim receiving order in bankruptcy had been made) and the two respondents for Shs. 20,025/60, being the price of goods delivered to Bugabula Traders Ltd. (hereinafter called the defendant company) in April and May, 1956. The respondents were directors of the defendant company, and the appellant alleged that they had guaranteed the due payment of the sum claimed. He pleaded *inter alia* that:

- “5. In consideration of the plaintiff agreeing to give goods to the defendant No. 1 on credit, defendant No. 2 and defendant No. 3 on or about 18th day of April, 1956, guaranteed to the plaintiff to be answerable and responsible for the due payment by defendant No. 1 of all moneys due by them for goods to be supplied by the plaintiff to the defendant No. 1 and promised to sign a written guarantee within a few days.
- “6. In terms of the said guarantee the plaintiff supplied and delivered in Kampala to the defendant No. 1 at their special instance and request goods of a total value of Shs. 20,025/60 being as to Shs. 10,012/80 value of goods delivered to defendant No. 1 on 18th April, 1956, and as to the balance of Shs. 10,012/80 value of goods delivered to defendant No. 1 on 1st May, 1956.
- “7. Defendants No. 2 and 3 on 22nd day of May, 1956, delivered a written guarantee to the plaintiff copy whereof is annexed hereto and marked ‘A.S.F. 1’ ”.

The respondents in their written statements of defence denied that they had ever guaranteed to be answerable or responsible for the price of the goods in question or had promised to sign a written guarantee as alleged in para. 5 of the plaint. They admitted having signed the guarantee annexe A.S.F. 1 to the plaint (hereinafter referred to as the written guarantee) but alleged that no goods were supplied under the written guarantee.

The written guarantee is signed by both the respondents and is dated May 22. It is in the following terms:

“P.O. Box No.

Kampala. Dt. 22/5/1956.

“Messrs. Folkes & Co.,
P.O. Box 182,
Kampala.

- “1. In consideration of your giving goods on credit to the Bugabula Traders Ltd., P.O. Box 992, Kampala I/We Karsandas Purshottam (2) Vallabhadas Mathuradas Modi agree to be answerable and responsible for the due payment by the said Bugabula Traders Ltd., Kampala of all moneys due by them to you for goods, together with any interest due thereon or any instalments to which you may agree for the due payment thereof whether such moneys have been properly demanded or not and whether I have received notice of any neglect or commission on their part or not, neither shall any indulgence or extra time given for payment invalidate this guarantee in any way.
- “2. This guarantee shall be a continuing guarantee to you within the limits aforesaid for the whole of the payments that may become due to you by the said Bugabula Traders Ltd. under the agreement.
- “3. This guarantee shall not be cancelled at any time but be enforceable against me until the whole of the payments provided for in the agreement shall have been made together with any interest due thereon and the debt completely satisfied.

Yours faithfully,”

And then follow the signatures of the two respondents over Sh. 1/- Uganda stamp.

The goods to which the suit relates were two consignments of flour delivered to the defendant company, the first on April 18, 1956, and the second on May 11, (not May 1, as is incorrectly stated in the plaint) 1956, that is to say, before the date appearing on the written guarantee.

At the trial the appellant sought to lead evidence to establish that the written guarantee had been signed, not on May 22, but in April before the delivery of the first consignment of flour, and that it was preceded by an oral guarantee. In a ruling delivered on December 3, 1957, the learned trial judge rejected this evidence. An appeal to this court was lodged against this ruling, but this court held that the appeal was premature and that the ruling could not be challenged till after judgment and decree in the case.

The case was accordingly remitted to the High Court, and at the resumed hearing it was contended for the plaintiff (appellant) that even if the written guarantee were taken as signed on May 22, yet on the wording the guarantee should be held to apply to moneys due in respect of past as well as future transactions. The learned trial judge rejected this construction and held that the guarantee was intended to be effective only from May 22, 1956. He further held that in any event the guarantee was not binding upon the two respondents because there were altogether four directors of the defendant company and, while the proposal had been that all four directors should sign the guarantee, yet in fact only the two respondents had signed it. He accordingly held that the respondents must succeed and dismissed the suit against them with costs. The appellant has now appealed to this court, challenging both the learned judge's ruling that evidence was not admissible to prove that the written guarantee was signed before May 22, and also the decision that the written guarantee, if taken as signed on May 22, did not relate to past credits and was not in any case binding on the respondents.

I will deal first with the question whether the guarantee is binding on the respondents in view of the fact that the proposal had been that all four directors should sign it, since this would dispose of the appeal if the learned judge's decision were correct.

At p. 4 of his judgment the learned judge says:

"But the defence case does not end there. Both defendants 2 and 3 testified that, when the guarantee was discussed with Sanghvi, the proposal was that all four directors of defendant company should sign it. This is not disputed because, at p. 6 of the record, Sanghvi testified: 'Defendants 2 and 3 asked me the terms of business. I said sixty days from date of invoice and a personal guarantee of all the directors of defendant company. They said they would consult the other directors and let me know. Later they agreed to those terms; and I told Folkes about it'. It is proved and admitted that only defendant 2 and defendant 3 signed the guarantee. The other two directors, who were stationed at Jinja, never signed it. I am of opinion that in those circumstances, the guarantee is not binding upon either defendant 2 or defendant 3, because the authorities cited to me (by) Mr. Shah appear to me to be conclusive. They are: s. 356 (1) Companies Ordinance. Palmer (16th Edn.) p. 675, r. 93 and p. 413 and s. 144 Indian Contract Act, Vol. V 2679 and *Evans v. Brembridge*, 69 E.R. 741."

It does not appear from this passage that the learned judge directed his mind to the essential point at issue, namely, whether the respondents signed the guarantee on the condition that, or on the faith of representations that, the signatures of the other two directors to the guarantee would be obtained. All he says is that

"the proposal was that all four directors of the defendant company should sign it."

This is undoubtedly true. The appellant wished to obtain a guarantee from all four directors. But it does not necessarily follow that the respondents only agreed to be bound by the guarantee *if* all four directors signed, and signed themselves in good faith in the expectation that the signatures of the other directors to the guarantee would be obtained in due course by the appellant. This issue is a question of fact, but, since the learned judge has not made any finding on it, I consider that it is now open to this court to review the evidence and reach its own conclusion on the matter.

So far as the appellant is concerned, it is clear, as I have said, that he wanted a guarantee from all four directors of the defendant company. Mr. Folkes himself stated in evidence "I wanted the other two signatures". And Sanghvi, he broker/agent who negotiated the transaction on behalf of the appellant, said:

"Defendants 2 and 3 asked me the terms of business—I said sixty days from date of invoice and a personal guarantee of all the directors of defendant company. They said they would consult the other directors and let me know. Later they agreed to those terms . . . The ink on exhibit 1 was put in by me on May 22, 1956. The other directors never signed it . . . I never saw the other two directors at their Kampala office although I often went there. Defendants 2 and 3 and Vithaldas were present when I filled in the particulars. They did not object."

It certainly does not appear to me that the inference to be drawn from this evidence is that the two respondents signed the written guarantee only on the condition that, or on the faith of expectations that, the other two directors would also sign, and did not consent to being bound by the guarantee unless the other two directors signed. It is to be noted that the witnesses were not cross-examined on this aspect of the matter.

There was some dispute before us as to the identity of the “Vithaldas” named in the passage from the evidence of Sanghvi which I have set out above. One of the directors who did not sign the written guarantee was Vithaldas Popatlal Thakrar, and in the context of Sanghvi’s evidence, where he had earlier said

“defendant company had several directors. Others were Vithaldas and Moraji,”

it was certainly reasonable to assume that the “Vithaldas” whom he mentioned subsequently was the director Vithaldas. Counsel for the respondents, however, maintained that this individual was a different Vithaldas, though there is nothing in the evidence to indicate this. In fact the first respondent’s evidence would appear to indicate the contrary since he says that when he signed exhibit 1 there were present “Modi and Vithaldas Thakrar”. The point is of some importance, since, if the respondents’ contention that they signed on condition that the signatures of the other directors would be obtained is true, it would be strange that one of those other directors should have been present when Sanghvi either filled in particulars on the written guarantee or obtained the signatures of the two respondents (whichever version may be correct) and that this other director’s signature to the written guarantee should not then have been put on the document. Nevertheless there was no cross-examination of the appellant’s witnesses to clear up the matter.

This question whether the guarantee was only signed on condition all four directors signed was, as pointed out by counsel for the appellant, only raised for the first time upon the re-examination of the first respondent. It was not pleaded in the respondents’ written statements of defence. It was not raised in cross-examination of the appellant’s witnesses. It was not raised in examination-in-chief of the first respondent. Owing to the abortive appeal against the learned judge’s ruling to which I have referred above, an adjournment of some seven months intervened between the examination-in-chief of the first respondent and his cross-examination. And it was only after cross-examination that in purported re-examination (it did not arise out of anything asked in cross-examination) the first respondent said:

“Sanghvi told me that after we two Kampala directors had signed he would get the other two to sign. I can read some English. I would not have signed the guarantee if I had known Sanghvi would not obtain the signatures of the other two directors.”

Thereafter the second respondent, in his examination-in-chief, said:

“I agree with second defendant’s evidence. Four directors were to sign the guarantee. Sangvhi told us he would get the other two directors to sign. Had I known the other two directors were not to sign I would not have signed.”

In these circumstances I find it quite impossible to believe that this evidence is anything but the merest afterthought. Had the respondents really signed the written guarantee only on the condition that the other two directors should also sign, this would have been one of the first matters they would have protested when the appellant sought to enforce the guarantee. It is not a matter requiring professional advice to bring it to their notice, and, if true, I cannot conceive that they would not have informed their advocate of the fact and that it would not then have been duly pleaded. I am further fortified in this opinion by the first respondent’s evidence in regard to exhibit 7. Exhibit 7 is the statement of affairs of the defendant company filed in the bankruptcy proceedings. In that statement Folkes & Co. (incorrectly described as “Fox & Co.”) are shown as secured creditors for an amount of Shs. 20,025/60, the particulars of the security being entered as “K. P. Thakrar & V. Mathuradas”—that is, the

respondents. This document, it is true, is signed, not by the respondents, but by the other two directors. Nevertheless the first respondent said this in evidence:

“All four directors agreed we had to file a petition. We had a meeting before the petition was filed and we discussed everything about the statement of affairs.

“The figure on exhibit 7 20025/60 is the same as that claimed in the plaint. We discussed the guarantee and the other two directors made the entry on what they thought was the position.”

Once again I find it impossible to believe that, had the two respondents genuinely signed the written guarantee only on the basis that all four directors would sign, they would not have so informed the other directors when the guarantee was discussed.

For these reasons I am of opinion that the respondents’ evidence on this point is worthy of no credence whatsoever and should be rejected. I would find as a fact that the signatures of the respondents to the written guarantee were not attached solely on the condition or on the faith or expectations that the other two directors would also sign and be bound by the guarantee.

In connection with this point, the learned judge refers to authorities cited to him by Mr. Shah which he regards as conclusive for the proposition that the guarantee is not binding upon the respondents, namely:

“Section 356 (1) Companies Ordinance. Palmer (16th Edn.) p. 675, r. 93 and p. 413 and s. 144 Indian Contract Act, Vol. V 2679 and *Evans v. Brembridge*, 69 E.R. 741.”

In view of my finding of fact above I do not think they are relevant. *Evans v. Brembridge* (1) is clearly distinguishable. In that case it appeared on the face of the deed that it was intended to contain a joint and several covenant by two co-sureties and that in that form it was executed by one of such sureties but not by the other. The learned Vice-Chancellor in his judgment said:

“From the form of the deed, which was prepared by the insurance company and sent by them to the plaintiff, it is beyond question that the original intention of all parties was that the plaintiff and William Bradley should be co-sureties for Elton, the borrower of the money, and that they should be jointly and severally bound.”

In the instant case the written guarantee certainly does not show on its face that it was intended that anyone besides the respondents should be bound by it. In fact, as was remarked by counsel for the appellant, the signatures to the guarantees are so placed as to negative an expectation that there would be any other signatories.

I turn now to the learned judge’s ruling that oral evidence was not admissible to show that the written guarantee was in fact signed on a date other than that shown on the face of it. He founded his decision on s. 90 of the Evidence Ordinance (Cap. 9 of the Laws of Uganda), the material part of which reads:

“When the terms of a contract . . . have been reduced to the form of a document . . . no evidence save as mentioned in s. 78 shall be given in proof of the terms of such contract.”

The learned judge correctly held that the exceptions to this rule contained in s. 78 and in s. 90 itself were not applicable, and continued:

“In the instant case there is no ambiguity in the terms of the document, at least as far as the date is concerned.”

He also said:

“The first witness for the plaintiff, an agent of the plaintiff company, himself testified that he wrote the date—May 22, 1956—upon exhibit 1”

[that is, the written guarantee]. "I am therefore also of the opinion that he would be precluded by the doctrine of estoppel from testifying that the document was, in fact, signed some six or seven weeks before."

So far as the doctrine of estoppel is concerned I am, with great respect, unable to see that it has any bearing whatever on the matter in issue. The doctrine is embodied in s. 113 of the Evidence Ordinance, which reads as follows:

"113. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

In the instant case, assuming for the moment that the written guarantee was in fact signed before May 22, there is no suggestion that Sanghvi, in writing the date "May 22, 1956" on the guarantee in any way caused or permitted the respondents to believe that such date was the true date of signature and to act on such belief. The respondents, as signatories, were fully aware of the date on which they signed, and the date "May 22, 1956" was filled in their presence. There was no possibility of their being misled as to the true date of signature. In any case, estoppel was not pleaded.

As regards s. 90 of the Evidence Ordinance, the learned judge has treated the date written at the top of the written guarantee as a "term of the contract". I do not think this is the correct view. In Sarkar on Evidence (9th Edn.) at p. 646, the learned author in his commentary on s. 91 of the Indian Evidence Act (which is in similar terms to s. 90 of the Evidence Ordinance) says:

"Quaere: Whether the words 'terms of a contract' include the date of a contract? [*Ma Hla v. Mg. Shwe*, 9 Bur. L.T. 250]. Dates of instruments are treated as formal parts of document. Like recitals of consideration they are presumed to be correct until disproved. Parol evidence is admissible to show that there was mistake as to date or that the date is incorrect through collusion or some other reason. Parol evidence has been admitted to prove that recited dates were wrong."

The case mentioned is unfortunately not available, but it appears well established that oral evidence is admissible to show that the date on a document is incorrect. At p. 560 of Sarkar, the learned author again says:

"There is a *prima facie* presumption that documents have been executed on the day they bear date. If there is no date it may be supplied, or if the date is wrong, oral evidence may be given."

In England a similar rule prevails. Halsbury's Laws of England (3rd Edn.). Vol. 11, p. 403, and *Browne v. Burton* (2) (1848), 17 L.J. Q.B. 49 where, at p. 50, Patteson, J., says:

"Now the rule uniformly acted upon from the time of *Clayton's* case to the present day is that a deed or other writing must be taken to speak from the time of the execution, and not from the date apparent on the face of it. That date is indeed to be taken *prima facie* as the true time of execution; but as soon as the contrary appears, the apparent date is to be utterly disregarded."

In my opinion it was open to the plaintiff/appellant to call oral evidence to show that the date written on the written guarantee was not in fact the date of execution, and the learned judge was wrong to exclude such evidence. Some evidence on the point was taken before the learned judge ruled that it was inadmissible, but it is impossible to make a finding of fact on the material

available. If there had been a finding of fact to the effect that the written guarantee was signed on or before April 18, this would, of course, have concluded the matter in favour of the plaintiff/appellant. I should be of opinion that the matter must be remitted to the Supreme Court for re-trial were it not that I think the appellant must succeed even on the basis most favourable to the respondents, that is to say, on the basis that the written guarantee was in fact signed on May 22, 1956.

As a result of the ruling of the learned trial judge, counsel for the plaintiff/appellant perforce had to argue the claim on the basis that the guarantee had been signed on May 22. The learned judge commented adversely upon this in his judgment, saying:

“Mr. Mascarenhas” [i.e. counsel for the plaintiff], “in his final address, shifted his ground, submitting to the ruling on the evidence point. He now asserts that the guarantee itself can be construed as having retroactive effect, that is to say, that it was effective before May 22, 1956, and when those two deliveries were made.”

.....

“Mr. Mascarenhas asserts that the word ‘giving’ in the first line is a gerund, and that the words ‘all moneys due’ in the third line, include moneys due in the past. It is contended, therefore, that the guarantee was intended to cover transactions before 22/5/1956, transactions on 22/5/1956 and transactions after that date; the two latter being supported, according to Mr. Mascarenhas, by the second paragraph of the guarantee. This defence does not run well with the defence at first attempted, namely, that the guarantee was signed in the first week of April, 1956.”

The reference to “defence” in the last sentence quoted is obviously an error and should be a reference to the plaintiff’s case. I hardly think that in the circumstances that prevailed the learned judge’s criticism was justified. Short of abandoning the case altogether, there was no other course which counsel for the plaintiff could take.

The learned judge continued:

“I have considered Mr. Mascarenhas’ argument on this part of the case with care. I agree that the word ‘giving’ is a kind of noun—a gerund; but in my view, even when read with all the remaining words in para. one, it cannot fairly be construed as referring to any date earlier than May 22. It is not clear enough. The insertion of one word, for example, ‘already’ between the words ‘monies’ and ‘due’ in line three, would have changed the situation. I hold that the guarantee was intended to be effective only from May 22, 1956.”

In reaching this conclusion the learned judge seems also to have relied upon the evidence of Gokaldas Purshottam as he says:

“There is one further reason why I am of opinion the defendants must succeed here.

“It is admitted by the plaintiff company that no delivery was made to defendant 1 after May 22, 1956.

“Although Mr. Gokaldas Purshottam is the father-in-law of defendant 2, I believe his evidence that he was told by Sanghvi that if, after the first two deliveries, the company (defendant 1) wanted more, guarantees of the directors would be necessary.”

So far as Gokaldas Purshottam’s evidence is concerned, I do not think it is of much assistance. He is recorded as saying:

“Sanghvi told me that if after the first two deliveries the company wanted more, guarantees of the directors would be necessary.”

It is not apparent from this that the guarantees of the directors were to be in respect of future deliveries only.

Before us Mr. Wilkinson for the appellant argued that on a proper construction the written guarantee covered both past and future credits and that the consideration for the guarantee was the promise of future credit; and he relied on *Edwards v. Jevons* (3) (1850), 19 L.J. C.P. 50.

For the respondents it was argued that the written guarantee could not be construed to cover past deliveries; and that even if the written guarantee were to be construed as applicable to the first two deliveries, there would be no consideration for such past transactions and the guarantee would accordingly be void. Mr. Dholakia for the second respondent cited *Wood v. Benson* (4), 149 E.R. 40, and illustration (c) to s. 127 of the Indian Contract Act as applied by the Contract Ordinance (Cap. 207). He conceded that under para. (d) of s. 2 of the Indian Contract Act, if the goods had been supplied “at the desire of the promisor” (i.e. the respondents) this would constitute a sufficient consideration, but he argued that there was nothing in the guarantee to show that the goods had been supplied at the desire of the respondents, and drew a distinction between the respondents and the defendant company, submitting that the goods had been supplied at the desire of the company.

I am of opinion that *Edwards v. Jevons* (3) is very much in point. The issue in that case was whether a guarantee in the terms

“In consideration of Messrs. E., R. & Co . . . giving credit to Mr. David Jevons . . . I hereby engage to be responsible to and pay any sum not exceeding £120 due to the said E., R. & Co. by the said David Jevons,”

was a valid guarantee in respect of past credit. It was held that the wording of the guarantee made it applicable to both past and future credit, and it was therefore valid. Wilde, C.J., in his judgment said:

“It is to be regretted that so much ambiguity has arisen in the course of the decisions on the subject of guaranties. But when we remember that in the ordinary course of business these instruments are drawn up without inquiry as to legal requisites, it often becomes difficult to say whether they are conformable with the rules of law. But considering that it is important to trade in general that facilities should be given to the operation of guaranties, and that it is desirable they should be sustained, if in point of law they can be sustained, let us see how the decisions affect the present case. This instrument is expressed in terms which shew that it was a trade guarantie. Now, it is objected that it does not appear whether the words ‘giving credit’, inserted in the guarantie, apply to credit which has been given, or to any credit which might afterwards be given, and that the guarantie is therefore bad. The answer is, that such words embrace, and may be applied to the one or the other. In *Haigh v. Brooks*, the guarantie was ‘in consideration of your being in advance to L.’ and in *Goldshede v. Swan*, the form was ‘in consideration of your having advanced this day,’ etc., and in both of those cases it was held that the words were ambiguous, and might be applied by evidence either to past or subsequent advances. If it turned out that the guarantie in this case was applicable only to a past consideration, then it would be bad. *Haigh v. Brooks* has not been impugned, but has been followed by other cases. Applying it then to the present case, I think that the words ‘giving credit’ are capable of embracing both bygone and future credit. If those words include both, where in truth it was for future credit only, this is a good guarantie; and supposing the other to exist also, the guarantie is still good.”

.....

“Coming back to the words ‘giving credit’ in the guarantee, the authorities shew that they may apply to past or future credits . . .”

In the instant case the material words in the written guarantee are

“In consideration of your giving goods on credit to the Bugabula Traders Ltd. . . . we . . . agree to be answerable and responsible for the due payment of all moneys due by them to you for goods . . .”

It appears to me that these words are as ambiguous as the words in the guarantee in *Edwards v. Jevons* (3), and equally capable of applying to the giving of goods on credit in the past as in the future. If I am right in my view, and the wording of the written guarantee is ambiguous, then under proviso (6) to s. 91 of the Evidence Ordinance the surrounding circumstances may be looked at in order to find out the real nature of the transaction. The case of *Morrell v. Cowan* (5) (1877), 7 Ch. D. 151, which was cited by Mr. Dholakia, does not, in my view, affect the matter. The material part of the guarantee which had to be construed in that case read

“In consideration of you . . . having at my request agreed to supply and furnish goods to M.M.C., I do hereby guarantee,”

etc. This was held to mean “If you *will* supply goods, I *will* guarantee payment”. I would respectfully agree with this interpretation. I do not think the wording in that case was ambiguous.

As in *Edwards v. Jevons* (3), the written guarantee in this case is a trade guarantee. It is not disputed that at May 22, 1956, the date which, for the purposes of this argument, must be taken to be the date of execution of the guarantee, two consignments of goods had been received by the defendant company on credit, and, on the respondents own case, a further consignment was contemplated. Since the guarantee is a trade guarantee and is in terms which apply equally to past as to future credit, it seems to be a natural inference that the guarantee was intended to cover moneys due on goods already delivered on credit as well as moneys which might become due on goods delivered in the future.

It remains to consider whether the guarantee, so far as it applied to past deliveries of goods on credit, was void for lack of consideration. In *Edwards v. Jevons* (3), as I understand it, the consideration, which was held to be sufficient, was the continuation of credit after the date of the guarantee.

“The declaration shows that there were continued dealings between the plaintiffs and the principal debtor, and it was proposed that he should get extended credit, provided the defendant gave his guarantee.”

(Wilde, C.J., at p. 53 of 19 L.J. C.P.). The position here is not quite the same. I do not think that the written guarantee can be construed as necessarily meaning that the defendant company was to get a further extension of credit in respect of goods already delivered. Nor does the written guarantee appear to contain a binding promise by the appellant to supply further goods. If the appellant had supplied further goods in reliance on the guarantee, this might have constituted sufficient consideration, but in fact no goods were supplied after May 22.

However, as I have already said, in my view the words “in consideration of your giving goods on credit” and “all moneys due by them to you for goods” are sufficiently wide to include goods already given on credit as well as those which might in future be given; and, as conceded by Mr. Dholakia, if the goods were supplied “at the desire of the promisor”, this would, under para. (d) of s. 2 of the Indian Contract Act, constitute a sufficient consideration.

It is true that the guarantee does not state in terms that the goods were supplied “at the desire of the promisor.” But in my view the words in the

guarantee “In consideration of your giving goods on credit” imply that the “giving” was “at the desire” of the signatories, i.e. the respondents. If there is any ambiguity about the meaning of the words, extrinsic evidence is again admissible under proviso (6) to s. 91 of the Evidence Ordinance to show how the language of the guarantee is related to existing facts, and the evidence shows beyond doubt that the supply of the goods was done at the instance and desire of the respondents. Accordingly, I am of opinion that the guarantee is not void for want of consideration.

For the reasons I have given I think the respondents are bound by the written guarantee, and that the appellant is entitled to judgment against them. There is no dispute as to the amount claimed, and I would accordingly allow the appeal and order that the judgment and decree of the High Court be set aside, and that judgment be entered for the plaintiff/appellant for the amount claimed and costs. The appellant should also have the costs of the appeal.

Sir Kenneth O'Connor P: I agree. There will be an order in the terms proposed by the learned Vice-President.

Gould JA: I also agree.

Appeal allowed with costs. Judgment and decree of the High Court set aside.

For the appellant:

PJ Wilkinson and VM Mascarenhas
VM Mascarenhas, Kampala

For the first respondent:

JM Shah
Patel & Shah, Jinja

For the second respondent:

BD Dholakia
Parekhji & Co, Kampala

Hawkins v R **[1959] 1 EA 47 (CAN)**

Division:	Court of Appeal at Nairobi
Date of judgment:	5 February 1959
Case Number:	213/1958
Before:	Forbes V-P, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya at Nairobi–Pelly Murphy, J

[1] Criminal law – Stealing by an agent – Cheque received by appellant in own name for payment to third person immediately – Cheque paid by appellant into own overdrawn account – Payment to third person not made for several months – Whether fraudulent conversion – Intention of appellant when paying cheque into own account – Penal Code, s. 5, s. 263 and s. 278 (K.).

Editor's Summary

The appellant, an accountant, was secretary to one, Churcher, in respect of his company promoting transactions as well as his private financial affairs. In April, 1957, one of Churcher's companies named V. Ltd. was in financial difficulties and the appellant induced one, Heath, to lend Churcher a sum of Shs. 10,000/- at seven per cent. interest for a period of six months. On July 10, 1957, Churcher consulted the appellant with a view to repaying Heath and made out a crossed cheque for Shs. 10,166/42 in the appellant's name with the object of making immediate repayment of the loan. The cheque was paid by the appellant on the same day into his own office account which at the time was overdrawn by some Shs. 25,000/-. This sum was not paid to Heath nor was he informed of the payment by Churcher. On October 16 Heath wrote to the appellant complaining that neither the principal nor the agreed interest had been repaid as agreed, and giving one further month for its repayment with interest; to this the appellant replied saying that his (Heath's) rights were being protected and that when the capital was repaid, he would arrange for interest to the date of repayment to be paid. He did not mention, however, that Churcher had already repaid the loan to him. After further pressure the appellant repaid Heath on December 31, 1957, by a cheque drawn on Churcher's personal account (which he was authorised to operate) for the total sum of Shs. 10,502/50. The appellant was subsequently convicted by a judge of the Supreme Court sitting with a jury, of stealing a cheque for Shs. 10,166/42. The appellant appealed and the substantial point argued at the hearing of the appeal was that, inasmuch as he (the appellant) was fully authorised by Churcher to pay the cheque into his own office account, which was exactly what he had done, he did nothing fraudulent with the cheque, as distinct from the cash into which it was converted after its payment into the bank and accordingly he did not steal the cheque.

Held –

- (i) in view of the vital relevance of intent in s. 263 (2) of the Penal Code, the appellant's physical act in paying the cheque into his office account could not be divorced from his intention when doing so, for the purpose of deciding whether that payment was a fraudulent conversion; so that
- (ii) if he paid the cheque into his office account with the intention of not paying Heath an equivalent sum within at most two days, but of reducing his own overdraft, even though he may have intended at some later date to pay Heath, then his act was not authorised and he was guilty of a fraudulent conversion of the cheque. *Menzour Ahmed v. R.*, [1957] E.A. 386 (C.A.), and *R. v. Davenport*, [1954] 1 All E.R. 602, considered.
- (iii) there was no misdirection of the jury in the judge's summing-up and there was sufficient evidence to support the jury's findings.

Appeal dismissed.

Cases referred to in judgment

- (1) *R. v. Davenport*, [1954] 1 All E.R. 602.
- (2) *Menzour Ahmed v. R.*, [1957] E.A. 386 (C.A.).

Judgment

Windham JA: read the following judgment of the court: This is an appeal from the conviction of the appellant on a charge of stealing a cheque by an agent contrary to s. 278 (b) of the Penal Code, upon a trial by a judge and jury in the Supreme Court of Kenya. The appellant had been charged on six counts, of which two were withdrawn from the jury upon the close of the Crown case, while the jury acquitted him on two of the remaining counts, finding him guilty on count 1.

The facts of the case relating to count 1 were the following, and were substantially undisputed. The appellant, an accountant and a Fellow of the Chartered Institute of Secretaries and Associate of the Institute of Bankers, was secretary to a Colonel Churcher. The latter was a company promoter in Nairobi, where he was a director of a number of companies including one called Vermiculite Limited which was incorporated in 1956 and which Churcher financed from funds of his in Australia. The appellant was Churcher's secretary not only in respect of his company promoting transactions but also in respect of his private financial affairs. For the purposes of his business the appellant had a banking account in his own name in the National Bank of India, Nairobi. The account of Vermiculite Limited itself was in the same bank. The appellant's position and responsibility with regard to Vermiculite Limited was expressed in the following words by Churcher in evidence:

"Accused had to run practically everything except technical side-outside work—for Vermiculite Limited . . . Accused had to run business side. He was not in charge. I was the owner. He dealt with correspondence. He kept the books of account. He made payments for the company. He received moneys . . . He had my complete confidence."

The appellant corroborated this when in evidence he said: "Churcher had left me in absolute control of his financial affairs".

In April, 1957, the financial position of Vermiculite Limited had become serious and a certain Major Heath was induced through the mediation of the appellant, and in writing agreed, to lend Churcher the sum of Shs. 10,000/- at seven per cent. interest, to be repaid in six months. Heath paid the money on April 12 by cheque which, by mutual agreement, was made out in the name of the appellant, and it was paid into the latter's business account in the National Bank of India, which will hereafter be referred to as his office account. None of the charges against the appellant related to this cheque.

On July 10, 1957, Churcher, having received further funds, went to see the appellant and told him that he now had moneys with which to repay Heath and that he wished to do so. The following is the relevant passage from Churcher's evidence:

"On July 8, 1957, my funds arrived. I went to see accused in his office in Sunglora House. I said I wish to pay off moneys owed to Major Heath as I now have funds. He agreed. I started to write out cheque. I inserted date. I asked accused what Major Heath's initials were. He said he didn't know but it was immaterial as the matter was a personal one between the three of us and I could make the cheque out to him as Major Heath had

done. I made the cheque payable to Charles S. Hawkins. I then started to fill body of cheque. I asked accused the amount of interest owing. He worked this out. He told me amount was Shs. 166/42. I therefore filled in cheque for Shs. 10,166/42. I signed it and gave it to accused. That cheque went through my account and was paid.”

This cheque for Shs. 10,166/42, which was crossed, was paid by the appellant forthwith, on July 10, into his office account, which at the time was overdrawn by some Shs. 25,000/-. The cheque was cleared on the same day. The above evidence of Churcher was accepted by the appellant in evidence, save that the appellant denied that Churcher had asked him what Heath’s initials were and added that in fact he knew what they were, a discrepancy which was pointed out to the jury in the summing up.

The question and the relevance of what were the appellant’s intentions immediately before he paid this cheque into his office account, with regard to the payment of its amount to Heath, will be considered presently. For the moment it will be convenient to set out briefly the further facts. The appellant did not pay that sum, or any part of it, to Heath on that same day, nor on the next day, nor indeed until some 5 1/2 months later, when on December 31, 1957, he did so by a cheque for Shs. 10,502/50 drawn on Churcher’s personal account. Meanwhile he did not inform Heath that on July 10 Churcher had paid him a cheque for Shs. 10,166/42 with the expressed object of thereby making immediate repayment to Heath of his loan with interest to date. He did nothing by way of paying or informing Heath for over three months. On October 16 Heath wrote a letter to him referring to his (Heath’s) loan of the Shs. 10,000/- to Churcher on April 12, complaining that the agreed interest on it, payable at the end of June and the end of September, had not been paid, and that the principal had not been repaid after six months as agreed, and giving one further month for its repayment with interest. To this letter the appellant replied on October 25. In this reply he gave vague reassurances to Heath that his rights were being protected, ending with an assurance that “when the capital is repaid I will arrange for interest to date of repayment”; but he made no mention, either direct or by implication, of the payment to him by Churcher some 3 1/2 months before of the cheque for Shs. 10,166/42 with the object of repaying Heath his loan. After further pressure the appellant, operating on Churcher’s personal account (on which, be it said, he had a general right to operate) made the payment to Heath of Shs. 10,502/50 which has been mentioned earlier.

Such were the salient relevant facts before the jury, in addition to more direct evidence of the intentions of Churcher which he intimated to the appellant on July 10, 1957 (to which reference will presently be made), with respect to the first count against the appellant, upon which they convicted him. The charge was that of “stealing by an agent” contrary to s. 278 (b) of the Penal Code of Kenya, and the particulars of the charge were that the appellant—

“on or about the 10th day of July, 1957, at Nairobi . . . stole a cheque for Shs. 10,166/42 which had been entrusted to him by George Maurice Churcher for him the said Charles Samuel Hawkins to pay to William Albert Henry Heath the same or the proceeds thereof.”

Stealing is defined by s. 263 of the Penal Code, of which the relevant subsections read as follows:

- “263. (1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing.
- “(2) A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents, that is to say—

- (a) an intent permanently to deprive the general or special owner of the thing of it;
- (b) an intent to use the thing as a pledge or security;
- (c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;
- (d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;
- (e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner.

“The term ‘special owner’ includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.

- “(3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it. It is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorised to dispose of it.”

By s. 5 of the Penal Code, “money” is defined to include cheques.

Section 265 is also relevant. It reads:

“When a person receives, either alone or jointly with another person, any money or valuable security or a power of attorney for the sale, mortgage, pledge, or other disposition of any property, whether capable of being stolen or not, with a direction in either case that such money or any part thereof, or any other money received in exchange for it, or any part thereof, or the proceeds or any part of the proceeds of such security, or of such mortgage, pledge or other disposition, shall be applied to any purpose or paid to any person specified in the direction, such money and proceeds are deemed to be the property of the person from whom the money, security or power of attorney was received until the direction has been complied with.”

Now applying s. 263 of the Penal Code to the charge against the appellant, and applying in particular para. (e) of sub-s. (2), that charge is that he fraudulently converted the cheque to the use of a person other than the general or special owner of it (that is, to the use of himself) in that having been entrusted with it by Churcher for the purpose of paying the debt due to Heath he paid it into his bank account intending to use it at his own will, although he may have intended afterwards to repay the amount to Heath.

The first point argued for the appellant was that, inasmuch as he was fully authorised by Churcher to pay the cheque into his own office account, which was exactly what he did, he did nothing fraudulent with regard to the cheque, as distinct from the money proceeds into which it was converted (to use that word in its loose sense) after its payment into the bank, and accordingly he did not steal the cheque. Learned counsel for the appellant has appositely referred to *R. v. Davenport* (1), [1954] 1 All E.R. 602, in this connection, where the distinction between a cheque and its proceeds in the bank, which the Crown concedes, was drawn by Goddard, L.C.J., who pointed out that the money proceeds in the bank are the property of the bank. Relying on this distinction learned defence counsel further seeks, on the ground that the appellant did with the cheque no more than he was authorised to do, to distinguish the present case from a recent decision of this court on very similar facts, *Menzour*

Ahmed v. R. (2), [1957] E.A. 386 (C.A.). That was a case where this court upheld a conviction for the theft of a cheque which had been made out in the name of the appellant (an advocate) by the debtor of a client of his, to the end that the appellant should pay the cheque or its proceeds over to the client. The distinction drawn by learned counsel for the appellant is that in that case, unlike the present one, the appellant did something with the cheque itself which he was not authorised to do, namely, by endorsing it over, not to the creditor client, but to a creditor of his own, so as to satisfy his own private debt.

This at first sight is an attractive argument. Generally speaking, in order to constitute a crime there must be an *actus reus* as well as *mens rea*. As is stated in Kenny's *Outlines of Criminal Law* (16th Edn.), p. 32—

“In law an *actus reus* is always required, although in ethics a guilty mind alone may be held sufficient to constitute guilt”.

The apparent exceptions to that rule are not relevant here. In the present case the *actus* relied upon is the payment into the appellant's bank account of the cheque in question, and *prima facie* this is an innocent act because it must be taken to have been authorised by Churcher. Can such an act, then, amount to a conversion, particularly when it could be argued that the appellant's real intention was to fail in his subsequent duty to draw another cheque and pay Heath rather than to do any unlawful act with relation to the cheque as such, and when it could also be said that the appellant might have changed his mind after paying the cheque into his bank account and have duly made the payment required of him?

The answer, as we see it, is that if a statute renders illegal an act, innocent in itself, provided it is done with a certain intention, then the act, done with that intention, becomes an *actus reus* and is no longer innocent. Many acts of conversion, rendered criminal by fraudulent intent, would in its absence be innocent acts. Thus retention by an agent of a greater sum than was actually due to him from moneys held on behalf of his principal is innocent if brought about by a genuine error in accounts—but is criminal if done with fraudulent intent. As to the argument that the appellant might have changed his mind and duly paid Heath, the possibility of his being charged in such circumstances is so remote as to need no discussion, but we would point out that a person who commits an act so proximate to a substantive crime as to constitute an attempt is still guilty of the attempt though he may repent and not complete the substantive offence.

We think, therefore, that the fallacy of the distinction which learned counsel for the appellant seeks to draw lies in his attempt to isolate, in the case now before us, the physical act of the appellant with regard to the cheque which Churcher gave him, namely, its payment into his office account which (in so far as it went) was authorised by Churcher, from his intention, at the moment of paying it in, with regard to the payment of an equivalent sum to Heath forthwith or, as the learned trial judge said in his summing up, at most within two days, which would allow of the cheque being cleared. In our opinion, in view of the vital relevance of intent in s. 263 (2) of the Penal Code, the appellant's physical act in paying the cheque into his office account cannot be divorced from his intention when doing so, for the purpose of deciding whether that payment was a fraudulent conversion. His act consisted of what he did with the cheque coupled with his intention when he did it. So, if at that moment he intended to “use it at his will” for the purpose of para. (e) of s. 263 (2), that is to say, if he paid it into his office account with the intention of not paying Heath an equivalent sum within at most two days, but of reducing his own overdraft, even though he may have intended at some later date to pay

Heath, then his act was not authorised and he was guilty of a fraudulent conversion of the cheque.

The distinction between the present case and that of *Menzour Ahmed v. R.* (2) is in our opinion more apparent than real. The advocate in that case departed from his mandate by endorsing the cheque to a creditor of his own when he should have paid it into a client account preparatory to paying his client. The appellant in the present case deviated from his instructions by paying the cheque into his bank account in the role of owner, intending to use it at his own will, and not as a mere trustee. We would also emphasise the observation in the judgment in that case, at the top of p. 390, that

“in determining whether a thing has been fraudulently converted the whole of the surrounding circumstances must be taken into consideration . . . including . . . the state of the appellant’s bank accounts”.

We have already drawn attention to some of the surrounding circumstances in the present case, and with regard to these we would only add, what indeed learned counsel for the appellant has conceded, that the appellant’s actions or inaction after he had paid Churcher’s cheque into his office account are relevant for the purpose of determining what was his intention at the time when he paid it in. Lastly, with regard to what the appellant knew to be Churcher’s object in giving him the cheque, we would record the following evidence of Churcher himself:

“It was my idea to repay Heath. I first mentioned it to accused on that day. I intended the money to be paid then and there because interest had been worked out to that day. In effect what I said was—‘I’ve got the money now, Charles, I want to pay Heath back’. There was no idea of putting accused in funds to repay Heath at his pleasure.”

And the appellant in evidence admitted—“I knew immediate payment was intended”.

At this point we would observe that, applying s. 265 of the Penal Code, when the appellant took the cheque from Churcher and paid it into his office account the cheque was the property of Churcher and not of the appellant, by reason of the words spoken by Churcher to him, which in our view amounted to a direction that its proceeds should be paid to Heath.

In the light of what we have held to be the legal position, there is in our view no misdirection of the jury in the passages in the learned trial judge’s summing-up which are of general application or which relate particularly to the count on which the jury convicted. The learned judge in our view put the position clearly and correctly in the following passage:

“In coming to a decision on the first count you must, before you find that the charge has been proved, be satisfied, first that the cheque for Shs. 10,166/42 was entrusted to the accused for him to pay an equivalent sum to Major Heath; secondly, and this is most important, that at the time when he paid that cheque into his bank account, the accused had no intention of paying an equivalent sum to Major Heath in the course of the next day or two but intended to use the credit he thus obtained for his own purposes; and thirdly, that in not paying Major Heath at that time, the accused acted fraudulently.

“I suggest that you need have no doubt about the fact that the cheque was entrusted to the accused so that he could pay Heath an equivalent sum—in fact the accused has said the cheque was given to him at his suggestion for that purpose.

“If you think there is a reasonable doubt, having regard to all the circumstances, and as to that you must consider the accused’s subsequent

conduct and his explanations of that conduct, if you have a reasonable doubt about the accused's intention at the time of the paying in of the cheque—that he might, as he says, have intended to pay Major Heath within a day or two and forgotten about it—if you have such a reasonable doubt, you must acquit the accused on the first count.

“As to the fraudulent intent, if you come to a decision adverse to the accused about his intentions to pay Major Heath within a day or two, it is no excuse for him if he merely intended to pay Major Heath at a later date.”

Upon these directions there was in our view sufficient evidence to support the jury's finding, implicit in their verdict, that when he paid Churcher's cheque into his office account the appellant had no intention of repaying Heath forthwith or even as soon as that cheque was cleared, and that he was accordingly guilty of stealing it by way of fraudulent conversion.

The appeal is accordingly dismissed.

Appeal dismissed.

For the appellant:

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For the respondent:

JF Marnan QC and DS Davies (Crown Counsel, Kenya)
The Attorney-General, Kenya

NAS Airport Services Limited v The Attorney-General of Kenya **[1959] 1 EA 53 (CAN)**

Division:	Court of Appeal at Nairobi
Date of judgment:	6 February 1959
Case Number:	98/1958
Before:	Sir Kenneth O'Connor P, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya—Miles, J

[1] *Practice – Preliminary point of law – In what circumstances a preliminary point of law can be set down for hearing – Civil Procedure (Revised) Rules, 1948, O. 6, r. 27 (K.) – English Rules of Supreme Court, O. 25, r. 2.*

[2] *Court of Appeal – Jurisdiction – Whether court has power to extend time even when time limited for filing appeal has already expired – What constitutes “sufficient reason” under r. 9 of Eastern African*

Court of Appeal Rules, 1954 – Failure to extract formal order – Cross-appeal – Record of cross-appeal embodying formal order – Eastern African Court of Appeal Rules, 1954, r. 9, r. 58 and r. 72.

Editor's Summary

The appellants had sued the respondent for damages for breach of a contract which they alleged was constituted by a tender they had submitted and which the Central Tender Board, acting on behalf of the Government of Kenya, had accepted. The respondent in para. 1 of the defence stated:

“The defendant will object that the plaint is bad in law and discloses no cause of action on the ground that it does not aver that the acceptance therein alleged of the plaintiff's tender or proposal was communicated to the plaintiffs.”

The appellants, in para. 4 of their reply, admitted that there had been no communication to them of the respondents' acceptance, but claimed that such communication was not necessary for the formation of the contract upon which

they were suing and further stated that if any such communication was necessary “the failure to communicate such acceptance was in breach of para. 59 (1) of Financial Orders and the Government are in the premises precluded from relying on the absence of such communication.” The respondent then applied under O. 12, r. 6, for judgment to be entered upon the admission that the acceptance of the Central Tender Board was not communicated to them or, alternatively, under O. 6, r. 27, that the point raised in para. 1 of the defence that the plaint is bad in law and discloses no cause of action be set down for hearing and disposed of before the hearing. The trial judge while rejecting the first alternative made an order that the preliminary point of law should be set down for hearing. The appellant appealed against this decision and the respondent cross-appealed. On appeal the substantial point argued by the appellant was that in view of the matters alleged in para. 4 of the reply the point of law apparently raised by para. 1 of the defence was not a point of law capable of trial as a preliminary point at all, or alternatively was not so capable without trying at the same time the issues raised by para. 4 of the reply. On the other hand the respondent contended, firstly that the trial court ought to have looked at the plaint only and not at the reply, in deciding whether a cause of action was disclosed, and that for that purpose the reply ought not to be allowed to supplement the plaint; and secondly that judgment should have been entered upon the appellants’ admission that there had been no communication of the acceptance. At the outset of the hearing of the appeal, the court drew attention to the fact that the appellants had not filed with their memorandum of appeal a formal order based on the decision of the Supreme Court. The appellants had in fact not extracted a formal order at the date of filing the memorandum of appeal, and as the decision resulted in an order the failure to do so was a defect going to jurisdiction and not a procedural defect. The respondent, however, had in the record of his cross-appeal included the formal order. At the hearing the appellants made an application for extension of time under r. 9 of the Court of Appeal Rules and undertook to re-lodge the necessary documents in the registry including the formal order. The respondent did not oppose the application. The court then granted the application, stating that it would state its reasons later and proceeded to hear the appeal on its merits.

Held –

- (i) there is no doubt that the terms of r. 9 of the Court of Appeal Rules are sufficiently wide to confer a discretion on the court to extend the time, even where (as here) the time limited for filing the appeal has already expired, provided that “sufficient reason” can be shown for the extension.
- (ii) the appellants had not shown sufficient reason for being granted the indulgence of an extension of time; nor did the mere fact of the respondent’s not opposing the application constitute in itself sufficient reason for extension.
- (iii) the ground for granting the extension was that the respondent had lodged a cross-appeal and had included the formal order in the record of his cross-appeal, and that a refusal of the application would thus cause unmerited hardship to him by depriving him of his right of cross-appealing through no fault or irregularity on his part.
- (iv) with regard to the cross-appeal (a) the plaint did disclose a cause of action and on a pure point of pleading, the plaint having alleged a valid contract by offer and acceptance it was for the defence to plead why the alleged contract was nevertheless invalid; (b) the appellants’ admission that there had been no communication of acceptance was not conclusive, since their denial that communication of acceptance was necessary may be tenable as a proposition of law, for there are circumstances, though they are exceptional, in which such communication has been held to be unnecessary.

- (v) with regard to the appeal (*a*) the object of O. 6, r. 27 is expedition, but to achieve that end the point of law must be one which can be decided fairly and

squarely, one way or the other, on facts agreed or not in issue on the pleadings, and not one which will not arise if some fact or facts in issue should be proved; (b) the trial judge failed to appreciate that the pleadings, and in particular para. 4 of the reply, did on the face of them raise issues of fact on which the determination of the legal question whether the plaint was bad in law would or might depend, and on which evidence should first have been adduced.

Appeal allowed with costs in both courts. Order of Supreme Court set aside. Cross-appeal dismissed with costs.

Cases referred to in judgment

- (1) *F. H. Mohamedbhai & Co. Ltd. v. Ghani* (1952), 19 E.A.C.A. 38.
- (2) *Farrab Incorporated v. The Official Receiver and Provisional Liquidator*, [1959] E.A. 5 (C.A.).
- (3) *Dominion Building Corporation Ltd. v. The King*, [1933] A.C. 533.
- (4) *Everett v. Ribbands*, [1952] 2 Q.B. 198; [1952] 1 All E.R. 823.
- (5) *Western Steamship Co. Ltd. v. Amaral Sutherland & Co. Ltd.*, [1914] 3 K.B. 55.
- (6) *Scott v. The Mercantile Accident Insurance Co.* (1892), 8 T.L.R. 431.
- (7) *S. C. Taverner & Co. Ltd. v. Glamorgan County Council* (1940), 57 T.L.R. 243.

February 6. The following judgments were read:

Judgment

Windham JA: The appellants are the plaintiffs in a suit pending in the Supreme Court of Kenya in which they sue the respondent, the attorney-general of Kenya, for £400,000 damages for breach of a contract whereby the respondent is alleged to have engaged them to provide catering services for a period of six years at the New Nairobi Airport, Embakasi. In their plaint they alleged that they had submitted a tender for the contract which the Central Tender Board, acting on behalf of the respondent, had accepted. Paragraph 1 of the defence is in the following terms:

“The defendant will object that the plaint is bad in law and discloses no cause of action on the ground that it does not aver that the acceptance therein alleged of the plaintiff’s tender or proposal was communicated to the plaintiffs.”

The appellants, in para. 4 of their reply, admitted that there had been no communication to them of the respondent’s acceptance, but demurred that such communication was not necessary for the formation of the particular contract on which they were suing. I will consider the wording of para. 4 of the reply in more detail presently. But, for the moment, it is sufficient to state that the respondent then made application to the Supreme Court, under O. 12, r. 6 and O. 6, r. 27 of the Civil Procedure Rules of Kenya,

“that judgment be entered for the defendant upon the admission of the plaintiffs made in para. 4 of the reply that the acceptance of the Central Tender Board was not communicated to them or alternatively that the point raised in para. 1 of the defence that the plaint is bad in law and discloses no cause of action be set down for hearing and disposed of before the hearing.”

Upon this motion the learned trial judge, on October 6, 1958, delivered the written decision from which

this appeal lies and against which the respondent has cross-appealed.

Before dealing with the merits of the appeal and cross-appeal it will be convenient to set out the reasons for this court's having granted an application for

extension of time for filing the appeal, an application which was made by learned counsel for the appellant at the outset of the hearing before us, which was unopposed, and which was granted forthwith upon an undertaking later duly fulfilled, with an intimation that the reasons for its granting would be embodied in the judgment.

The application for extension of time was made under r. 9 of the East African Court of Appeal Rules, 1954, which reads thus:

- “9.(1) The court shall have power for sufficient reason to extend time for making any application, including an application for leave to appeal, or for bringing any appeal, or for taking any step in or in connection with any appeal, notwithstanding that the time limited therefore may have expired, and whether the time limited for such purpose was so limited by order of the court or by these Rules or by order of a superior court or by any written law of any of the territories.
- “(2) In any order extending the time for doing any act the court shall specify the time within which such act shall be done.”

Notice of appeal from the decision of October 6, 1958, was filed by the appellants on October 15. Under r. 58 of the same Rules, subject to any extension of time, they had to lodge their appeal in the registry within sixty days of that date, that is on or before December 14. This they purported to do on December 10. But they failed to file with their memorandum of appeal any formal order embodying the decision of October 6, having not yet extracted such a formal order. What they did file with the memorandum on December 10 was a draft of a formal order which they had, on December 4, submitted to the respondent for approval but which the latter had not yet approved. It is conceded for the purpose of this submission, and on the authority of *F. H. Mohamedbhai & Co. Ltd. v. Ghani* (1) (1952), 19 E.A.C.A. 38, that the decision of October 6 not having (as we shall see) conclusively determined the rights of the parties, was not a “judgment” but an “order”, and that in such a case, as was recently held by this court in *Farrab Incorporated v. The Official Receiver and Provisional Liquidator* (2), [1959] E.A. 5 (C.A.), until a formal order has been extracted there is nothing in existence from which an appeal can be preferred. That decision also lays down that the defect, that is to say, the absence of a formal order when the appeal is filed, is one which goes to jurisdiction and cannot be waived under r. 72 as a mere procedural defect. There was in *Farrab’s* case (2), however, no application, such as there was here, for extension of time for filing a new appeal after the proper extraction of a formal order, under r. 9 of the Rules. There is to our minds no doubt that the terms of that rule, which I have earlier set out, are sufficiently wide to confer a discretion on this court so to extend the time, even where (as here) the time limited for filing the appeal has already expired, provided that “sufficient reason” can be shown for the extension.

The appellants allowed a period of almost two months to elapse, namely from October 6 until December 4, before they even submitted the draft of a formal order for the respondent’s approval, fully knowing that in a further eight days from then their time for lodging their appeal would expire. They advanced certain reasons which, in our view, did not amount to an adequate excuse for this delay, a delay but for which they should with an ample margin of time have obtained approval of the draft and filed the formal order with their memorandum of appeal. Accordingly the appellants did not, in our view, show sufficient reason for being granted the indulgence of an extension of time. Nor did the mere fact of the respondent’s not opposing the application constitute in itself, in our view, sufficient reason for the extension. The ground for our granting the extension was the fact that the respondent had lodged a cross-appeal and had included the formal order in the record of his cross-appeal,

and that a refusal of the application would thus cause unmerited hardship to him by depriving him of his right of cross-appealing through no fault or irregularity on his part. This, we considered, constituted a “sufficient reason” under r. 9 for allowing the extension of time for filing the appeal, so as to permit the appellants to re-lodge the necessary documents in the registry including the formal order. This they duly did.

I turn now to the merits of the appeal and of the cross-appeal. In his decision of October 6 the learned trial judge granted the second of the alternative reliefs which the respondent had sought in his application, and ordered, under O. 6, r. 27, of the Civil Procedure Rules, that the point raised in para. 1 of the defence, namely that the plaint was bad in law and disclosed no cause of action, should be set down for hearing before the trial. The appellants attack this order as being bad in law in that the determination of the point will or may depend on facts to be proved and evidence adduced at the trial and cannot be disposed of as a pure question of law, and they accordingly ask that the whole action be set down for trial at once without the prior determination of that particular issue. The respondent, in his cross-appeal, urges that the existing order is unsatisfactory as being likely to result in an ultimate waste of time and money, and contends that on the pleadings the trial court ought to have granted the first of his alternative prayers and to have forthwith entered judgment for him on the pleadings under O. 12, r. 6.

It will be convenient to deal first with the cross-appeal, and for that purpose to set out para. 3 of the plaint, in which the contract and its particulars are pleaded, and para. 4 of the reply, which answers the allegation in para. 1 of the defence (which I have already set out) that by reason of the non-averment of any communication of the respondent’s alleged acceptance of the appellants’ tender the plaint is bad in law and discloses no cause of action.

Paragraph 3 of the plaint runs thus:

- “3. By a contract made as hereinafter particularised it was agreed between the plaintiffs and the Government of the Colony and Protectorate of Kenya (hereinafter called ‘the Government’) that the plaintiffs should provide catering services for a period of six years from March 1, 1958, alternatively, from such date as the airport hereinafter mentioned should be sufficiently completed for the provision thereof, at the New Nairobi Airport, Embakasi, on the terms of the documents enclosed in a letter dated April 17, 1957, from the Central Tender Board of the Government to the plaintiffs as supplemented by a tender for the provision of such services submitted by the plaintiffs to the said board on May 15, 1957.

Particulars

“The contract alleged was made between the plaintiffs and the said board acting on behalf of the Government and in pursuance of or in accordance with Financial Orders of the said Colony and Protectorate, 1950, Revised Edition, Chapter XII, s. 3, and was formed by an invitation to tender issued or advertised by the said board at Nairobi in March, 1957, the letter of April 17, 1957, and enclosures thereto and the plaintiffs tender hereinbefore referred to and by the approval or acceptance by the said board at a meeting on or about June 1, 1957, of the plaintiffs said tender.”

Paragraph 4 of the reply is in these words:

- “4. The plaintiffs admit that the acceptance of the Central Tender Board was not communicated to them but deny that communication of such acceptance was necessary for the formation of the contract pleaded in the plaint. Further if, which is denied, any such acceptance was necessary the failure to communicate such acceptance was in breach of para. 598 (1) of

the said Financial Orders and the Government are in the premises precluded from relying on the absence of such communication.”

The first point urged in the cross-appeal is that the trial court ought to have looked at the plaint only and not at the reply, in deciding whether a cause of action was disclosed, and that for that purpose the reply cannot be allowed to supplement the plaint. With regard to this, it is sufficient to say that in my view the plaint alone does disclose a cause of action, in that it alleges a breach of a contract, and that the contract was formed by an invitation to tender, followed by a tender, followed by the acceptance of that tender. On a pure point of pleading, the plaint having alleged a valid contract by offer and acceptance, it was for the defence to plead why the alleged contract was nevertheless invalid, namely because the acceptance had not been communicated, and not for the plaintiff-appellants to “leap before they had come to the stile” by anticipating this defence and pleading in the plaint either that communication had been made or that it was in the circumstances unnecessary. This was implied in the plaint’s allegation of a valid contract by tender and acceptance.

With regard to the alternative contention that judgment should have been entered for the respondent upon the appellants’ admission of fact in the reply, namely that there had been no communication of the acceptance, it is sufficient to say that this admission was not conclusive, since the plaintiffs’ denial that communication of acceptance was necessary may be tenable as a proposition of law; for there are circumstances, though they are exceptional, in which such communication has been held to be unnecessary; it was so held, for instance, in *Dominion Building Corporation Ltd. v. The King* (3), [1933] A.C. 533. A dismissal of the suit on the ground of the plaint disclosing no cause of action, or upon the admission in the reply, would have wrongly denied to the appellants an opportunity of proving that their case fell within such an exceptional category or, as alternatively pleaded in para. 4 of the reply, that the respondent was, in the circumstances of the case, precluded from relying on the absence of communication of their acceptance. For these reasons I would order that the cross-appeal be dismissed with costs.

I turn to the appeal. Order 6, r. 27, under which the order appealed from was made reads as follows:

“27. Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the court at or after the hearing, provided that by consent of the parties, or by order of the court on the application of either party, the same may be set down for hearing and disposed of at any time before the hearing.”

This rule reproduces in all essentials the English O. 25, r. 2 of the Rules of the Supreme Court, as it stood before its amendment in 1958. Its general object and scope are summarized in the following words by Romer, L.J., in *Everett v. Ribbands* (4), [1952] 2 Q.B. 198 at p. 206:

“I think where you have a point of law which, if decided in one way, is going to be decisive of litigation, then advantage ought to be taken of the facilities afforded by the Rules of Court to have it disposed of at the close of pleadings or very shortly after the close of pleadings.”

Clearly the object of the rule is expedition. But to achieve that end the point of law must be one which can be decided fairly and squarely, one way or the other, on facts agreed or not in issue on the pleadings, and not one which will not arise if some fact or facts in issue should be proved; for in such a case the short-cut, as is so often the way with short-cuts, would prove longer in the end. On this ground an order made under the English rule was set aside in *Western Steamship Company Limited v. Amaral Sutherland & Company Limited* (5),

[1914] 3 K.B. 55. And in such a case, as was pointed out in *Scott v. The Mercantile Accident Insurance Company* (6) (1892), 8 T.L.R. 431, where a refusal to make such an order was upheld, it is

“very desirable that the trial should not be delayed, for during the delay witnesses might die or go abroad or their memory of occurrences might become weak or confused,”

and it is “desirable, therefore, that such issues should be tried as soon as possible.”

The principle to be applied in making such an order is very clearly expressed in the following two passages from the judgment of Humphreys, J., in *S.C. Taverner & Co., Ltd. v. Glamorgan Country Council* (7) (1940), 57 T.L.R. 243:

“It is right to say by way of preliminary observation that the cases in which O. XXV, r. 2, can be conveniently invoked with a view to the saving of expense or time must be few and far between. I am not the only judge who has taken that view, although I was not aware of that when these proceedings came before me. I have been referred by leading counsel for the plaintiffs to what may be described as a wealth of authority, and it appears that many judges have made the same observation. It is very rarely that the facts are so clearly and definitely stated in pleadings (in this case supplemented by the clear and precise language of a document in writing—namely, the contract between the parties) that the court can say that it has all the necessary facts before it and can therefore decide the case, without hearing any witnesses or any more about it, on the pleadings and certain admitted documents.”

In the present case, it is to be observed, the court would not even have the advantage of any written documents before it, whether those forming the contract or others that might throw light on the necessity or otherwise of a communication of the defendant’s acceptance of the plaintiffs’ tender.

The second passage, at p. 244, reads as follows:

“If I could find that there were any evidence which the plaintiffs could call which would assist in the decision of this question of law, I should certainly refuse to make any order, because any such evidence is not at this moment available to the court. It is to be observed that the language of Mr. Justice Roche makes quite clear what was clear in any event—namely, that the evidence referred to as likely to throw further light must be evidence which would be admissible on the pleadings. It is not enough for a party who is objecting to the preliminary decision of a point of law to say that when the matter comes before an official referee he will have a variety of things to say and suggestions to make. He has to establish that there are evident on the pleadings issues of fact which may affect the decision of the court on the point of law. On that, it is necessary to inquire what this case is about, and how the point of law arises.”

In *Taverner’s* case (7), the court did decide a legal point set down for trial as a preliminary issue under the English O. 25, r. 2, and overruled a submission by the plaintiffs that the point ought not to be so tried because they desired to adduce evidence which might throw further light on the legal issue. But, as is clear from the second of the two passages which I have quoted, the court took this course only because the plaintiffs failed to show that there were facts in issue on the pleadings which might affect the decision on the legal point, and could do no more than say vaguely that they would “have a variety of things to say and suggestions to make”. It is here, I think with respect, that the learned trial judge in the present case allowed himself to be misled. For in relying as he did on *Taverner’s* case (7), as authority in favour of making the order under

O. 6, r. 27, he failed to appreciate that in the present case the pleadings, and in particular para. 4 of the reply, do on the face of them raise issues of fact on which the determination of the legal question whether the plaint is bad in law will or might depend. I have already said that in my view the plaint taken by itself does disclose a cause of action. And if the reply is to be read together with the plaint for the purpose, as the learned judge (correctly in my view) read it in making his order, then para. 4 of the reply raises more than one question of fact relevant to the legal issue, on which evidence should first be adduced. One concerns the precise nature and terms of the contract, as touching the necessity or otherwise of a communication of the respondent's acceptance of the appellants' tender, which would entail production of the relevant documents and perhaps oral evidence also. Another, arising from the alternative submission in para. 4 of the reply, is whether in the circumstances the respondent is precluded from relying on the absence of communication, for which purpose evidence of those circumstances would be necessary.

In brief, the procedure under O. 6, r. 27 is a short-cut which should be sparingly used, and only in exceptional circumstances where the facts relevant to the point of law to be set down are so clear-cut on the pleadings that there is no room for evidence upon any fact pleaded which would assist in the decision of that point of law, or which fact, if decided in one way, would result in the point no longer arising. The present case, for the reasons that I have given, is not in my opinion one of those exceptional cases, and I would therefore allow the appeal, with costs here and in the court below, set aside the order of the court below, and direct that the whole case be set down for trial.

Sir Kenneth O'Connor P: I agree. There will be an order in the terms proposed by the learned Justice of Appeal.

Gould JA: I also agree.

Appeal allowed with costs in both courts. Order of Supreme Court set aside. Cross-appeal dismissed with costs.

For the appellants:

RJ Parker (of the English Bar) and *Ralph C de Souza*
Stephen & Roche, Nairobi

For the respondent:

JF Marnan QC, (Crown Counsel, Kenya)
The Attorney-General, Kenya

Syed Abdul Hadi Abdulla v The Commissioner of Income Tax
[1959] 1 EA 61 (CAA)

Division:	Court of Appeal at Aden
Date of judgment:	19 January 1959
Case Number:	1/1958
Before:	Sir Kenneth O'Connor P, Forbes V-P and Gould JA

[1] Costs – Taxation – Interpretation of para. 1 of Third Schedule of Eastern African Court of Appeal Rules, 1954 – Supreme Court Ordinance (Cap. 144) (A.).

Editor’s Summary

The applicant included in a bill of costs an item of Shs. 1,500/- in respect of “Instructions to appeal against the judgment of the Supreme Court”. The taxing officer taxed Shs. 915/- off this item on the ground that “in view of r. 1 of the Third Schedule . . . of Rules of Court of Appeal, I allow advocate fees only under Schedule II of Rules for commuting pleader’s fee, Cap. 144, p. 2773–Laws of Aden”. Paragraph 1 of the Third Schedule reads:

“The remuneration of an advocate by his client shall be governed by the rules and scales applicable to proceedings in the Superior Court of the Territory in which the advocate was retained:

“Provided that where the court directs taxation of costs as between solicitor and client the registrar shall tax such costs in accordance with these Rules and scales.”

Upon reference under r. 6 (2) of the Eastern African Court of Appeal Rules, 1954, the Chief Justice of Aden sitting as a judge of the Court of Appeal upheld the decision of the taxing officer, reasoning that since the second sentence of para. 1 of the Third Schedule dealt with the case when the taxation was between solicitor and client, the first sentence could not refer to other than party to party costs, and held that the words “remuneration of an advocate by his client” impliedly referred to the costs that were “to be paid by the unsuccessful party to the successful party”. The applicant thereupon referred the matter for the decision of the full court.

Held –

- (i) the intention of para. 1 of the Third Schedule is to make it clear that the payment to be made to an advocate by his own client is to be governed by local law; and
- (ii) the proviso is inserted *ex abundanti cautela* to ensure that the taxation of costs as awarded between solicitor and client will be taxed on the basis of the rules and scales in the Third Schedule and not on the basis of the local remuneration provided for advocates.

Application allowed with costs. Matter remitted to taxing officer for taxation in accordance with item 6 of Scale A of the Third Schedule to the Rules.

No Cases referred to in judgment in judgment

January 19. The following judgments were read:

Judgment

Forbes V-P: This is an application to the full court against an order of the Chief Justice of Aden sitting as a judge of this court made upon a reference to him under r. 6 (2) of the Eastern African Court of Appeal Rules, 1954 (which I will refer to as the Appeal Rules), against a decision made by the deputy registrar of this court at Aden in his capacity as taxing officer.

The applicant included in a bill of costs an item of Shs. 1,500/- in respect of “Instructions to appeal against the judgment of the Supreme Court”. The

deputy registrar as taxing officer taxed Shs. 915/- off this item on the ground that

“in view of r. 1 of the Third Schedule on p. 229 of Rules of Court of Appeal, I allow advocate fees only under Schedule II of Rules for commuting pleader’s Fee, Cap. 144, p. 2773–Laws of Aden”.

Paragraph 1 of the Third Schedule to the Appeal Rules, to which the learned deputy registrar refers as r. 1, reads as follows:

“The remuneration of an advocate by his client shall be governed by the rules and scales applicable to proceedings in the superior court of the territory in which the advocate was retained:

“Provided that where the court directs taxation of costs as between solicitor and client the registrar shall tax such costs in accordance with these rules and scales.”

Upon the reference under r. 6 (2) of the Appeal Rules, the learned Chief Justice upheld the decision of the deputy registrar. In his ruling the learned Chief Justice set out para. 1 of the Third Schedule to the Appeal Rules, and proceeded–

“Since the second sentence of the section deals with the case when the taxation is between solicitor and client, the first sentence cannot refer to other than party and party costs. I see no alternative to construing the words ‘remuneration of an advocate by his client’ other than by impliedly adding the words ‘to be paid by the unsuccessful party to the successful party’. If this is not done no basis for costs at all would exist.”

With respect, I do not think the learned Chief Justice was justified in reading any additional words into para. 1. He appears to have regarded the proviso to para. 1 as supplying the basis for taxation of costs as between solicitor and client, and assumes that the intention of the earlier part of the paragraph was to supply the basis for taxation of costs as between party and party. But in fact the basis of taxation is supplied by para. 7 to the Third Schedule which provides:

“All bills of costs incurred in proceedings in the court and in proceedings in a superior court preparatory or incidental to, or consequential upon, proceedings in the court shall be taxable according to the scales hereinafter set out: Provided that, as regards proceedings in a superior court for which no provision is made in these rules or scales, the rules and scales applicable to such superior court shall be followed.”

Item 6 of Scale A to the Third Schedule provides, *inter alia*,

“Instructions to appeal or to oppose an appeal–Such sum as the taxing officer may allow as reasonable, having regard to the question whether the taxation is as between party and party or as between solicitor and client . . .”

Thus the basis of taxation, whether party and party or solicitor and client, is provided for in the Third Schedule quite apart from the provisions of para. 1.

In my opinion there is no need to strain the language of para. 1 or read into it any more than it says. It refers to “The remuneration of an advocate by his client”. It appears to me this means exactly what it says, and that the body of the paragraph deals with the payment of an advocate by his own client—a matter which it seems only natural should be governed by the local rules relating to the remuneration of advocates. It is true that the proviso relates to the taxation of costs awarded as between solicitor and client, but it seems to me that this provision has merely been inserted *ex abundanti cautela*

to ensure that such costs will be taxed on the basis of the rules and scales in the Third Schedule and not on the basis of the local remuneration provided for advocates. It is true also that r. 15 of the Appeal Rules, which refers to the Third Schedule, refers to the “costs of any proceedings in the court” and not to remuneration of advocates, but I do not think this can affect the express words of para. 1 of the Third Schedule. It appears to me that the intention of para. 1 is to make it clear that the payment to be made to an advocate by his own client is to be governed by local law. Having disposed of this, possibly collateral, matter, the Third Schedule then proceeds to set out the rules and scales to be applied in the taxation of costs as between litigants in this court.

I would add that, so far as I am aware, the interpretation I have put upon para. 1 of the Third Schedule to the Appeal Rules is that adopted in the principal Registry of the Court.

I would allow this application with costs before us and before the Chief Justice and remit the matter to the deputy registrar for taxation of the item in question in the appellant’s bill of costs in accordance with the provisions of item 6 of Scale A of the Third Schedule to the Appeal Rules.

Sir Kenneth O’Connor P: I agree. The application is allowed with costs and the matter remitted for taxation as proposed by the learned vice-president.

Gould JA: I agree.

Application allowed with costs. Matter remitted to taxing officer for taxation in accordance with item 6 of Scale A of the Third Schedule to the Rules.

For the applicant:

PK Sanghani

PK Sanghani, Aden

For the respondent:

RJ Holmes (Crown Counsel, Aden)

The Attorney-General, Aden

R v De Commarmond [1959] 1 EA 64 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	4 February 1959
Case Number:	727/1958
Before:	Sir Ronald Sinclair CJ and Rudd J
Sourced by:	LawAfrica

[1] *Criminal law – Charge – Two offences consisting of one single act charged in one count – Whether*

charge bad for duplicity – Traffic Ordinance, 1953, s. 44A and s. 45 (K.).

Editor's Summary

The respondent was acquitted by a magistrate of a charge of causing death by driving a motor vehicle “at a speed and in a manner dangerous to the public” contrary to s. 44A of the Traffic Ordinance, 1953, on the ground that the charge was bad for duplicity. The Crown appealed by way of case stated and argued that where the offences charged consist of one single act they may be made the subject of one single count. The respondent on the other hand contended that if more than one of the offences created in s. 44A or s. 45 are charged in one count then on general principles the count is bad for duplicity.

Held – the respondent’s act of driving, though it might have been both at a speed and in a manner dangerous to the public, was one and indivisible and accordingly was properly the subject of a single count.

R. v. Jones, Ex parte Thomas, [1921] 1 K.B. 632, and *R. v. Courtley*, [1958] Journal of Criminal Law 200, applied.

Acquittal set aside. Trial court directed to try respondent according to law.

Cases referred to in judgment

- (1) *R. v. Wilmot*, [1933] All E.R. Rep. 628; 24 Cr. App. R. 63.
- (2) *R. v. Surrey Justices, Ex parte Witherick*, [1931] All E.R. Rep. 807; [1932] 1 K.B. 450.
- (3) *R. v. Jones, Ex parte Thomas*, [1921] 1 K.B. 632.
- (4) *R. v. Courtley*, [1958] Journal of Criminal Law 200.

Judgment

Sir Ronald Sinclair CJ: read the following judgment of the court: This is an appeal by case stated by the attorney-general from a decision of the senior resident magistrate, Nakuru, acquitting the respondent on a charge of causing death by driving a motor vehicle at a speed and in a manner dangerous to the public contrary to s. 44A of the Traffic Ordinance, 1953.

The particulars of the charge against the respondent were as follows:

“Phillip de Commarmond, on the 31st August, 1958, at about 7.30 p.m. in Delamere Avenue, Nakuru, in the Rift Valley Province, drove a motor-lorry, Reg. No. KCD 845, at a speed and in a manner dangerous to the public, and thereby collided with a motor vehicle, Reg. No. KAA 920, and caused the death of one Mrs. Mortibhai w/o Karsaan Punjaa.”

At the close of the case for the prosecution it was submitted on behalf of the respondent that the charge was bad for duplicity. The learned magistrate, following the decision in *R. v. Wilmot* (1), 24 Cr. App. R. 63, upheld the submission and acquitted and discharged the respondent.

In *R. v. Wilmot* (1) the defendant was convicted on a count in an indictment which charged him with driving a motor vehicle

“recklessly or at a speed or in a manner which was dangerous to the public having regard to all the circumstances of the case”

contrary to s. 11 (1) of the Road Traffic Act, 1930. It was held that the count was bad for duplicity and the conviction was quashed. The Court of Criminal Appeal, which consisted of Hewart, L.C.J., Avory, J., and Humphreys, J., cited with approval the following passage from the judgment of Avory, J., in *R. v. Surrey Justices, Ex parte Witherick* (2), [1932] 1 K.B. 450 at p. 452:

“It is an elementary principle that an information must not charge offences in the alternative, since the defendant cannot then know with precision with what he is charged and of what he is convicted and may be prevented on a future occasion from pleading autre-fois convict.”

In the latter case, however, Avory, J., cited with approbation the decision in *R. v. Jones, Ex parte Thomas* (3), [1921] 1 K.B. 632, to which he was also a party. In *R. v. Jones, Ex parte Thomas* (3), the defendant was convicted of driving a motor-car on a highway

“recklessly and at a speed which was dangerous to the public having regard to all the circumstances of the case . . .”

contrary to s. 1 of the Motor Car Act, 1903. It was held that as the driving of the car was one indivisible act which might constitute both the offences charged, the conviction was not bad for duplicity.

Section 1 of the Motor Car Act, 1903, and s. 11 (1) of the Road Traffic Act, 1930, are in similar terms to s. 45 (1) of the Traffic Ordinance, 1953. Section 44A of that Ordinance under which the respondent was charged is in substance a reproduction of s. 8 (1) of the Road Traffic Act, 1956. It reads:

“44A. Any person who causes the death of another by driving a motor vehicle on a road recklessly or at a speed or in a manner which is dangerous to the public, or by leaving any vehicle on a road in such a position or manner or in such a condition as to be dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road and the amount of traffic which is actually at the time or which might reasonably be expected to be on the road, shall be guilty of an offence and shall be liable on conviction therefore to imprisonment for a period not exceeding five years.”

It will be noted that in that section the language of s. 45 is adopted.

Counsel for the Crown relied on *R. v. Jones, Ex parte Thomas* (3), and submitted that the same principle applies to a charge under s. 44A of the Traffic Ordinance. For the respondent, however, it was contended that *R. v. Jones, Ex parte Thomas* (3), was wrongly decided, that s. 44A creates four separate offences and s. 45 three offences and that if more than one of those offences are charged in one count, then on general principles the count is bad for duplicity.

We see no reason for differing from the decision in *R. v. Jones, Ex parte Thomas* (3), which, so far as we are aware, has never been doubted. We accept as good law the principle laid down in that case that where the offences charged consist of one single act they may be made the subject of one single count. Applying that principle to the present case, the respondent's act of driving, though it might have been both at a speed and in a manner dangerous to the public, was one and indivisible and accordingly was properly the subject of a single count. We are fortified in the view we have taken by a ruling given at Oxford Assizes by Stable, J., in *R. v. Courtley* (4), [1958] Journal of Criminal Law 200. In that case the defendant was charged on an indictment containing

two counts under s. 8 (1) of the Road Traffic Act, 1956. The first charged him with causing death by driving at a speed dangerous to the public, and the second with causing the death of the same person by driving in a manner dangerous to the public. Both charges related to the same incident. On the arraignment of the defendant, Stable, J., expressed the view that the indictment was not in proper form, and directed that a fresh indictment be preferred containing one count only, which alleged that the defendant caused the death by driving at a speed *and* in a manner dangerous to the public. He invited, however, counsel for the defence to move to quash the indictment and, after hearing argument, ruled that the indictment was good. He referred to *R. v. Wilmot* (1), *R. v. Surrey Justices, Ex parte Witherick* (2), and *R. v. Jones, Ex parte Thomas* (3), and said that where there was only one act of driving and where the allegation was of one wrongful act only, there ought to be one count only.

In our view, therefore, the learned trial magistrate was wrong in acquitting the respondent on the ground that the charge was bad for duplicity. The acquittal is accordingly set aside and the case is remitted to the trial court with a direction that the respondent be brought before the court and tried according to law.

Acquittal set aside. Trial court directed to try respondent according to law.

For the appellant:

DS Davies (Crown Counsel, Kenya)

The Attorney-General, Kenya

For the respondent:

JA Mackie-Robertson

Kaplan & Stratton, Nairobi

Uddham Singh v Ambalal & Company Limited [1959] 1 EA 67 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	28 January 1959
Case Number:	863/1958
Before:	Sir Audley McKisack CJ
Sourced by:	LawAfrica

[1] *Practice – Summary procedure – Claim for liquidated sum arising out of contract of employment – Affidavit of plaintiff stating his belief that there is no defence to claim – Letter before action from defendant’s advocate repudiating claim and intimating intention to oppose claim – Whether plaintiff entitled to proceed under O. XXXIII – Civil Procedure Rules, O. XXXIII, r. 2 (U.).*

Editor's Summary

The plaintiff, who had been employed by the defendant, brought an action claiming a specific sum for arrears of wages and Shs. 1,100/- as one month's wages in lieu of notice. His plaint was filed under O. XXXIII, and in accordance with r. 2 thereof he filed an affidavit deposing that his employment was wrongfully terminated, and stating that in his belief there was no defence to the suit. The defendant company applied for unconditional leave to appear and defend, and filed an affidavit to which were annexed certain letters exchanged between the parties and their advocates before action, in one of which the defendant company's advocate had denied that the plaintiff had worked at the rate of wages claimed, or for the period alleged by him, and disputed the plaintiff's right to one month's notice, or salary in lieu thereof. The plaintiff did not oppose the application for unconditional leave to appear and defend, but when the defendant company claimed the costs of the application, this was contested. The defendant company submitted that the action was not for a liquidated demand for money arising upon a contract, which it must be if O. XXXIII is to be invoked, and that the plaintiff had no reasonable grounds for his sworn belief that there was no defence to the suit.

Held –

- (i) although the suit arose out of a contract of employment, the claim was not for unliquidated damages in respect of wrongful dismissal, but a claim for the balance of arrears of wages due, and one month's wages in lieu of notice, both of which were liquidated amounts.
- (ii) since the letter from the defendant's advocate indicated that the defendant company would not entertain the plaintiff's claim and would defend the action, the plaintiff was not entitled to say that in his belief there was no defence to the suit and the action ought not to have been filed under O. XXXIII.

Unconditional leave to appear and defend granted, with costs of the application.

[**Editorial Note:** See also *Haja Arjabu Kasule v. F. T. Kawesa*, [1957] E.A. 611 (U.).]

Cases referred to in judgment

- (1) *Law v. Redditch Local Board*, [1892] 1 Q.B. 127.
- (2) *Uganda Transport v. Count de la Pasture* (1954), 21 E.A.C.A. 163.

Judgment

Sir Audley McKisack CJ: The defendant applies for unconditional leave to appear and defend this suit, which was filed under the summary procedure provided for in O. XXXIII. The plaintiff does not oppose this application, and the only matter in dispute is that of costs. The

defendant says that he should be granted the costs of the application in any event, because the suit ought never to have been filed under O. XXXIII.

The defendant argues this on two grounds. The first is that the suit is not for a

“liquidated demand in money . . . arising . . . upon a contract express or implied”,

as it must be if O. XXXIII is to be applicable. On this point I think the defendant is wrong. Although the suit arises out of a contract of employment which the plaintiff ‘avers was wrongfully terminated, the claim is not one for unliquidated damages in respect of wrongful dismissal. It is a claim for the balance of arrears of wages due and, in addition, for one month’s salary in lieu of notice, for which the plaintiff says there was an express or implied term in the contract. The sums claimed under both these heads are specific sums calculated on the plaintiff’s rate of wages, which he says was Shs. 1,100/- a month. The balance of arrears of wages is clearly a liquidated demand, and so is the claim for one month’s wages, i.e. Shs. 1,100/-, in lieu of notice. In *Law v. Redditch Local Board* (1), [1892] 1 Q.B. 127, where the claim was in respect of a so-called penalty clause in a building contract, Lord Esher, M.R., said (at p. 130):

“One rule which appears to be recognised in the cases as a canon of construction with regard to agreements of this kind is that, where the parties to a contract have agreed that, in case of one of the parties doing or omitting to do some one thing, he shall pay a specific sum to the other as damages, as a general rule such sum is to be regarded by the court as liquidated damages and not a penalty.”

There is also the case of *Uganda Transport v. Count de la Pasture* (2) (1954), 21 E.A.C.A. 163, where the claim was for salary and allowances alleged to be due to the plaintiff and for unliquidated damages for wrongful dismissal. Briggs, J.A. (as he then was), in considering whether the claim had been properly filed under O. XXXIII, observed at p. 165:

“There is clearly no discretion to allow any claim to be brought by summary procedure if it is not precisely within the terms of O. XXXIII, r. 2. And it is equally clear that, save for the claim for salary and allowances alleged to be due under the contract, this is a claim for damages for wrongful dismissal under various heads. The contract is not alleged to contain any provision for liquidated damages on breach, and it is perfectly clear that such a claim, although the amounts under each head are specified, is for unliquidated damages.”

Here, in contrast to that case, there was, according to the plaintiff in the instant case, contractual provision for liquidated damages on breach, i.e. for payment of one month’s salary in lieu of notice.

But there is the further question to be decided, viz., whether the plaintiff had reasonable grounds for believing that there was no defence to the suit. If he had not, then he ought not to have invoked the summary procedure. Rule 2 of O. XXXIII requires the plaint to be accompanied by an affidavit

“by the plaintiff, or by any other person who can swear positively to the facts, verifying the cause of action, and the amount claimed (if any), and stating that in his belief there is no defence to the suit”.

The plaintiff filed such an affidavit, but, on the question of reasonable belief, the correspondence which passed between the plaintiff and the defendant before the suit was filed, and which is annexed to the defendant’s affidavit, is relevant. The plaintiff’s advocate wrote claiming the balance of salary due,

and one month's salary in lieu of notice. The defendant's advocate replied denying that the plaintiff had worked at the rate of wages alleged, or for the period alleged, or that he was entitled either to a month's notice or to a month's salary in lieu thereof; and the letter said that the plaintiff had not been engaged on monthly terms and, further, that the defendant challenged the accuracy of the figures in the plaintiff's letter.

In the face of that letter from the defendant's advocate I do not think that the plaintiff can be said to have had reasonable grounds for believing that there was no defence to the suit. It is argued that this letter was evasive and, on the face of it, written merely for the purpose of delay, since it did not specify what amount was, in the defendant's view, due to the plaintiff. But I read the defendant's letter as meaning that nothing was due to the plaintiff, particularly as the letter ended by saying: "We are unable to entertain the 'claim of your client'", and added that, if the plaintiff sued, the defendant would defend the action and hold the plaintiff liable for the consequences. How then can it be said that, at that stage, the plaintiff reasonably believed there was no defence to the suit? I agree with the defendant's advocate that, in view of this correspondence between the parties, the suit ought never to have been filed under O. XXXIII.

In the result the defendant is granted unconditional leave to appear and defend. He is to file his defence within fourteen days. He will have his costs of this application in any event.

Unconditional leave to appear and defend granted, with costs of application.

For the plaintiff:

F Haque

Haque & Gopal, Kampala

For the defendant:

JK Patel

Patel & Dave, Kampala

The East African Ahmadiyya Muslim Mission v Kampala Municipal Council [1959] 1 EA 70 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	22 January 1959
Case Number:	3/1959
Before:	Sheridan J
Sourced by:	LawAfrica

[1] *Rates – Exemption – Land used exclusively for public worship – Land leased for mosque – Erection of mosque incomplete – Local Government (Rating) Ordinance (Cap. 104), s. 3 (U.).*

Editor's Summary

The appellants were lessees from the Crown of land at Kampala, and in the lease had covenanted not to use the premises without the consent of the Governor other than for religious and educational purposes. The building of a mosque on the land was not begun until October, 1957, more than three years after the commencement of the lease. In March, 1958, the Kampala Valuation Court held that the land was not exempt from rates as land used exclusively for public worship, under s. 3 of the Local Government (Rating) Ordinance, and made an assessment accordingly. The Valuation Court had accepted a submission on behalf of the Municipal Council that until the completion and use of the mosque it was impossible to say that the premises were exempt, and put the burden of proof that the land was being used exclusively for public worship on the appellants. On appeal

Held – it was sophistry to contend that until the building was completed the land was being used merely for the erection of a building; this was not the intention of the legislature, and it was obvious that in determining the intention of the legislature or the meaning of its language in any particular passage, the intention which appears to be most in accord with convenience, reason, justice and legal principles should, in all cases of doubtful significance, be presumed to be the true one.

Appeal allowed. Declaration that the property assessed was not rateable property and was exempt.

Cases referred to in judgment

- (1) *Cardiff Archdiocese Trustees v. Pontypridd Assessment Committee and Others* (1930), 46 T.L.R. 633.
- (2) *Rogers v. Lewisham Borough Council*, [1951] 2 All E.R. 718; [1951] 2 K.B. 768.

Judgment

Sheridan J: This is an appeal under s. 13 (1) of the Local Government (Rating) Ordinance (Cap. 104) from a decision of the Kampala Valuation Court that the land held by the appellants at No. 66 Bombo Road on a forty-nine year Crown lease commencing on February 1, 1954, is rateable property as defined by s. 3 of the Ordinance and is not exempted from rates by virtue of para. (b) of that section as being

“land used exclusively for public worship together with the necessary cartilage.”

By cl. 2 (d) of the lease the appellants covenanted not to use the land and buildings or any part thereof other than for religious and educational purposes without the previous consent in writing of the Governor, and a residential

quarters for one priest. There was considerable delay in implementing the terms of the lease and this seems to have influenced the Valuation Court in reaching its decision. In my view delay is irrelevant and in any event by the time the court reached its decision on March 21, 1958, plans for the “proposed new mosque” had already been passed on September 26, 1957, and the building had commenced in October, 1957. I have been shown a photograph of the mosque in the course of construction. I have not been told when the photograph was taken, but it shows the building nearing completion.

The Valuation Court accepted the contention of the respondents that until the building was completed and in use it was impossible to say that the premises were exempt from rates, as there was no evidence of user. It dismissed the appellant’s objection to rating as premature. On a strictly grammatical interpretation of s. 3 (b) of the Ordinance it is possible to argue in support of the respondent’s contention but I cannot believe that it accords with the intention of the legislature. The land was leased for the purpose of public worship and in the absence of evidence to the contrary there must be a presumption that the land will be used for the purpose for which it was allocated. The court misdirected itself in putting the burden of proof on the appellants. If the appellants had convened a meeting of their followers on the vacant land and had held a religious service in the open, such as reading excerpts from the Koran, no one could have argued that the land was not being used exclusively for public worship. It is the height of sophistry to contend, as do the respondents, that until the building is completed the land is being used merely for the erection of a building, albeit a building designed to be used exclusively for public worship. I do not think that this can ever have been intended by the legislature. As stated by Maxwell on *The Interpretation of Statutes* (9th Edn.), p. 198:

“In determining either the general object of the legislature, or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most in accord with convenience, reason, justice and legal principles should in all cases of doubtful significance, be presumed to be the true one.”

For this reason I construe s. 3 (b) of the Ordinance to exempt from rating land used or intended to be used exclusively for public worship. Mr. Caldwell, for the respondents, relied on *Cardiff Archdiocese Trustees v. Pontypridd Assessment Committee and Others* (1) (1930), 46 T.L.R. 633, where the Divisional Court considered s. 1 of the Poor Rate Exemption Act, 1833, which exempts from rates any church or such part thereof as shall be appropriated exclusively for public worship but provides that there shall be no exemption for any part which is not so appropriated. In that case the whole building was used for public religious worship but on certain nights it was divided by a moveable partition and dances were held, the charges for admission being devoted to church purposes. It was held that the part where dances were held was a “part” excluded by the section from the exemption and was therefore rateable. The same conclusion was reached in *Rogers v. Lewisham Borough Council* (2), [1951] 2 K.B. 768 in regard to classrooms which were used for secular activities of children followed by religious services. These authorities could only be material if there is any evidence forthcoming that subsequent to the opening the mosque or any part of it is being used for any purpose other than exclusively for public worship. I realise that the lease permits the land to be used for educational as well as religious purposes. It is probable that only religious education is contemplated. If secular teaching is carried on then that will be a matter for the Valuation Court.

For the above reasons I allow the appeal, set aside the decision of the Valuation Court in making the assessment No. 3/57/12a and declare that the

property assessed is not rateable property and is exempt from assessment. The appellants will have the costs of this appeal.

Appeal allowed. Declaration that property assessed was not rateable property and was exempt.

For the appellants:

ML Patel

HD Choudry, Kampala

For the respondents:

RA Caldwell

PJ Wilkinson, Kampala

R v Ochola s/o Katholi
[1959] 1 EA 72 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	3 March 1959
Case Number:	22/1959
Before:	Sir Audley McKisack CJ
Sourced by:	LawAfrica

[1] Jurisdiction – Criminal law – Accused charged with offence under Penal Code – Whether native court or Buganda court can enforce Penal Code – Native Courts Ordinance (Cap. 76), s. 10 (d) (U.) – Buganda Courts Ordinance (Cap. 77), s. 9 (c) (U.).

Editor's Summary

The accused was charged in a district court with causing grievous harm, contrary to s. 212 of the Penal Code. At the hearing, when the prosecutor had outlined the facts, the magistrate said it was a case more suitable for a native court, and made an order under s. 5 of the Subordinate Courts Ordinance, transferring the case accordingly. Later, when the magistrate had read a bulletin of recent decisions of the High Court, he sent the case to the High Court for further consideration in revision.

Held – once proceedings are instituted under the Penal Code, neither a native court established under the Native Courts Ordinance, nor a court established under the Buganda Courts Ordinance (Cap. 77) has jurisdiction. *R. v. Yowana Muigira* (1942), 6 U.L.R. 118, applied.

Order of magistrate set aside. Accused discharged under s. 83 (a) of the Criminal Procedure Code.

Cases referred to in judgment

- (1) *Y. Mada v. Lukiko*, Uganda High Court Criminal Appeal No. 271 of 1958 (unreported).
- (2) *R. v. Yowana Muigira* (1942), 6 U.L.R. 118.

Judgment

Sir Audley McKisack CJ: The accused was charged in the district court at Tororo with causing grievous harm, contra s. 212 of the Penal Code. He pleaded not guilty on January 7, 1959, and the case came on for hearing on January 19. The public prosecutor having outlined the facts, the learned trial magistrate expressed the view that it was a more suitable case for a native court, and made an order, under s. 5 of the Subordinate Courts Ordinance, transferring the case accordingly.

Subsequently the learned trial magistrate read the recent judgment in *Y. Mada v. Lukiko* (1), Uganda High Court Criminal Appeal No. 271 of 1958 (briefly

reported in the High Court monthly bulletin), in which reference was made to *R. v. Yowana Muigira* (2) (1942), 6 U.L.R. 118. He has consequently sent the case to the High Court since he considers that the High Court may wish to make an order in revision.

In *R. v. Yowana Muigira* (2) it was held as follows:

“That once proceedings are instituted under the Penal Code, the Buganda courts have no jurisdiction in the matter, and the fact that the offence charged under the Penal Code may at the same time be an offence under native law cannot make the case triable by a Buganda court, since it has become a proceeding under an Ordinance and is thus specifically excluded by s. 9 (c).”

Section 9 (c) of the Buganda Courts Ordinance referred to in that decision is as follows:

“9. Subject to any express provision to the contrary, no court shall have jurisdiction in any proceedings—

.....

- (c) taken under any Ordinance or any English or Indian law in force in the Protectorate unless such court has been authorised to administer or enforce such Ordinance or law by the terms of an Ordinance or under s. 12 of this Ordinance.”

It appears to me that this ruling applies with equal force in relation to a court established under the Native Courts Ordinance (Cap. 76) as it does to a Buganda court, since s. 9 (c) of the Buganda Courts Ordinance (Cap. 77) has its counterpart in s. 10 (d) of the Native Courts Ordinance, and neither the Buganda courts nor the native courts have been authorised to administer or enforce the Penal Code. Consequently s. 5 (1) of the Subordinate Courts Ordinance does not avail, since it authorises a transfer to “any native court having power to entertain the proceedings”, and, for the reasons given, a native court does not have power to entertain proceedings taken under the Penal Code.

I therefore set aside the order made by the learned trial magistrate and substitute an order discharging the accused under s. 83 (a) of the Criminal Procedure Code. This order does not, of course, bar the institution of proceedings under customary law in the appropriate native court in respect of the same facts as those upon which he was charged under the Penal Code in the district court.

Order of magistrate set aside. Accused discharged under s. 83 (a) of the Criminal Procedure Code.

Cooper and another v Nevill and another [1959] 1 EA 74 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	26 March 1959
Case Number:	2/1959
Before:	Sir Kenneth O'Connor P, Forbes V-P and Gould JA
Sourced by:	LawAfrica

appeal – How value of matter in dispute should be assessed – East African (Appeal to Privy Council) Order-in-Council, 1951, s. 3 (a).

Editor's Summary

The applicants, who were husband and wife, moved for leave to appeal to the Privy Council under s. 3 of the East African (Appeal to Privy Council) Order-in-Council, 1951, and claimed that they were entitled, under s. 3 (a) to appeal as of right, or alternatively that the court should, under s. 3 (b) exercise its discretion in their favour. The first applicant had obtained in the Supreme Court £50 damages against both respondents for loss of consortium, the second appellant had been awarded £2,500 general damages from both respondents and both appellants had been awarded special damages in addition. On appeal, the judgment of the Supreme Court against the first respondent was set aside, and the general damages awarded against the second respondent were reduced to £750. From that decision the applicants sought to appeal again.

Held –

- (i) the value of the subject matter of an appeal referred to in s. 3 (a) of the Order-in-Council refers to the appeal to the Privy Council, and not to the appeal from the Supreme Court to the Court of Appeal, and since the second applicant had her damages reduced by more than £1,000, she was entitled to appeal as of right against both respondents.
- (ii) since the damages awarded to the first applicant had already been paid, his interest in a further appeal was limited to the question of costs, but since these were not part of the subject matter in dispute, they should be ignored in assessing the value of the subject matter for the purposes of a further appeal.
- (iii) the first applicant had no claim which should properly be aggregated with the second applicant's claim, so as to give him a right of appeal under s. 3 (a), and since the issue of negligence would be canvassed on the appeal by the second applicant, there would be no advantage to the public in having it submitted by the first applicant also, and accordingly the court would not exercise its discretion to grant him leave to appeal.

Application of the first applicant refused. Application of the second applicant granted.

Cases referred to in judgment

- (1) *Allan v. Pratt* (1888), 13 App. Cas. 780.
- (2) *Meghji Lakhamshi & Bros. v. Furniture Workshop*, [1954] 1 All E.R. 273; [1954] A.C. 80.
- (3) *Bank of New South Wales v. Owston* (1879), 4 App. Cas. 270.
- (4) *Lovibond v. Grand Trunk Railway of Canada* (1936), *The Times*, May 4; [1936] 2 All E.R. 495.
- (5) *Lipshitz v. Valero*, [1948] A.C. 1.
- (6) *Durga Doss Chowdry v. Ramanauth Chowdry* (1860), 19 E.R. 530.
- (7) *Deonarain v. Guni Singh* (1907), 34 Cal. 400.
- (8) *Re Khawaja Muhammed Yusuf* (1896), 18 All. 196.
- (9) *Byjnath v. Graham* (1885), 11 Cal. 740.

(10) *Kho Khine and Others v. Snadden* (1868), L.R. 2 P.C. 50.

(11) *Pethu Reddiar and Others v. Rajambu Ammal* (1948), 75 I.A. 153.

(12) *Mahon v. Osborne*, [1939] 1 All E.R. 535.

March 26. The following judgments were read:

Judgment

Sir Kenneth O'Connor P: This is an application by motion for leave to appeal to Her Majesty in Council under s. 3 of the East African (Appeal to Privy Council) Order-in-Council, 1951 (hereinafter referred to as “the Order-in-Council”), against a final judgment of this court dated November 24, 1958. That section reads as follows:

“**Appealable Limit.**—3. Subject to the provisions of this Order, an appeal shall lie—

- (a) as of right, from any final judgment of the court, where the matter in dispute on the appeal amounts to or is of the value of £1,000 sterling or upwards, or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the said value or upwards; and
- (b) at the discretion of the court, from any other judgment of the court, whether final or interlocutory, if, in the opinion of the court, the question involved in the appeal is one which, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision.”

The application is made, in the first place, under para. (a) of s. 3, the applicants alleging that they are entitled to appeal as of right. Alternatively, they apply under para. (b) for this court to exercise a discretion in their favour on the ground that the question involved in the appeal is one which, by reason of its great general or public importance, ought to be submitted to Her Majesty in Council for decision.

The history of the matter is as follows:

The first and second applicants are husband and wife and will hereinafter be referred to respectively as “the husband” and “the wife”. The first respondent is a surgeon in practice in Nairobi. I will refer to him as “the surgeon”. The second respondent is the authority which controls the Nairobi European Hospital. I will refer to it hereinafter as “the hospital”. On or about February 1, 1956, the surgeon operated on the wife at the European hospital. The husband and the wife allege that the surgeon and the hospital were negligent in the conduct of the operation. On June, 1957, they filed a joint plaint in the Supreme Court of Kenya in which the husband claimed against the surgeon and the hospital, or one or other of them, damages for loss of consortium; the wife claimed against the surgeon and the hospital, or one or other of them, damages for pain, suffering and injuries; and the husband and the wife claimed against the surgeon and the hospital, or one or other of them, Shs. 10,858/05 special damages, interest at court rates and costs.

On February 17, 1958, the Supreme Court delivered judgment and awarded as damages against the surgeon and the hospital—

- (a) to the husband Shs. 1,000/- (£50) for loss of consortium;
- (b) to the wife Shs. 50,000/- (£2,500) for general damages; and
- (c) to the husband and the wife both, Shs. 5,189/80 (approximately £260), which was the sum agreed as special damages.

On appeal, this court, on November 24, 1958, set aside the judgment of the Supreme Court against the surgeon and reduced the wife's general damages against the hospital from Shs. 50,000/- (£2,500) to Shs. 15,000/- (£750). Against that decision both the husband and the wife seek to appeal to Her Majesty in Council.

The first question which arises in respect of each of them is: Does the matter in dispute on the appeal amount to, or is it of the value of, £1,000 sterling or upwards? I take it as a matter of construction, that the words "the appeal" in para. (a) of s. 3 of the Order-in-Council must, in the context, refer to the appeal which is the subject matter of the section, that is the appeal to the Privy Council, and not the appeal from the Supreme Court to the Court of Appeal. What then, is the value of the matter in dispute on the proposed appeal to the Privy Council, first, as regards the wife, and second, as regards the husband?

I think that the guiding principle is that stated by the Earl of Selborne in *Allan v. Pratt* (1) (1888), 13 App. Cas. 780, at p. 781:

"... the judgment is to be looked at as it affects the interests of the party who is prejudiced by it, and who seeks to relieve himself from it by appeal. If there is to be a limit of value at all, that seems evidently the right principle by which to measure it. The person against whom the judgment is passed has either lost what he demanded as plaintiff or has been adjudged to pay something or to do something as defendant."

Allan v. Pratt (1) was approved and followed in *Meghji Lakhamshi & Bros. v. Furniture Workshop* (2), [1954] A.C. 80.

The wife seeks to appeal. What has she demanded as a plaintiff which she has lost? She did not claim in the plaint any specific sum for general damages. She claimed Shs. 10,858/05 for special damages, subsequently agreed at Shs. 5,189/80 or approximately £260. As already mentioned, she was awarded by the Supreme Court this sum as special damages and £2,500 as general damages, a total of £2,760 approximately.

It has been held that where a decree has been pronounced ordering the payment of a sum of money, the sum so adjudged furnishes a measure of value: *Bentwich Privy Council Practice* (3rd Edn.), p. 108; *Bank of New South Wales v. Owston* (3) (1879), 4 App. Cas. 270. But that was a case of a proposed appeal by a defendant, not a plaintiff, and there had been no intervening appeal. In the present case, as stated, the wife's general damages were reduced to £750 by this court on first appeal, the special damages remaining at approximately £260.

In *Lovibond v. Grand Trunk Railway of Canada* (4) (1936), *The Times*, May 4, cited in note (1) to *Bentwich* at p. 32, it was held that in determining the value of a claim the court should consider what was at stake on the appeal, and not what was at stake on the original action. There also there was no intervening appellate court and "the appeal" referred to is the appeal to the Privy Council. In *Meghji Lakhamshi's* case (2), however, and in *Lipshitz v. Valero* (5), [1948] A.C. 1, there was an intervening appeal. It is clear from these cases that (as I have already gathered as a matter of construction of s. 3) what is to be looked at is the value to the appellant of the intended appeal to the Privy Council. Clearly, on that appeal, the question of the surgeon's liability to the wife would be in dispute; it would be open to the hospital again to dispute its liability; and the quantum of damages against the hospital or the surgeon or both would be in dispute if the wife succeeds against either or both. The wife has already recovered total damages in excess of £1,000 against the hospital. She has lost £2,760 which she recovered as plaintiff against the surgeon though, since we are informed that £750 and the special damages have been paid by the hospital, £1,010 of this is a notional rather than an actual loss. But the difference still exceeds

£1,000. She has had her damages against the hospital reduced by more

than £1,000, and, as I understand the position, seeks to dispute that reduction. In my view, the matter in dispute on the appeal by the wife amounts to more than £1,000 and she is entitled, under para. (a) of s. 3, to appeal as of right against both respondents.

I now turn to the application of the husband. As already stated, he recovered in the Supreme Court against the surgeon and the hospital £50 for loss of consortium and the agreed special damages amounting to approximately £260, a total of about £310. He successfully maintained this judgment on the appeal to this court as against the hospital, but failed to maintain it against the surgeon. He did not cross-appeal or seek to have the £50 for loss of consortium increased. We are informed that he has been paid the decretal amount by the hospital. Since he has already recovered his agreed special damages and did not seek to have his damages for loss of consortium increased, and has been paid both amounts, his only interest in appealing is in relation to costs. If the wife were to succeed, the husband might be entitled to some variation of the order made by this court relating to the surgeon's costs. It is clear on the authorities that costs are not part of the subject matter in dispute and are to be ignored in assessing the value of an appeal: *Durga Doss Chowdry v. Ramanauth Chowdry* (6) (1860), 19 E.R. 530 (P.C.). Interest accruing subsequently to decree is also to be ignored, *ibid* p. 531. In my opinion, the husband is not entitled to appeal as of right under para. (a) of s. 3, unless "the matter in dispute on the appeal" means the aggregate of the matters in dispute by both would-be appellants. Mr. Kean, for the applicants, contends that the case has been treated throughout as one case, that the issues of fact are all the same and that, in such circumstances, the authorities show that the interests of the parties should be aggregated so as to give the husband a right of appeal. He cites in support of this proposition: *Deonarain v. Guni Singh* (7) (1907), 34 Cal. 400; *Re Khawaja Muhammed Yusuf* (8) (1896), 18 All. 196; *Byjnath v. Graham* (9) (1885), 11 Cal. 740; and *Kho Khine and Others v. Snadden* (10) (1868), L.R. 2 P.C. 50.

The first three of these cases depended upon s. 596 of the old Indian Civil Procedure Code, the text of which is very different from that of s. 3 of the Order-in-Council. In *Deonarain's* case (7) there were appeals by defendants against decrees depriving them of parcels of land of an aggregate value over the appealable limit. This seems to me distinguishable from an appeal by a plaintiff suing in tort for a sum which measured by the decree is under the appealable limit who has recovered the amount and seeks to appeal only for the purpose of recovering some costs which he has been ordered to pay. In *Khawaja Muhammed Yusuf's* case (8) there were two suits by the same claimant over the same property, the value of one suit and of the property being over the appealable limit and the value of the other suit being under it. It was held that the lesser suit should also be certified as fit for appeal to Her Majesty in Council on the ground that the decree to be passed was one which must involve property claimed by the appellant exceeding the appealable value. That ground does not exist in the present case.

In *Byjnath v. Graham* (9) the application was apparently made under the provisions of s. 595, s. 596 and s. 600 of the old Indian Civil Procedure Code which allowed the court to grant a certificate if the case fulfils the requirements of s. 596 or is "otherwise certified to be a fit one for appeal to Her Majesty in Council". *Byjnath's* case (9) has no application to an appeal under para. (a) of s. 3 of the Order-in-Council, though it might be of use in considering para. (b).

Kho Khine and Others v. Snadden (10) was an application to the Privy Council for special leave to appeal. That was a matter of discretion, and the case is not of assistance in deciding whether the husband has an appeal as of right under para. (a) of s. 3 of the Order-in-Council. I have already pointed out that, so

far as the husband is concerned (since costs are not part of the subject matter in dispute: *Durga Doss Chowdry v. Ramanauth Chowdry* (6)), there is at present no “matter in dispute on the appeal” which reaches the appealable value. The money having been paid already by the hospital, an additional right of recourse against the surgeon, if established, would not be of value to the husband. The husband’s position could, of course, be affected if there were a cross-appeal by the hospital in which the hospital succeeded. I think that this possibility can be disregarded. The hospital has paid, and there has been no hint of a cross-appeal against the award to the husband. In any event, the husband’s interest, if any is (excluding costs) well below the appealable limit.

In *Pethu Reddiar and Others v. Rajambu Ammal* (11) (1948), 75 I.A. 153, it was held by the Privy Council that claims on sale deeds of various appellants should be aggregated to make up the appealable value. The facts of that case were different from those of the present case and s. 110 of the Indian Civil Procedure Code, on which *Reddiar’s* case (11) was decided, differs in some respects from s. 3 of the Order-in-Council. Their lordships said:

“This was not the case of an appeal involving several appellants each of whom sued or was sued in respect of some distinct or unrelated cause of action, and it is unnecessary to consider the applicability of s. 110 to appeals of that kind. Here, the case of the respondent against each appellant and of each appellant against the respondent depended, in its substance, on the view taken of the evidence as a whole and turned on the same issue regarding the capacity of Somasundara. On the facts of this appeal there was, indeed, but one “matter in dispute” unless the mere circumstance of a plurality of appellants decrees otherwise. On the true construction of the section their lordships were unable to see any ground for such a refinement and they therefore overruled the preliminary objection.”

In *Pethu Reddiar’s* case (11), however, all the appellants had a substantial interest in property: none of them was solely interested in costs. I think that that case is distinguishable. In this case I have come to the conclusion that the husband has no claim which should properly be aggregated with the wife’s claim so as to give the husband an appeal as of right under s. 3 (a) of the Order-in-Council. If their lordships of the Privy Council should allow the wife’s appeal, no doubt they will give such direction regarding costs below as they think fit or it may be that their lordships will give the husband special leave to appeal.

In the view I have taken of para. (a) of s. 3, I must proceed to consider whether the court should exercise a discretion in favour of the husband under para. (b) of that section. This question does not arise as regards the wife, as she has an appeal in her own right. Mr. Kean drew our attention to the remarks of Scott, L.J., in *Mahon v. Osborne* (12), [1939] 1 All E.R. 535, a case of a swab left in a patient during an abdominal operation. In the report of that case His Lordship said, at p. 537, that the case was one of very great and general importance. Counsel for the respondents, on the other hand, argued that the principles governing liability for negligence in cases of this nature had, since *Mahon v. Osborne* (12) and partly as a result of that decision, been well-established, that there was no question now of great general or public importance which would be raised in the proposed appeal, the problem in the present case being merely to apply established principles to a particular set of facts.

I think that there is weight in the respondents’ argument, but it is unnecessary to decide the point because the liability to his patient of the surgeon, which is the only suggested question of great general or public importance, would be bound to be canvassed in the wife’s appeal. That question will be submitted

to Her Majesty in Council for decision in the wife's appeal and there would be no added advantage to the public in having it submitted by the husband also.

It is not suggested, and I see no reason to hold, that the husband's case comes within the words "or otherwise" in s. 3 (b). To give the husband leave to appeal also would considerably enhance the expense of the litigation for no useful purpose. I would not exercise a discretion in the husband's favour under paragraph (b).

I would grant the application of the wife and give her leave to appeal under s. 3 (a) of the Order-in-Council, the costs of the application to be costs in the appeal to Her Majesty in Council and to be paid to the respondents if the appeal should be dismissed for want of prosecution; such leave to be subject to the usual conditions to be settled by a judge in chambers under liberty to apply. I would dismiss the husband's application with costs.

Forbes V-P: I agree.

Gould JA: I also agree.

Application of the first applicant refused. Application of the second applicant granted.

For the applicants:

M Kean

Sirley & Kean, Nairobi

For the first respondent:

AE Hunter

Daly & Figgis, Nairobi

For the second respondent:

RDC Wilcock

Archer & Wilcock, Nairobi

Credit Finance Corporation Ltd v Ali Mwakasanga
[1959] 1 EA 79 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	24 February 1959
Case Number:	95/1958
Before:	Forbes V-P, Gould JA and Windham JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika–Crawshaw, J

[1] Contract – Hire purchase – Writing – Contract signed by hirer not signed by owners – Deposit paid by hirer – Part performance – Whether contract enforceable.

[2] Hire purchase – Contract in writing but not signed by owners – Whether contract must be in writing and signed.

Editor's Summary

The respondent paid a deposit to and signed a hire-purchase agreement with the appellants for a lorry delivered to him. No one signed the agreement on behalf of the appellants, and during the hearing of an action between the parties the respondent's advocate was allowed to amend his pleadings so as to plead that the agreement was invalid for want of execution on behalf of the appellants. The trial judge upheld this contention. On appeal

Held – the payment of the deposit and acceptance of the lorry by the respondent (together with the respondent's admissions in evidence) established an executed contract to act on the agreement, and despite the failure of the appellants to sign it, the agreement must, on the doctrine of part performance, be treated as binding on both parties.

Appeal allowed.

Cases referred to in judgment

- (1) *Broden v. Metropolitan Railway Co.* (1877), 2 App. Cas. 666.
- (2) *Mahomed Musa v. Aghore Kumar Ganguli* (1914), 42 Cal. 801.

February 24. The following judgments were read:

Judgment

Windham JA: This appeal arises out of an action in the High Court of Tanganyika in which the respondent sued the Motor Mart and Exchange Ltd. (first defendants) and the appellants (second defendants) jointly and severally upon two hire-purchase agreements, one dated September, 1955, and the other February, 1956, under each of which the respondent, an African, had agreed to purchase a motor-lorry from the appellants, a finance corporation, through the first defendants who were motor-car dealers. The first agreement proved abortive owing apparently to the withdrawal of the respondent's guarantor, and the motor-lorry, which had been delivered at the respondent's request, to one Keshavji Ramji for the purpose of having a body built on to it, was returned to the first defendants. The respondent then signed a second hire-purchase agreement with the appellants for the purchase of a similar lorry. The deposit of Shs. 7,540/- which he had paid to the appellants under the earlier agreement was retained by them as the deposit payable under this second agreement, and the respondent took delivery of the second lorry and forthwith took it to Keshavji Ramji for the building of a body on to it, just as in the case of the earlier lorry. Keshavji Ramji put a body on to it, keeping it for some four weeks for this purpose. Thereafter, as the respondent failed to pay him for the body, the lorry remained with Keshavji Ramji for another month. During this time the respondent had also failed to pay to the appellants either of the first two monthly instalments of Shs. 1,278/- each, totalling Shs. 2,556/-, due to them under the hire-purchase agreement. When he did not receive payment Keshavji Ramji again removed the body, and this lorry too was returned to the first defendants at the appellants' instance. The respondent then sued the first defendant and the appellants for Shs. 18,000/- as loss of profits for eighteen months, from December, 1955, to May, 1957, inclusive, in respect of both lorries, and for the return of his Shs. 7,540/- deposit. The appellants counterclaimed for Shs. 2,556/- for the instalments due on the second agreement for the two months for which the lorry had been with the respondent or with Keshavji Ramji, and also for Shs. 786/- being the price of a tyre and tube (Shs. 594/22) and of a wheel and rim (Shs. 192/-) removed from it by the respondent during those two months.

The learned trial judge, after hearing evidence at length, dismissed the case against the first defendants with costs. With regard to the claim against the appellants he held that the first hire-purchase agreement had been replaced by the second, and that he therefore did not need to decide on its validity. He then held the second agreement to be ineffective on the ground that it had not been signed by or on behalf of the appellants. He accordingly dismissed the respondent's claim for loss of profits but ordered the appellants to repay to the respondent the Shs. 7,540/- deposit, there being (as he found) no agreement under which it could be held to have been forfeited to them; while for the same reason he dismissed the appellants' counterclaim save for the sum of Shs. 594/22 which he said was admitted by the respondent. This would seem to have been an oversight, for in fact the respondent admitted in evidence owing to the appellants the whole of the Shs. 786/- claimed for tyre, tube, wheel and rim, and not merely the Shs. 594/22 claimed for tyre and tube. Against this decision the appellants appeal. Since the claim to the Shs.

7,540/- deposit and the whole counterclaim arise upon the second of the two hire-purchase

agreements, it is with that agreement alone that this appeal is directly concerned.

It was not until the respondent had begun giving evidence that the question of the validity of either of the hire-purchase agreements was raised. It had been admitted on the pleadings that they were valid and binding documents. But during the respondent's evidence his advocate applied to amend the plaint by the insertion of an alternative plea that both agreements were incomplete in that neither of them had been executed by the appellant (second defendant), and that the Shs. 7,540/- should accordingly be refunded to the respondent "as money had and received, consideration having failed". This amendment, perhaps a little surprisingly, was allowed without objection, and a consequential amendment to the appellants' statement of defence, while not denying the lack of execution, reasserted the validity of the second agreement.

The two hire-purchase agreements were duly produced in evidence, and it immediately became clear that, while each of them bore the thumb-print of the respondent, neither of them was signed on behalf of the appellants. A defence witness, Mr. Tyrrell, was the agent in Dar-es-Salaam of the appellants, whose head office was in Nairobi. With him the respondent, negotiating for the most part through the first defendants, had entered into the agreements (if any), and Tyrrell had endorsed his signature on the respondent's proposal form; but he had never signed either of the resulting printed forms of hire-purchase agreement. In giving evidence Mr. Tyrrell, to quote the relevant passage from the judgment,

"said that his endorsing his approval on the proposal form, although it virtually completed the sale of the vehicle from the first defendant to the second defendant, did not necessarily complete the hire-purchase agreement, for normally the latter subsequently required particulars to be filled in by the first defendant, such as date of first rental. He said the agreement became complete when it was ready for sending by the first defendant to Nairobi, and that the signature by the second defendant company in Nairobi was a mere formality".

Mr. Tyrrell, under cross-examination, then admitted that the appellants' Nairobi head office, even after his approval of the proposal form, still retained the final word and could nevertheless refuse to sign the agreement, though they had never yet taken such a course.

Upon this evidence the learned trial judge rightly held that Mr. Tyrrell had no authority himself to enter into hire-purchase agreements on behalf of the appellants. He went on to hold that there was therefore no enforceable hire-purchase agreement between the appellants and the respondent, with the results that I have already stated. Earlier in his judgment he had said—

"If this second agreement was enforceable I have no doubt that the plaintiff was in breach in failing to pay the instalments . . .",

a finding of fact fully supported by the evidence. Under the terms of the agreement not only did the respondent in such circumstances remain liable to pay the instalments claimed in the counterclaim for the two months for which he had had possession of the lorry, but he also forfeited his Shs. 7,540/- deposit. This appeal therefore turns on one point only, namely, whether the learned judge's conclusion that no enforceable agreement had been established was correct, or whether the parties having acted on the footing of there being a concluded agreement and in accordance with the written terms of the document, they (and in particular the respondent) must be held to be bound by it notwithstanding the appellants' not having signed it. It may at this stage be noted that learned counsel for the respondent concedes that there is no requirement under the laws of Tanganyika that hire-purchase agreements must be in writing signed by the parties.

Upon the evidence accepted by the court below, and upon the respondent's admissions, this seems to me to be a case where, in spite of the document not having been signed on behalf of the appellants, an agreement in the terms of that document, binding on both parties, must be held to have been established by reason of their having acted upon it, in accordance with the doctrine of part performance. In particular, as against the respondent, who is, of course, the only party who challenges the document, the agreement must in my view be held binding by reason not only of his having signed it, but of his having paid to the appellants the deposit of Shs. 7,540/- in accordance with its terms and accepted delivery of the lorry which was its subject matter. These acts, taken together, are unequivocally attributable to a recognition of the validity of the agreement and an executed resolve to act upon it. Learned counsel for the respondent, while admitting (as he must) the payment of the deposit, has attempted to raise doubts whether the respondent ever did take delivery of the lorry. But not only did the learned trial judge find in his judgment that the lorry

“was taken to Keshavji Ramji Ltd., this time I think by the plaintiff himself, for a body to be put on”,

but the respondent (plaintiff) himself in evidence admitted—

“After the second agreement, of February, 1956, I was given a truck which I took to Bhatia. Next day manager first defendant told me to take it to Keshavji with whom they always dealt. I took it to Keshavji. They built a body on it, taking two months.”

The doctrine whereby part performance will supply the want of formal execution of a contract was laid down in very clear terms by the House of Lords in *Brogden v. Metropolitan Railway Co.* (1) (1877), 2 App. Cas. 666, where the facts were in essence very similar to those in the present case, and where a draft of a contract which one of the parties had not signed was held a valid contract binding upon the other party by reason of their having acted upon it: for, in the words of Lord Blackburn, at p. 693—

“if both parties have acted upon that draft and treated it as binding, they will be bound by it”.

And in view of the application of the Indian Evidence Act and the Indian Contract Act in Tanganyika Territory it is relevant that it was held by the Privy Council in *Mahomed Musa v. Aghore Kumar Ganguli* (2) (1914), 42 Cal. 801, after stating and applying the doctrine, that

“Their lordships do not think that the law of India is inconsistent with these principles; on the contrary it follows them”.

On these grounds I would allow the appeal with costs here and below, set aside so much of the judgment below as affects the appellant, and enter judgment for the appellant with costs for the whole of the amount of the counterclaim.

Forbes V-P: I agree. The appeal is allowed and an order will be made in terms proposed by the learned justice of appeal.

Gould JA: I also agree.

Appeal allowed.

For the appellants:

KA Master QC and NM Patel

Atkinson & Master, Dar-es-Salaam

For the respondent:

MN Rattansey

Mahmud N Rattansey & Co, Dar-es-Salaam

Hussein Ramadhan Mrangi v R
[1959] 1 EA 83 (HCZ)

Division: HM High Court for Zanzibar at Zanzibar
Date of judgment: 30 January 1959
Case Number: 53/1958
Before: Horsfall Ag CJ
Sourced by: LawAfrica

[1] Criminal law – Charge – Goods stolen by servant from bailee – Accused convicted of obtaining goods by false pretences – Whether facts support conviction for stealing by servant – Penal Decree, s. 255, s. 268, s. 299 (Z.).

Editor's Summary

The appellant's master had left his coat with a dhobi for ironing. The appellant called and falsely represented to the dhobi that his master had ordered him to collect it. The dhobi handed over the coat to the appellant, who did not return it to his master. The appellant was later charged and convicted by a magistrate of the offence of obtaining goods by false pretences, contrary to s. 299 of the Penal Decree. On appeal against conviction and sentence the court invited and heard argument whether the conviction should be for obtaining goods by false pretences, or for larceny by a trick.

Held –

- (i) in view of the definition of stealing in s. 255 (1) and (3) of the Penal Decree, the proper charge and conviction should have been theft by a servant contrary to s. 268.
- (ii) it is not proper for an appellate court on an appeal against conviction to review the recommendation of the convicting subordinate court that a deportation order be made against the appellant.

Appeal allowed. Conviction under s. 268 substituted.

Judgment

Horsfall Ag CJ: This is an appeal against the conviction and sentence of the learned resident magistrate, Wete, Pemba, dated December 6, 1958, when he sentenced the appellant to one year's imprisonment for the offence of obtaining goods by false pretences contrary to s. 299 of the Penal Decree.

The brief facts are that the accused was the servant of P.W. 1. P.W. 1 had left his coat with P.W. 2

who is a dhobi, for ironing. P.W. 1 happening to pass P.W. 2's house in company with the accused, P.W. 1 asked P.W. 2 when it would be ready. Accused heard P.W. 2 say that it would be ready the next day. Accused and P.W. 1 went away. Shortly afterwards accused returned to P.W. 2 and told him that P.W. 1 had sent him for his coat. P.W. 2 believed accused and handed him the coat. P.W. 1 fell sick and it was only some days later that he learned the accused had been given his coat. P.W. 1 had never instructed accused to collect the coat. Accused never gave the coat to P.W. 1. The coat has not been recovered.

After hearing the evidence of P.W. 1 and P.W. 2 the learned magistrate recorded:

"In view of the evidence given I alter the charge to one of obtaining goods by false pretences. Obtaining goods by false pretences contrary to s. 299 of the Penal Decree."

Appellant had at the beginning of the trial pleaded not guilty to the offence of stealing by servant contrary to s. 268 of the Penal Decree.

At the hearing of the appeal I requested the Crown to argue whether the conviction should properly be for false pretences or for larceny by a trick.

The legal position, arising out of the facts, is that P.W. 2 was a bailee of the coat and was unable to part with the property in it to the accused. The

property in the coat always remained in P.W. 1, the owner. P.W. 2 was only able to part with possession of the coat. Accused obtained this possession by means of the lie that his master had sent him for the coat and believing him P.W. 2 handed him the coat to give to his master. Accused then converted the coat to his own purposes.

As the Penal Decree nowhere states that the property must be obtained by a false pretence I considered whether I could interpret the Zanzibar false pretences sections as not requiring that the property be obtained by a false pretence and that it is sufficient if mere possession is obtained by the fraudulent manoeuvre. To do this would cause a disturbance to established thinking not justified by any disadvantages which it might or might not remove. I consider that s. 299 must continue to receive the accepted interpretation.

In England larceny by a trick is a common-law offence which is now statutory larceny by reason of s. 1 of the Larceny Act, 1916. The sections relating to theft in the Penal Decree differ quite considerably from the Larceny Act and I can find nothing in the Penal Decree similar to the English law relating to larceny by a trick. Accordingly I think that it is necessary to examine our local Penal Decree to discover what, if any, section is relevant to the facts in this case.

Section 255 (1) reads:

“A person who . . . fraudulently converts to the use of any person other than the general or special owner anything capable of being stolen is said to steal that thing.”

Section 255 (3) reads:

“When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of conversion in the possession of the person who converts it.”

I consider that these sections are applicable to this case. I set aside the conviction of false pretences contrary to s. 299 and under s. 178B of the Criminal Procedure Decree I substitute therefore a conviction of the original charge of stealing by a servant contrary to s. 268.

There are no merits in any of the grounds of appeal contained in the memorandum of appeal but before disposing of the appeal I wish to refer to ground 8 which reads: “That I also appeal against the order of deportation made against me.”

Part XI of the Criminal Procedure Decree provides for procedure for appeal against a conviction or order of any subordinate court. At the present stage the magistrate has merely recommended to the British Resident that a person whom he has convicted of

“an offence punishable with imprisonment otherwise than only in default of payment of a fine”

is a suitable subject for a deportation order. In my view it would not be proper for an appeal court on an appeal against conviction to review such a recommendation. It is for the British Resident to decide whether, if he thinks fit, it is a suitable case for making a deportation order. Of course, if the appeal court quashes the conviction arising out of which the recommendation is made, it is not then open to the British Resident to make a deportation order. The person is no longer a convicted person.

The sentence of one year's imprisonment will begin to run as from January 23, 1959.

Appeal allowed. Conviction under s. 268 substituted.

The appellant in person.

For the respondent:

BAG Target (Crown Counsel, Zanzibar)

The Attorney-General, Zanzibar

R v Ambari s/o Juma
[1959] 1 EA 85 (HCT)

Division: HM High Court for Tanganyika at Dar-Es-Salaam
Date of judgment: 14 March 1959
Case Number: 69/1959
Before: Mahon Ag CJ
Sourced by: LawAfrica

[1] Criminal law – Arraignment – Accused charged before magistrate having no jurisdiction to try case – Accused pleads not guilty – Accused not asked to plead at trial before magistrate having jurisdiction – Whether trial a nullity – Penal Code, s. 135, s. 136 (T.) – Criminal Procedure Code, s. 4, s. 203 and First Schedule (T.) – Subordinate Courts Ordinance (Cap. 3), s. 4, s. 5 (T.).

Editor's Summary

The accused was charged with defilement of a girl under the age of twelve, contrary to s. 136 of the Penal Code. He was taken before a third-class magistrate who had no jurisdiction to try the case. This magistrate read and explained the charge to the accused, who pleaded not guilty. Subsequently the accused was tried by a first-class magistrate, who convicted him of indecent assault contrary to s. 135 (1) of the Penal Code. There was no record that the accused was again asked to plead to the charge at his trial, nor was there any record that he was then reminded of his earlier plea. In the exercise of its jurisdiction in revision the High Court considered the validity of the proceedings.

Held –

- (i) in view of the terms of s. 203 of the Criminal Procedure Code the plea of an accused person cannot lawfully be taken by a court which has no jurisdiction to try the offence.
- (ii) since the accused was not at his trial called on to plead and did not plead to the charge, the trial was a nullity.

Order that the conviction and sentence be set aside and for a new trial.

Cases referred to in judgment

- (1) *Saja s/o Mbako v. R.* (1956), 23 E.A.C.A. 571.
- (2) *R. v. Rajabu bin Ramadhan*, Tanganyika Gazette Law Report Supplement No. 7 of 1955, 3.

Judgment

Mahon Ag CJ: The accused was charged with the defilement of a girl under twelve years of age contrary to s. 136, Penal Code.

On January 19 the accused was brought before a third-class magistrate by whom the charge was read and explained to the accused who pleaded not guilty. He was then remanded in custody from time to time until February 11 when he appeared before a first-class magistrate. This magistrate, so far as the record shows, neither called upon the accused to plead nor reminded him of the offence with which he was charged. The accused was eventually convicted of indecent assault under s. 135 (1) and sentenced to two years' imprisonment to be followed by three years' police supervision.

Some doubt was felt as to the validity of the proceedings by this court so the case was set down to enable the learned attorney-general to be heard.

It is quite clear from the First Schedule of the Criminal Procedure Code that the only court other than the High Court which has jurisdiction to try the offences created by s. 136 is a subordinate court presided over by a first-class magistrate. My attention has been drawn to *Saja s/o Mbako v. R.* (1) (1956), 23 E.A.C.A. 571, where it was held that:

“As arraignment does not form part of the trial there can be no objection to an accused being arraigned before one judge and tried by another without the latter taking any further steps in regard to arraignment, although the

better practice is for the second judge to arraign the accused afresh or at least to remind him of the substance of the charge and of his former plea.”

Learned counsel for the Crown submits that this principle should apply in the case of subordinate courts and I agree, but only in the case of subordinate courts of concurrent jurisdiction. In this territory the powers and jurisdiction of subordinate courts are limited and determined by the powers and jurisdiction of the class of magistrate for the time being presiding therein; s. 4 (2), Sub-ordinate Courts Ordinance (Cap. 3). Sub-section (1) of s. 5 of this Ordinance provides for three classes of magistrates, and that the powers and jurisdiction of every magistrate shall be such as are conferred by or under any law for the time being in force upon magistrates of the class to which he is appointed.

So far as the Penal Code is concerned the jurisdiction of the High Court and the subordinate courts is laid down in s. 4, Criminal Procedure Code, while the powers of the three classes of magistrates are limited as stated in s. 7, s. 8 and s. 9.

Section 203 of the Criminal Procedure Code is in these terms:

- “(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.
- “(2) If the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there shall appear to it sufficient cause to the contrary.
- “(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.
- “(4) If the accused person refuses to plead, the court shall order a plea of ‘not guilty’ to be entered for him.”

In each sub-section reference is made to “the court” and this must in my opinion be construed as meaning one and the same court. If this is correct then it follows that the court referred to in sub-s. (1) is also the court referred to in sub-s. (3) which under this sub-section is required to hear the case, that is the court having jurisdiction to try the offence charged.

My attention has been drawn to *R. v. Rajabu bin Ramadhan* (2), *Tanganyika Gazette Law Report Supplement No. 7 of 1955*, at p. 3, and in particular to para. 7 of the judgment, but with respect I do not think that it was ever intended to suggest that a plea should be taken by a magistrate with no jurisdiction to try the offence charged.

To conclude, I am of the opinion after considering s. 4, s. 203 and the First Schedule to the Criminal Procedure Code, that an accused person cannot be lawfully arraigned in this territory before a court which has no jurisdiction to try him, although such a court may, of course, remand him or admit him to bail. It follows, therefore, that the proceedings before the third-class magistrate on January 19 were a nullity in so far as the taking of a plea was concerned, and as the accused was not thereafter called upon to plead and did not in fact plead, the trial was a nullity, the irregularity not being one which can be cleared by s. 346 of the Criminal Procedure Code.

The conviction and sentence must therefore be and are hereby set aside and it is directed that the accused be re-tried by a court of competent jurisdiction. In the event of him being convicted the time which he has already spent in gaol should be taken into consideration when assessing sentence.

Order that the conviction and sentence be set aside and for a new trial.

The accused in person.

For the Crown:

DL Davies (Crown Counsel, Tanganyika)

The Attorney-General, Tanganyika

The Trustees of the Port of Aden v Gohra Bint Salem and others [1959] 1 EA 87 (CAA)

Division:	Court of Appeal at Aden
Date of judgment:	12 March 1959
Case Number:	99/1958
Before:	Sir Kenneth O'Connor P, Forbes V-P and Gould JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Aden–Curran, Ag. C.J

[1] *Rent restriction – Employee occupying premises of employers – Notice given to determine service and contractual tenancy – Whether tenant can claim protection of Rent Restriction Ordinance – Rent Restrictions Ordinance, s. 11 (A.).*

[2] *Res judicata – Rent restriction – Proceedings to recover possession dismissed – Fresh proceedings instituted by landlord – Fresh grounds pleaded – Whether matter res judicata – Civil Courts Ordinance, s. 20 (1) and (5) (A.) – Indian Code of Civil Procedure, 1908, s. 11, Explanation IV.*

Editor's Summary

The appellants had originally brought a suit in the Supreme Court against one Hussain for a prohibitory injunction to restrain him from trespassing in the suit premises on the ground that he had been given the premises for his personal occupation as a licensee so long as he was employed by the appellants. They also alleged that his employment and his licence had terminated with effect from August 31, 1957, and that he had then failed to vacate the premises. In the alternative the appellants claimed that the defendant's occupation was a "service occupancy" and that he was not protected under the Rent Restriction Ordinance. Hussain, while admitting the termination of his employment, contended that he was protected and that he could not vacate the premises unless alternative accommodation was provided. The case was argued solely on the issue whether or not Hussain was a licensee or holder of a "service occupancy" or a "protected" tenant. The Chief Justice held that he was a tenant and as the appellants had failed to produce any evidence that they reasonably required the premises, dismissed the suit. The appellants then served a notice on Hussain purporting to terminate his tenancy with effect from January 31, 1958, and when he did not vacate the premises, instituted a new suit, pleading that the premises had been built for the exclusive use of their employees and that the tenant was a tenant of some other premises. The preliminary point was taken that the matter was *res judicata* and this was upheld by the

Acting Chief Justice. The appellants thereupon appealed and, as Hussain had died in the meantime, his heirs were made respondents to the appeal. On appeal it was argued for the appellants that the Chief Justice's finding on the question of reasonableness in the first case was obiter since that issue had not arisen on the pleadings or evidence in the case. The judgment in fact turned on s. 20 (5) of the Civil Courts Ordinance which reads:

“Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

The appellants conceded that in the first suit they could have pleaded in the alternative that if Hussain were held to be a tenant, they were entitled to recover under the Rent Restriction Ordinance, but argued that this was not a matter which the appellants “ought” to have raised in the former suit. They also submitted that where a plaintiff had several causes of action, he was entitled to sue on any one of them, and the decision thereon could not operate

as res judicata in a subsequent suit based on a different cause of action; that the question of recovery of the premises on the basis of the defendant being a licensee was quite separate and distinct from the question of recovery of the premises from a tenant; that the two claims could not be combined without embarrassment and confusion of the issues; that in a suit for ejectment a new cause of action arises at the expiration of each month of a monthly tenancy; and that the plea of alternative accommodation raised a new cause of action.

Held –

- (i) an alternative claim to recover possession under the Rent Restriction Ordinance, in the original suit, was a matter which not only might, but ought, to have been made a ground of attack.
- (ii) no notice to quit is necessary in the case of a statutory tenancy before an application is made to the court to obtain possession under s. 11 (cf. *Morrison v. Jacobs*, [1945] K.B. 577); in the circumstances the notice purporting to determine the tenancy on January 31, 1958, did not give rise to the cause of action in this case, and so could not constitute a new cause of action.
- (iii) in view of the short period of time that elapsed between the two suits it was reasonable to infer that in fact no change of circumstances had occurred, and therefore the appellants could not rely on either plea as being based on a cause of action which did not exist at the time of the first suit.

Appeal dismissed.

Cases referred to in judgment

- (1) *Morrison v. Jacobs*, [1945] 2 All E.R. 430; [1945] K.B. 577.
- (2) *Burman v. Woods*, [1948] 1 K.B. 111.
- (3) *Seth Ghasiram Seth Dalchand Palliwal v. Mt. Kundanbai and Others* (1940), A.I.R. Nag. 163.

March 12. The following judgments were read by direction of the court:

Judgment

Forbes V-P: This is an appeal from a judgment and decree of the Supreme Court of Aden. Hussain Ali Hussain, the defendant in the suit from which the appeal is brought (whom I will refer to as the defendant) died shortly after the judgment appealed against and before notice of appeal could be served on him. The appeal has accordingly been brought against his heirs as respondents.

The appellants seek to recover possession of a house owned by them, A.P.T. House No. E. 23, which had been allocated to the defendant at a time when he was employed by the appellants. The appellants originally brought a suit (which I will refer to as the first suit) against the defendant for a prohibitory injunction to restrain him from trespassing in the suit premises on the ground that the defendant had been given the house for his personal occupation as a licensee so long as he was employed by the appellants; that the defendant's employment had been terminated and his licence also had been terminated, both with effect from August 31, 1957; and that the defendant had failed to vacate the suit premises. In the alternative the appellants pleaded that the defendant's occupation was a "service occupancy" and that he was not a tenant protected under the Rent Restrictions Ordinance. In his written statement of defence the defendant admitted that his employment with the appellants had been terminated, but pleaded that he was

“a lawful tenant in exclusive possession of the suit premises and he cannot vacate it unless an alternative accommodation is provided to him”,

and that he was “a tenant protected under the provisions of Rent Restrictions, etc., Ordinance”.

When the first suit came on for hearing no issues were apparently framed, but it is clear from the notes on the record that it was argued solely on the issue whether or not the defendant was a licensee or holder of a “service occupancy”, or was a tenant to whom the Rent Restrictions Ordinance applied. In the event the learned Chief Justice, who heard the suit, held that the defendant had a tenancy. He continued:

“Finding, as I do, that the defendant has a tenancy it remains to see what are the plaintiffs’ rights in the light of the Rent Restrictions Ordinance. I refrain from using the expression ‘service tenancy’ as I do not think there is such a thing in Aden. What we have is the power given to a landlord under s. 11 (2) (e) of the Rent Restrictions Ordinance to recover possession of premises to whomsoever they are let if he can satisfy the court that he reasonably requires them for occupation as a dwelling house by some person engaged in his whole-time employment and that an order for possession would be reasonable taking all the circumstances into consideration . . . The difficulty which I now find in making up my mind is due to the lack of evidence tendered by the plaintiffs as to their requirement . . . The plaintiffs have proved that they *desire* the house but not that they *reasonably* require it. No doubt such evidence exists . . . But this evidence is not before the court and the suit must be dismissed with costs.”

The appellants did not appeal against the learned Chief Justice’s decision and the parties are accordingly bound by it. Instead they served a notice on the defendant purporting to terminate his tenancy with effect from January 31, 1958, and, when he did not vacate the suit premises, instituted a new suit in which they pleaded, *inter alia*:

- “5. The plaintiff corporation has built the said quarters for the exclusive use of its employees. The plaintiff has got a large number of its employees on its waiting list to be provided with residential accommodation. The plaintiff experiences considerable difficulty in recruiting labour unless residential accommodation is provided for them. The plaintiff genuinely requires the suit premises for the purposes of residence of its full-time employees.
- “6. The defendant has got alternative accommodation at a house, M. 169/3, situated at Nehru Street, Maalla. The plaintiff believes that the defendant is the tenant of the said premises. The said house is owned by Kalil Suleman Koover, proprietor, India Hotel, Tawahi.”

When this second suit came on for hearing before the learned Acting Chief Justice, the preliminary point was taken that the matter was “res judicata”. After hearing argument the learned Acting Chief Justice upheld this contention. He said:

“I therefore consider that this action is substantially and directly similar to the action in Suit No. 641/57 and of course covers the same subject matter. It was a ground of claim which he not alone might have made but ought to have made. I do not consider this suit is in any way collateral and incidental in issue, it is as I have said in effect the same suit and something to which the doctrine of res judicata applies.”

He accordingly dismissed the suit with costs.

It is against this decision that the appellants have now appealed.

The relevant provision relating to res judicata is s. 20 of the Civil Courts Ordinance (Cap. 25), the material part of which reads as follows:

“20. (1) No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

“(5) Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

It was argued before us that the learned Chief Justice’s finding in the first suit on the question of reasonableness—that is to say, his finding that the appellants as plaintiffs in that suit could not recover possession under the Rent Restrictions Ordinance because they had not established that they reasonably required the premises—was obiter since that issue did not arise on the pleadings or evidence in the case, and that this issue had accordingly not been determined in that suit. I do not think it is necessary to consider this aspect, as I think that, even on the basis that the court in the first suit had not finally decided the matter, the question is concluded by sub-s. (5) of s. 20 of the Civil Courts Ordinance.

It was conceded by counsel for the appellants that the appellants could, in the first suit, have pleaded in the alternative that, if the defendant were held to be a tenant protected by the provisions of the Rent Restrictions Ordinance, they were entitled to recover under that Ordinance. He argued, however, that this was not a matter which the appellants “ought” to have raised in the former suit. He submitted that where a plaintiff has several causes of action, he is entitled to sue on any one of them, and the decision thereon cannot operate as res judicata in a subsequent suit based on a different cause of action; that the question of recovery of the suit premises on the basis of the defendant being a licensee is quite separate and distinct from the question of recovery of the premises from a tenant; that there is distinct incongruity between these two claims and that therefore they should not be combined; and that the two claims could not be combined without embarrassment and confusion of the issues.

I accept that alternative claims need not be combined if there is distinct incongruity between them or if the combination would result in embarrassment, inconsistency or confusion, or the evidence in support of one claim would be destructive of the other—see commentary in Chitale and Rao, *Code of Civil Procedure* (5th Edn.) at p. 237 et seq. upon Explanation IV to s. 11 of the Indian Code of Civil Procedure, which is in the same terms as sub-s. (5) of s. 20 of the Aden Civil Courts Ordinance. In the instant case the claim was for recovery of the suit premises. I cannot see that the inclusion of an alternative claim to recover under the Rent Restrictions Ordinance in the event of the court holding that the defendant was a tenant and not a licensee would be incongruous or inconsistent or would result in any confusion or embarrassment, or that the evidence in support of the alternative claim would be in any way destructive of the former claim. The defendant in fact in his defence raised the issue whether or not he was a tenant protected by the Rent Restrictions Ordinance. It seems to me that at that stage at least the plaintiff not only might, but ought to have sought leave to add a claim to recover under the Rent Restrictions Ordinance in the event of the defendant succeeding on this issue. Evidence called in support of such a plea would have been additional

to, and not in contradiction of the plea to recover possession from the defendant as licensee.

I consider therefore that in the original suit for recovery of possession of the premises an alternative claim to recover such possession under the Rent Restrictions Ordinance was a matter which not only might, but ought, to have been made a ground of attack.

It was also argued by counsel for the appellants that in a suit for ejectment a new cause of action arises at the expiration of each month of a monthly tenancy; that in the instant suit the cause of action is the notice determining the tenancy on January 31, 1958; and that this is a new cause of action which has arisen after the conclusion of the previous suit. For the respondents it was argued that the notice to quit dated July 31, 1957, terminated the contractual tenancy and that thereafter the defendant was a statutory tenant; and that the subsequent notice was accordingly redundant and null and void.

I think there can be no doubt that the letter from the appellants to the defendant dated July 31, 1957, giving notice of termination of the defendant's services upon August 31, 1957, and requiring him to vacate the suit premises on that date, effectively terminated the contractual tenancy which the learned Acting Chief Justice held to exist at that date, and that thereafter the defendant was a statutory tenant. Possession could thereafter only be obtained upon one of the grounds set out in s. 11 of the Rent Restrictions Ordinance, and no notice to quit is necessary in the case of a statutory tenancy before an application is made to the court to obtain possession under that section (cf. *Morrison v. Jacobs* (1), [1945] K.B. 577 at p. 581). In the circumstances the notice purporting to determine the tenancy on January 31, 1958, did not give rise to the cause of action in the instant case, and so could not constitute a new cause of action.

It was also contended that the plea in para. 6 of the plaint (which relates to alternative accommodation) raises a new cause of action. The issues raised in para. 5 and para. 6 of the plaint in the second suit are obviously matters in which circumstances may change from time to time. In England in *Burman v. Woods* (2), [1948] 1 K.B. 111, it was held that the principle of res judicata was not applicable to such issues. It would seem, however, that the sense in which the term "res judicata" is there used may be narrower than the sense in which it is understood in India in relation to s. 11 of the Indian Civil Procedure Code (which is substantially the same as s. 20 of the Aden Civil Courts Ordinance).

"... what is known as res judicata in India is dealt with in England under the branch of law of estoppel by record which relates to judgments inter partes"

(Chitale and Rao *supra* at p. 172; *Seth Ghasiram Seth Dalchand Palliwal v. Mt. Kundanbai and Others* (3) (1940), A.I.R. Nag. 163). I think in the instant case the test is whether or not the pleas are based on facts which existed at the time of the former suit. If circumstances have changed there is no doubt that the pleas would not be res judicata (Chitale and Rao *supra* at p. 286; Halsbury's Laws of England (2nd Edn.), Vol. 13, p. 413). It is not asserted in the plaint that either of the pleas in para. 5 and para. 6 is based on facts which did not exist at, or circumstances which have changed since, the time of the first suit. This may not be strictly necessary. Nevertheless the issue of res judicata was apparently raised on the written statement of defence (though this cannot be asserted definitely as the statement has not been included in the record before this court) and it was argued before the learned Acting Chief Justice, and at no stage does it appear to have been suggested by or on behalf of the appellants that the pleas were based on changed circumstances. There is nothing in the facts pleaded themselves to lead to such a conclusion. In the circumstances and in view of the short period of time that elapsed between the

two suits I think it is a reasonable inference that in fact no change of circumstances has occurred. Accordingly, I do not think the appellants can rely on either plea as being based on a cause of action which did not exist at the time of the first suit.

For these reasons I think the learned Acting Chief Justice was right in treating the matter as *res judicata*, and I would dismiss the appeal with costs.

Sir Kenneth O'Connor P: I agree and have nothing to add. The appeal is dismissed with costs.

Gould JA: I also agree.

Appeal dismissed.

For the appellants:

PK Sanghani

PK Sanghani, Aden

For the respondents:

HM Handa and SN Iyer

HM Handa, Aden

Kibangeny Arap Kolil v R [1959] 1 EA 92 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	2 March 1959
Case Number:	228/1958
Before:	Forbes V-P, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya–Farrell, J

[1] *Criminal law – Evidence – Child witnesses – Court’s duty before child can be sworn or affirmed – Oaths and Statutory Declarations Ordinance (Cap. 20), s. 15 and s. 19 (1) (K.) – Oaths and Statutory Declarations (Amendment) Ordinance, 1954 (K.) – English Children and Young Persons Act, 1933, s. 38 (1).*

[2] *Criminal Law – Evidence – Trial by assessors – Sworn evidence of two children – Corroboration – Failure of trial judge to warn either himself or assessors of danger of convicting on uncorroborated evidence – Effect.*

Editor’s Summary

The appellant was convicted by the Supreme Court of the murder of his cousin. Evidence of the killing was given by the eye-witness testimony, upon affirmation, of the appellant's two sons whose ages the trial judge estimated at from twelve to fourteen years and nine to ten years respectively. The manner of killing was corroborated by medical evidence, but there was no corroboration by any other witness, nor by any circumstance sufficient to raise more than very slight suspicion, of the boys' evidence of the identity of the deceased's assailant. Throughout the trial it seems to have been assumed both by defence counsel and the court that the murderer was the appellant and the only defence raised was that of insanity. The killing was at no time admitted by the appellant; in fact in a cautioned statement in answer to the charge he denied it, while in his unsworn statement from the dock he did not admit it but said "At this time I was sick and did not know what I was doing . . . I was told I had killed someone. When I was told this I told them I did not know what I was doing". The trial judge rejected the defence of legal insanity and convicted the appellant. At the hearing of the appeal Crown counsel intimated that he felt unable to support the conviction based as it was solely on the evidence of the two boys, for two reasons, namely: (a) the court had failed to satisfy itself, before they testified, whether or not they understood the nature

of an oath or affirmation and (b) the court had failed to warn itself or the assessors of the danger of convicting on their uncorroborated testimony.

Held –

- (i) since the evidence of the two boys was of so vital a nature the court could not say that the trial judge's failure to comply with the requirements of s. 19 (1) of the Oaths and Statutory Declarations Ordinance was one which could have occasioned no miscarriage of justice;
- (ii) the failure of the trial judge to warn either himself or the assessors of the danger of convicting upon the evidence of the two boys in view of the absence of corroboration and any admission by the appellant was an additional ground for allowing the appeal.

Per curiam – “There is no definition in the Oaths and Statutory Declarations Ordinance of the expression ‘child of tender years’ for the purpose of s. 19. But we take it to mean, in the absence of special circumstances, any child of any age, or apparent age, of under fourteen years.”

Dictum of Lord Goddard, C.J., in *R. v. Campbell*, [1956] 2 All E.R. 272, that “whether a child is of tender years is a matter of the good sense of the court” . . . where there is no statutory definition of the phrase, approved.

Appeal allowed.

Cases referred to in judgment

- (1) *R. v. Campbell*, [1956] 2 All E.R. 272.
- (2) *Nyasani s/o Bichana v. R.*, [1958] E.A. 190 (C.A.).
- (3) *R. v. Surgenor*, [1940] 2 All E.R. 249.
- (4) *Njuguna s/o Wangurimu v. R.* (1953), 20 E.A.C.A. 196.
- (5) *R. v. Leonard bin Ngimbwa* (1943), 10 E.A.C.A. 113.

Judgment

Windham JA: read the following judgment of the court: The appellant was convicted by the Supreme Court of Kenya of the murder of his cousin. The evidence of the killing was afforded by the eye-witness testimony of the appellant's two sons, whose ages the learned trial judge estimated at approximately from twelve to fourteen years and from nine to ten years respectively. These two boys, who gave their evidence upon affirmation, testified that on one afternoon the appellant, for no apparent reason and upon no provocation on the deceased's part, threatened the latter with a stick and then, fetching a panga from his house, slashed through the deceased's neck to the spinal column, thereby killing him instantly. The manner of the killing was corroborated by the medical evidence; but there was no corroboration by any other witness, nor by any circumstance sufficient to raise more than very slight suspicion, of the boys' evidence of the identity of the deceased's assailant. Throughout the trial, as is evident from the line of cross-examination and from the judgment, it seems to have been assumed, both by learned defence counsel and by the court, that the murderer was the appellant, and the only defence raised by his counsel was that of insanity. The killing, however, was at no time admitted by the appellant. In a cautioned

statement in answer to the charge he denied it, while in his unsworn statement from the dock he did not admit it but said:

“At this time I was sick and did not know what I was doing . . . I was told I had killed someone. When I was told this I told them I did not know what I was doing.”

The learned judge, in the light of the appellant’s conduct immediately after the killing, as testified to by the two boys, rejected the defence of legal insanity and accordingly convicted the appellant of murder.

At the hearing of the appeal learned Crown counsel very properly intimated that he felt unable to support the conviction, based as it was solely on the evidence of the two boys, for two reasons: first, that the court failed to satisfy itself, before they testified, whether or not they understood the nature of an oath or affirmation; secondly, that the court failed to warn itself or the assessors of the danger of convicting on their uncorroborated testimony.

The first point arises primarily from the provisions of the Oaths and Statutory Declarations Ordinance (Cap. 20) as amended by the Oaths and Statutory Declarations (Amendment) Ordinance, 1954. As has been stated earlier, these two boys were affirmed. Section 15 of that Ordinance sets out the circumstances in which a witness may be affirmed instead of being sworn. It has not been suggested, nor do we consider, that s. 15 was misapplied or that these two boys ought to have been sworn rather than affirmed; and since that same section provides that an affirmation shall be of the same effect as an oath the legal position regarding the validity and weight of their testimony is the same as if they had been sworn, and the word “oath” may be deemed to include “affirmation” in the section to which we now turn, namely s. 19 (1) of the same Ordinance, which reads as follows:

“19. (1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court, or such person as aforesaid, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person as aforesaid, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with the provisions of s. 229 of the Criminal Procedure Code, shall be deemed to be a deposition within the meaning of that section:

“Provided that where evidence admitted by virtue of this section is given on behalf of the prosecution in any proceedings against any person for any offence the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him.”

There is no definition in the Oaths and Statutory Declarations Ordinance of the expression “child of tender years” for the purpose of s. 19. But we take it to mean, in the absence of special circumstances, any child of an age, or apparent age, of under fourteen years; although, as was said by Lord Goddard, C.J., in *R. v. Campbell* (1), [1956] 2 All E.R. 272,

“Whether a child is of tender years is a matter of the good sense of the court . . . ”

where there is no statutory definition of the phrase. The two boys in this case, both of whom were estimated to be under fourteen years old, must therefore be considered as children of tender years.

Section 19 (1) provides, as we have seen, that where such a child does not in the opinion of the court understand the nature of an oath his evidence may be received unsworn if the court is satisfied of his intelligence and that he understands the duty of speaking the truth. This necessarily implies that before the child can be allowed to give evidence upon oath (or affirmation) the court must satisfy itself that he does understand the nature of an oath. Such was the interpretation placed on the passage by this court in the recent case of *Nyasani s/o Bichana v. R.* (2), [1958] E.A. 190 (C.A.), where after reciting the section we held:

“It is clearly the duty of the court under that section to ascertain, first, whether a child tendered as a witness understands the nature of an oath, and, if the finding on this question is in the negative, to satisfy itself that the child ‘is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth’.”

That was a case where the child was unsworn. But the court’s duty before a child can be sworn or affirmed is made clear.

We would also refer to the duty that has been held incumbent upon the court in England in similar cases. The corresponding statutory provision there is s. 38 (1) of the Children and Young Persons Act, 1933, the wording of which, for all relevant purposes, is identical with that of s. 19 (1) of the Oaths and Statutory Declarations Ordinance. In *R. v. Surgenor* (3), [1940] 2 All E.R. 249, the Court of Criminal Appeal, after reciting s. 38 (1), said:

“That section quite clearly states—and this court has on more than one occasion intimated—that it is the duty of the presiding judge to satisfy himself whether or not a child of tender age is in a position to be sworn . . . Those who preside over criminal trials ought to remember that it is the duty of the presiding judge to make an investigation for himself.”

In that case the child, a girl of nine years, was allowed to give her evidence unsworn and, her evidence not having been of a vital nature such as needed corroboration, the appeal was dismissed in spite of the irregularity, since it had caused no miscarriage of justice. But the first duty of the court where the evidence of a child of tender years is sought to be given was made clear, namely to ascertain whether the child understands the nature of an oath, and to swear him only if he does.

In the present case the learned trial judge, so far as appears from the record, made no such investigation before affirming either of the two boy witnesses. Such an investigation need not be a lengthy one, but it must be made and, when made, the trial judge ought to record it. His only note of any relevance upon the record was one written after the conclusion of the evidence of the elder of the two boys, and before the calling of the younger boy, that:

“the witness appears to be a boy of twelve to fourteen but answers intelligently.”

That is not enough. The investigation should precede the swearing and the evidence, and should be directed to the particular question whether the child understands the nature of an oath rather than to the question of his general intelligence. Since the evidence of the two boys was of so vital a nature we cannot say that the learned trial judge’s failure to comply with the requirements of s. 19 (1) was one which can have occasioned no miscarriage of justice, and upon this ground alone the appeal must be allowed.

There was moreover another irregularity regarding the evidence of these boys which has fortified us in allowing the appeal, and that is the failure of the learned trial judge, so far as can be gathered from the record, to warn either himself or the assessors of the danger of convicting on their uncorroborated evidence. Had their evidence been neither sworn nor affirmed, then there would have been a legal necessity for its corroboration by other material evidence implicating the appellant, by virtue of the proviso to s. 19 (1), and a conviction upon it, if uncorroborated, would have been bad notwithstanding such a warning. But even where the evidence of a child of tender years is sworn (or affirmed), then although there is no necessity for its corroboration as a matter of law, a court ought not to convict upon it, if uncorroborated, without warning itself and the assessors (if any) of the danger of so doing. This rule must be distinguished from the rule whereby this court will look for

and require corroboration of the evidence of complainants, whether they be children or adults, in sexual offences: vide *Njuguna s/o Wangurimu v. R.* (4) (1953), 20 E.A.C.A. 196. In *R. v. Leonard bin Ngimbwa* (5) (1943), 10 E.A.C.A. 113, a case where a girl of about eleven years old was the sole eye-witness to a murder, and whose evidence was given on affirmation, this court held that

“even though she was affirmed the court must be very careful before acting on her evidence and should weigh and scrutinize it closely in the light of all the surrounding circumstances,”

and the appeal was dismissed in that case only because the trial court had appreciated the danger and had looked for and found corroboration of the girl’s story. In such cases the trial court must either find corroboration implicating the accused or must, after warning itself of the danger of convicting without it, express itself to be convinced of the truth of the child’s story notwithstanding that danger. In *R. v. Campbell* (1) Lord Goddard, C.J., said, at p. 276:

“The sworn evidence of a child need not as a matter of law be corroborated but a jury should be warned, not that they must find corroboration, but that there is a risk in acting on the uncorroborated evidence of young boys or girls though they may do so if convinced the witness is telling the truth, and this warning should also be given where a young boy or girl is called to corroborate the evidence either of another child, sworn or unsworn, or of an adult.”

This passage, it will be seen, also indicates that, unless such a warning is given, the evidence of one child cannot amount to corroboration of that of another. In the present case the learned trial judge gave no such warning, either to himself or to the assessors, in respect of the evidence of either of the two boys. Had there in fact been corroboration of their story, implicating the appellant, we might have held the failure to have occasioned no miscarriage of justice. But since there was no such corroboration, nor any admission by the appellant, the failure affords an additional ground for allowing the appeal.

For these reasons the appeal must be allowed, and the conviction and sentence quashed.

Appeal Allowed.

The appellant in person.

For the respondent:

DD Charters (Crown Counsel, Kenya)

The Attorney-General, Kenya

Raojibhai Bhailalbhair Patel v R [1959] 1 EA 97 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	26 February 1959
Case Number:	106/1958
Before:	Forbes V-P, Gould and Windham JJA
Sourced by:	LawAfrica

Appeal from: H.M. Supreme Court of Kenya–Sir Ronald Sinclair, C.J and MacDuff, J

[1] *Exchange control – Attempted exportation of currency notes – Appellant intending to travel to India after breaking journey at Aden – Whether traveller “to Aden” – Exchange Control Ordinance, 1950, s. 22 (1) (a) and s. 31, and para. 1 (1) of Part II of the Fifth Schedule (K.) – East African Customs Management Act, 1952, s. 147 (c) (ii) – Criminal Procedure Code, s. 360 (K.) – Council of Ministers (Consequential Provisions) Ordinance, 1954, s. 3 (K.) – Exchange Control (Import and Export) (Amendment) Order, 1953 (K.) – Indian Evidence Act, 1872, s. 105 – Evidence Act (Amendment) Ordinance, s. 3 (K.).*

Editor’s Summary

The appellant had been convicted by a magistrate of attempting to export currency notes contrary to s. 22 (1) (a) of the Exchange Control Ordinance, 1950, and of putting restricted goods on board an aircraft for exportation contrary to s. 147 (c) (ii) of the East African Customs Management Act, 1952. The appellant, a customs officer, went to Eastleigh Airport, Nairobi, to board a plane for Aden, his ultimate destination being India. He was going on overseas leave. He told the customs that he had nothing to declare and his baggage was put on the aircraft without examination. On his way to the aircraft he met a regional controller of customs whose suspicions were aroused, the appellant was detained, his baggage removed from the aircraft and on examination a sum of £2,905 in East African currency notes was discovered, for which no exchange control permission had been obtained. The departure form signed by the appellant gave his country of destination as India; his tickets indicated that he would break his journey at Aden for from two to three days and then continue to Bombay, and he had admitted that he intended taking the currency notes to India and “to his children at Bombay”. His appeal to the Supreme Court having been dismissed, he appealed again and submitted, *inter alia*, that he was a traveller to Aden and therefore, came within the exemption provided by s. 3 (1) (i) of the Exchange Control (Import and Export) Order, 1950, as amended, and accordingly that no permission was required to export the currency notes. It was also submitted on his behalf that the possibility always existed that the appellant might convert his currency notes into a bank draft before leaving Aden.

Held –

- (i) when it is considered that what is aimed at by the legislation is the prohibition of the export of East African currency from the currency group it becomes clear that it is the destination of the currency which is the important factor and not the places at which it may halt en route;
- (ii) the admitted facts showed beyond doubt that the appellant intended to take the currency notes to India after breaking his journey in Aden;
- (iii) there had been no attempt to discharge the onus, which lay upon the appellant, of showing that he fell within the exception, by any suggestion that he intended to apply for any permit, or exchange his currency notes for any draft or other form of credit in Aden.

Appeal dismissed.

Case referred to in judgment

(1) *Lamond v. Richard and The Gordon Hotels Ltd.*, [1897] 1 Q.B. 541.

Judgment

Windham JA: read the following judgment of the court: The appellant was convicted by a magistrate upon two counts both arising from the same set of circumstances. The first count was for the attempted exportation of notes contrary to s. 22 (1) (a) of the Kenya Exchange Control Ordinance, 1950, as read with para. 1 (1) of Pt. II of the Fifth Schedule to the said Ordinance and the second was for putting restricted goods on board an aircraft for exportation contrary to s. 147 (c) (ii) of the East African Customs Management Act, 1952. An appeal to the Supreme Court of Kenya from these convictions was dismissed and the appellant has now brought an appeal to this court, in which, by virtue of s. 360 of the Criminal Procedure Code he may rely only “on a matter of law” but not “on a matter of fact”. It is as well to mention at the outset that argument in the Supreme Court and before us was limited to the questions arising upon the first of the two counts above-mentioned, but it is common ground that the conviction upon the second must stand or fall with the first.

There is no dispute about the facts, the following statement of which is taken from the judgment of the learned magistrate:

“On the night of December 30 last, the accused, a Customs officer, went to Eastleigh airport to embark on an Air India aircraft to Aden. His ultimate destination was India. He was going on leave. He had with him a suitcase and a grip, in the latter of which, wrapped in a handkerchief, was a sum of £2905 in East African currency notes for which no exchange control permission had been obtained. He was asked if he had anything to declare and said he had not. He was passed through, his baggage not being examined. On his way to the aircraft, he was encountered by Mr. Burgess, a regional commissioner of customs, whose suspicions were aroused. As a result, the accused’s baggage, which, by then had been put on the aircraft, was removed, and the accused taken to an office for questioning. He again said that he had nothing to declare. He was asked to open the grip for examination. He did so and removed a bundle of clothing wherein was the money with which we are concerned. The remaining contents of the grip were examined and he was told that the bundle that he was holding would have to be examined. After some hesitation, he handed it over, and the money, wrapped in a handkerchief, discovered. He was told by Mr. Mathieson, the Customs examination officer, whose duties included the detention of any person or property for any possible breach of customs law that action would be taken against him. He asked Mr. Mathieson to forget the whole thing and to say that he had found nothing. This was refused. The accused then suggested that the notes be retained until he returned from India. He said that he was taking the money to his children at Bombay. He was arrested, police were sent for and arrived. He was charged and made a cautioned statement. He repeated that he was taking the money to India and said that he knew it was an offence to do so. He added that the money was his and he thought he could take it with him, which statement is not without contradiction.

.....

“The accused, who called no defence witnesses made a statutory statement of some brevity as follows: ‘I was travelling to Aden from Nairobi on December 30, 1957, by Air India International Plane Flight A. 1016.

I was carrying to Aden Shs. 58,100/- in East African currency notes in a handgrip (exhibit 1). I was to stay in Aden until January 2, 1958, and was thereafter to proceed to Bombay. The notes were mine and that is all'."

The following additional statement is taken from the judgment of the learned judges in the Supreme Court:

"It is necessary to refer to two further relevant facts. First, the appellant was in possession of a return air ticket indicating that he was travelling from Nairobi to Aden by Air India International Flight No. AII 216 on December 30, 1957, at 9 p.m. and from Aden to Bombay by Air India International Flight No. AII 206 on January 2, 1958. Secondly, the departure declaration form which the appellant signed, showed that he gave his country of destination as India."

For the purposes of the discussion of the law which must shortly be undertaken it is expedient to extract from these statements the main facts relevant to the intention of the appellant at the time of his apprehension with relation to his journey and the currency notes in question. They are:

- (a) The departure form signed by the appellant gave his country of destination as India;
- (b) his ticket indicated that he would break his journey at Aden for from two to three days and then continue to Bombay;
- (c) he said he intended taking the currency notes to India and "to his children at Bombay".

The legislation touching the matter is contained firstly in the Exchange Control Ordinance, No. 40 of 1950, of which s. 22 (1), so far as it is material, provides:

"22(1) The exportation from the Colony of—(a) any notes of a class which are or have at any time been legal tender in the United Kingdom or any part of the United Kingdom or in any other territory . . . is hereby prohibited except with the permission of the member."

From this provision an exemption was granted by the member (this was prior to the change of designation to "Minister" effected by s. 3 of the Council of Ministers (Consequential Provisions) Ordinance, 1954) in exercise of powers conferred upon him by s. 31 of the Exchange Control Ordinance, and the question now before the court turns upon the construction which it is proper to place upon the terms of this exemption. It is contained in para. 3 (1) (i) of the Exchange Control (Import and Export) Order, 1950 (as amended by the Exchange Control (Import and Export) (Amendment) Order, 1953), which is as follows:

- "3(1) There shall be exempted from the provisions of s. 22 of the Ordinance, the exportation from the Colony—
- (i) by any traveller to the Uganda Protectorate, the Trust Territory of Tanganyika, Aden and the Somaliland Protectorate or to Zanzibar on his person or in his baggage of any currency notes or postal orders;"

The only other reference to legislation which it is necessary to make is to s. 105 of the Indian Evidence Act, as substituted by s. 3 of the Evidence Act (Amendment) Ordinance (Cap. 12) by virtue of which, it is not disputed, the burden of proving the existence of circumstances bringing the case within the exemption above set out is upon the appellant.

The pith of the finding of the learned magistrate upon the matter is contained in the following passage from his judgment:

“The accused’s destination was India, the destination of the money was India. He was not a traveller ‘to Aden but if a traveller at all “through” Aden to India’. In other words he was a traveller to India; he was not a traveller to Aden.”

The approach to the question adopted by the learned appellate judges in the Supreme Court was rather more complex. It is sufficient for the time being to set out the following passage from their judgment:

“To bring himself within the exemption a traveller must, in our view, satisfy two conditions, the currency exported must be on his person or in his baggage and as such they must accompany him to the other territory within the currency group.

- “2. If that interpretation is correct, then we think that the export of currency notes from Kenya by a traveller whose ultimate destination is outside the East African currency group, but who intends to break his journey in another territory within the group, is prohibited unless he takes such notes into the territory where he proposes to break his journey. To put the position in another way, the exemption applies to the currency notes exported only if they are part of the traveller, being either on his person or in his baggage, when he enters the other territory.
- “3. To take an example which will explain our interpretation of the exemption—a traveller to India by way of Aden, who breaks his journey at Aden, but who sends his baggage on an aircraft flying direct to India, would not come within the exemption since his baggage does not accompany him to Aden. He, himself, may be said to be a traveller to Aden, but the currency notes are not exported, being in his baggage or on his person, by him in his capacity as a traveller to Aden. Following this reasoning, a traveller to Aden is not exempted in respect of the currency notes on his person or in his baggage unless he intends to take such notes with him to Aden.”

That the problem in question is one which must be approached in the light of the object of the exchange control legislation as a whole was fully appreciated in both courts below and by counsel on both sides. We feel we can do no better than to quote on this topic the following passage from the judgment in the Supreme Court:

“In our view the words ‘traveller to Aden’ in para. 3 (i) of the Exchange Control (Import and Export) Order, 1950, cannot be construed without reference to their context and the object of the exchange control legislation as a whole. The object of the Kenya legislation and the corresponding legislation in the other territories in the East African currency group is clearly to prohibit the export of currency from the territories forming that group without the permission of Government. However, since each of the territories can only legislate within its own borders and cannot prohibit the export of currency from other territories within the East African currency group, to obtain the required result it has been necessary for each territory to legislate by way of an absolute prohibition against the export of currency out of its own territory and to provide by way of exemption to cover the movement of persons from one territory into another territory within the currency group. Accordingly, each of the territories in the currency group prohibits, save under licence from Government, the export of currency out of its own territory, but exempts from that prohibition currency notes (or postal orders) carried on the

person or in the baggage of a traveller to another territory within the currency group.”

With these observations we are in full agreement.

The memorandum filed in this court on behalf of the appellant contained many and lengthy grounds of appeal. A number of these, counsel submitted, were necessitated by what he considered to be a departure, in the judgment of the Supreme Court, into the realm of speculation concerning the existence and effect of a bonding system in Aden. The learned judges having found, as above stated that

“the currency exported must be on his person or in his baggage and as such they (sic) must accompany him to the other territory within the currency group”,

construed this as entailing that once a traveller had gone through the Aden Customs with his currency he was a “traveller to Aden” within the meaning of the Ordinance. They then upheld the convictions by drawing an inference (with which, were we faced with the necessity of deciding, we could find it very difficult to agree) that the appellant would in all probability have left his baggage and currency in bond during his stay in Aden, and by having regard to the burden upon the appellant of showing that he came within the exemption. Counsel complained (*inter alia*) that this matter of customs and bond had never been referred to by anybody at the trial or the appeal and that there had been no opportunity of dealing with it. However that may be we think that our best course is not to deal directly with this ground of appeal but to proceed to the basic ground which was that the wording of the Ordinance had been misconstrued.

It was submitted for the appellant that it was necessary to give the words “traveller to Aden” no more than their every day meaning—that the appellant was undoubtedly a traveller and by going to Aden he became a “traveller to Aden”—that it then became a matter for the Aden laws and Aden authorities to deal with the subsequent destination of the currency—that it made no difference that the appellant was (as was conceded) also a traveller to India. Counsel relied also upon s. 5 (a) of the Exchange Control (Import and Export) Order, 1950, which provides that the exemption shall not apply to a person employed or engaged in any capacity on board any ship or aircraft arriving in or departing from the Colony. He argued that if the Supreme Court judgment was correct there was no need to exclude such persons from the exemption, as, if they merely passed through a place they would not be travellers to it. We consider there is no weight in this argument as the provision may very well have been made in view of the difficulty of deciding where the crew of an aeroplane which operated in and out of the scheduled territories were “travellers to” and in view of their opportunities for smuggling notes if so disposed.

Counsel for the Crown submitted that the journey as a whole must be looked at and referred to one of the descriptions of the word “journey” in the Shorter Oxford Dictionary as “a spell of going or travelling, viewed as a distinct whole”. This aspect of the meaning of “journey” might be said to derive support from the phraseology which has been used by almost everyone concerned in these proceedings in referring to the fact that the appellant was to “break his journey” in Aden for two or three days. We are not, however, construing the word “journey” and no real help is to be derived from the dictionary definitions. Counsel also submitted that the question of where a person is travelling to, must be one of fact. With that proposition no one has disagreed though counsel for the appellant takes the attitude that the fact is conclusively decided in his favour by the arrival of the appellant, with the currency on his person or in his baggage, in Aden.

The words “a traveller to” are, clearly and without any straining, susceptible of two meanings. If a person is in Genoa and intends to fly to London in a plane which touches down in Paris, he becomes when he leaves in one sense a traveller to Paris, because he is on his way there, but in another and perhaps more usual sense, a traveller to London because that is his destination. As has been already stated the question of deciding the appropriate meaning in the present case is one to be resolved with reference to the object of the particular legislation. When it is considered that what is aimed at is the prohibition of the export of East African currency from the currency group it becomes clear that it is the destination of the currency which is the important factor and not the places at which it may halt en route. Surely if an intending passenger for Bombay via Aden were asked by a Customs officer where he was taking certain currency and replied “to Aden” that, though true in the sense contended for by counsel for the appellant, would be an attempted evasion of the legislation. The wording of the exemption order also clearly indicates that there must be what might be called a joint travelling to the designated territory of the traveller and the currency notes, as the latter must be “on his person or in his baggage”. This was of course clearly recognised by the learned appellate judges in the Supreme Court who more than once used such phrases as “a traveller to Aden in respect of the currency notes”, in indicating what was required to come within the exemption. Where, however, the joint travelling continues or is intended to continue beyond Aden to some place other than the territories designated in the exemption order, this very fact in our view tends to negative any inference that the traveller was, in relation to the currency notes, a traveller to Aden, having regard to the intention of the legislation and the purpose for which the exemption order was made. Upon this view of the position a traveller is a traveller to Aden within the meaning of the exemption order only if his journey, in relation to the currency, is to terminate there.

This is a question of fact and may, as such, include one of degree. The clearest manifestation of intention arises in the case, mentioned in the judgment of the Supreme Court, of the traveller whose aeroplane touches down at Aden for an hour and who does not leave the airport. He is, in the words used by the learned magistrate, a traveller through, and not to, Aden. When, however, a longer break in the journey is made (or, as in the present case, contemplated) it is a question to be decided upon the circumstances of each case whether the joint journey, or the travel in relation to the currency, has terminated. The break may be so prolonged or so indeterminate as to be thought to divest the person concerned of the character of a traveller and render any further travel a new journey. Something of an analogy may be found in the case of travellers in relation to whom innkeepers have a duty to provide accommodation. On this topic it is sufficient to set out the headnote in *Lamond v. Richard and The Gordon Hotels Ltd.* (1), [1897] 1 Q.B. 541 which is as follows:

“The common law liability of an innkeeper to receive and lodge a guest attaches only so long as the guest is a traveller, and a person who has been received at an inn as a traveller does not necessarily continue to reside there in that character. Whether at any given time during his residence he is still a traveller is a question of fact, and one of the ingredients for determining this fact is the length of time that has elapsed since his arrival. If the guest has lost the character of traveller the innkeeper is not bound to supply him with lodging, but is entitled, on giving reasonable notice, to require him to leave.”

The only point upon which we differ, with great respect, from the view of the learned judges in the Supreme Court, is that we are unable to accept that the declaration of the currency by the traveller to the Customs or other authority upon arrival, automatically makes the person concerned a traveller to Aden

in relation to the currency. If a bonding procedure exists and could be utilised for the purposes of currency notes, its utilisation would be only one of many ways of manifesting an intention of continuing the journey in relation to the currency. It would in fact be surprising if a country's currency laws could not be applied to currency left in bond and it would also be strange if a person who failed to declare his currency and took it to his hotel undetected was thereby rendered "a traveller to Aden" so as to avoid liability under the Kenya law.

As we take the wider view which we have expressed above, it is unnecessary to deal with the criticisms of the Supreme Court judgment by counsel for the appellant relating to the matter of bonding procedure. Upon our construction of the exemption order they are immaterial and do not, in the circumstances of the case, assist the appellant. We should, however, mention the contention of counsel for the appellant that reliance by the learned Supreme Court judges upon certain matters indicating the intention of the appellant with regard to his journey was unjustified, as the offence created by the section is one of strict liability, to which questions of mens rea are irrelevant. The answer to this is of course that the question of intent as a component of mens rea was not being considered at all in the passages of the judgment complained of. The offence charged was an attempt to export. That there was such an attempt was clear and undisputed, but in order to decide whether the appellant had brought himself within the provisions of the exemption order, the court, having no actual journey to consider, could only decide the question by ascertaining what journey was in contemplation—and, as has been found, the journey had to be considered in relation to the currency notes. This question could only be resolved by considering the intention of the appellant upon his departure from Kenya.

Another submission relied upon by counsel for the appellants, was that the possibility always existed that the appellant might have converted his currency notes into a bank draft before leaving Aden. Had he in fact embarked upon the journey and had he purchased such a draft in Aden, his journey, in relation to the notes, would have been completed in Aden, and he would have been within the terms of the exemption order. The evidence, however, was necessarily confined to the charge of attempting to export currency notes, and, the onus being upon the appellant to bring himself within the exemption, it is clear that he made no attempt whatsoever to assert any such intention.

Another argument which might be relied upon by the appellant is that a traveller, breaking his journey in Aden for two days, might apply for and obtain, permission to export his currency notes outside the currency area. If he then continued his journey (in relation to the currency) would he, breaking no law of Aden, which is one of the territories concerned, be guilty of an offence against the law of Kenya? We concede that this submission has weight, importing as it does, the idea that it is for the last country, through which the currency is to pass, to exercise control. It is not however of such weight as to induce us to accept the alternative to the view which we have already expressed; an alternative which would involve acceptance of the proposition that all transit passengers through Aden from Kenya must be deemed free of offence against the Kenya legislation because the Aden authorities could, (though, pursuant to policy with regard to transit passengers, they may elect not to do so), apply to them their own currency control laws. It is not necessary for us to decide what liability a traveller would incur under Kenya law, if, breaking his journey in Aden, he obtained there permission to export his currency, before continuing his journey. It is unlikely, in such circumstances, that he would be prosecuted. If he were it may be that the courts would take the view that the travel in relation to the notes in the character in which they were exported from Kenya terminated in Aden by reason of the permit there granted; or they might conclude that if currency notes were to be exported

from Kenya beyond the currency area, Kenya was the place in which to apply for a permit. As we have said we do not need to express a concluded opinion upon this question as it does not arise upon the facts of the present case. What has had to be considered by this court and those below is a case of proved attempted export; there has been no attempt to discharge the onus, which lies upon the appellant, of showing that he falls within the exemption, by any suggestion that he intended to apply for any permit, or exchange his currency for any draft or other form of credit, in Aden. The admitted facts as summarised earlier in this judgment show beyond doubt that the appellant intended to take the currency notes to India after breaking his journey in Aden for two or three days. If he also intended to take any action in Aden which might possibly have affected the question of his liability for attempting to export the notes from Kenya it was for him to show, at least to the point of raising a reasonable doubt in the mind of the court, that such was the case. This has not been done or attempted.

In the result we agree fully with the construction placed by the learned judges of the Supreme Court upon the legislation in question that the concept of travel must be in relation to the currency notes contemplated in the charge. We have differed in our view of the manner in which the legislation so construed should be applied to particular circumstances, but as our own view is the wider one, we are, for the reasons given above, no less satisfied than were the learned judges in the Supreme Court, that the appellant was rightly convicted.

Appeal dismissed.

For the appellant:

J O'Brien Kelly and Bhailal Patel
Bhartal Patel, Nairobi

For the respondent:

JS Rumbold (Crown Counsel, Kenya)
The Attorney-General, Kenya

Abdul Hussein v R
[1959] 1 EA 105 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	9 February 1959
Case Number:	743/1958
Before:	Sir Ronald Sinclair CJ and Rudd J
Sourced by:	LawAfrica

[1] *By-laws – Nairobi Municipality – Whether applicable to trading premises on Crown land within military area – Trader not servant of Crown – Nairobi Municipality (General) By-laws, 1948, By-law 2.*

[2] *Evidence – Onus of proof – Municipal by-laws – Whether applicable to trading premises on Crown land within military area – Trader not servant of Crown – Indian Evidence Act, 1872, s. 105.*

Editor's Summary

The appellant was charged in the court of the city magistrate, Nairobi, with using unlicensed trade premises contrary to By-law 2 of the Nairobi Municipality (General) By-laws, 1948. The appellant was the proprietor of a grocery shop situated in the City of Nairobi on Crown land within a military compound known as Buller Camp. The defence at the trial was that because the premises were on Crown land and the appellant catered for military personnel, By-law 2 had no application to the premises and no licence was required. The magistrate found that the appellant was trading for profit with the general public, as well as with military personnel; that he was accordingly using trade premises and that he did not have the appropriate licence under the By-laws. He was convicted and fined Shs. 105/-. He thereupon appealed and on appeal contended that as the premises were on Crown land, *prima facie* the By-laws had no application; that the onus was on the prosecution to establish that in the circumstances of the case the By-laws did apply to the premises and the prosecution did not discharge that onus.

Held –

- (i) if a tenant or licensee of the Crown uses premises on Crown land within the Municipality as trade premises, then *prima facie* there is a contravention of By-law 2.
- (ii) a private tenant or licensee is not exempted from the operation of the By-law merely because he occupies Crown land; the test is “Were the premises used by the Crown solely for the purpose of the Crown?”

Rayner v. Drewitt (1900), 82 L.T. 718, applied.

- (iii) as it was clear that the appellant was a member of the public and not a servant of the Crown and as there was nothing to indicate that he had any good claim to Crown status, there was a *prima facie* case against him and the burden lay on him of proving the existence of circumstances which would exempt him from the operation of the By-law; the appellant did not discharge that burden even to the extent of raising a reasonable doubt.

Appeal dismissed.

Cases referred to in judgment

- (1) *R. v. Hussein Mohamed Moti*, Nairobi Resident Magistrate's Court Criminal Case No. 1070 of 1956 (unreported).
- (2) *Cooper v. Hawkins*, [1904] 2 K.B. 164.
- (3) *Gorton Local Board of Health v. Prison Commissioners* (1887), [1904] 2 K.B. 165 (n.).
- (4) *London County Territorial and Auxiliary Forces Association v. Nichols*, [1948] 2 All E.R. 432; [1949] 1 K.B. 35.
- (5) *Rayner v. Drewitt* (1900), 82 L.T. 718.

[**Editorial Note:** The appellant at the trial produced in evidence a judgment of the magistrate's court in *R. v. Hussein Mohamed Moti*, Nairobi Resident Magistrate's Court Criminal Case No. 1070 of 1956, which held that as the (same) premises were on military land By-law 78 of the City By-laws did not apply. The court, whilst finding the charge proved, considered that as the appellant had in consequence of that judgment good ground for believing that no licence under the By-laws was required, he should be discharged under s. 36 (1) of the Penal Code, and set aside the conviction and sentence.]

Judgment

Sir Ronald Sinclair CJ: read the following judgment of the court: The appellant was convicted by the city magistrate, Nairobi, on a charge of using unlicensed trade premises contrary to By-law 2 of the Nairobi Municipality (General) By-laws, 1958,

“in that on the 6th day of August, 1958, on Crown land in Buller Camp, within the City of Nairobi, you did use trade premises for the sale of food-stuffs, the said premises not having been licensed for the current year”.

He was sentenced to pay a fine of Shs. 105/- and now appeals against conviction and sentence.

It appears from the evidence which the trial magistrate accepted that the appellant is the proprietor of a grocery shop which is situated in the City of Nairobi on Crown land within a military compound known as Buller Camp. The boundaries of the military area which comprises, or at least includes, Buller Camp are defined by General Notice No. 686 of 1918. A barbed wire fence separates the appellant's premises from the camp itself, the only entrance to the premises being from Mbagathi Road.

By-law 2 of the Nairobi Municipality (General) By-laws, 1948, provides:

“A person shall not use or cause or allow to be used any store premises, manufactory premises, or trade premises unless and until the premises have been licensed as store premises, manufactory premises, or trade premises as the case may be, and a valid and unexpired licence of the appropriate kind be current in respect thereof”.

“Trade premises” are defined in By-law 1 as meaning:

“any premises in which articles of food or drink are kept and exposed for sale, and shall include store premises and manufactory premises”.

The trial magistrate found that on the date of the alleged offence the appellant was trading for profit with the general public, as well as with military personnel, that he was accordingly using trade premises and that he did not have the appropriate licence therefore under the By-laws. There was evidence to support that finding and we see no reason to disagree with it.

The defence at the trial was that because the premises are on Crown land and the appellant catered for military personnel, By-law 2 had no application to the premises and no licence was required. The appellant did not give evidence or call witnesses, but put in evidence a judgment in Criminal Case No. 1070/56 in the Resident Magistrate's Court, Nairobi, *R. v. Hussein Mohamed Moti* (1), which relates to a prosecution under the By-laws in respect of the same premises. The learned magistrate rejected this contention. He said in his judgment:

“There can be no doubt that it is correct to say as a general principle that no legislation binds the Crown except by necessary implication or by

expressed terms contained therein: and one can go with Mr. Rise borough to the extent that one can agree that the City By-laws do not bind the Crown. But it is, in my view, ludicrous to suggest that once the Crown has allowed a citizen to occupy a piece of Crown land for the purposes of trade that that citizen can hide under the umbrella of the Crown and claim to be beyond the scope of by-laws regulating his trade. There can be no doubt on the evidence in this case that the accused was trading for his profit and was trading with the general public. There can equally be no doubt that such use of Crown land cannot be regarded as being used solely by the Crown for the purposes of the Crown—in fact the record in M. 1070/56 indicates that the position is that the military authorities have tried to remove the accused from their land.

“I find that the accused was using trade premises within the City of Nairobi and that he had no licence so to do. I find that in the circumstances of this case the By-laws do apply to the accused and his trading enterprise and I think that *Rayner v. Drewitt*, 82 L.T. 718 is very relevant to that finding.”

The sole ground of appeal is that the learned magistrate erred in holding that the Nairobi Municipality (General) By-laws, 1948, and particularly By-law 2 thereof, were applicable to the premises in question. It was submitted on behalf of the appellant that as the premises are on Crown land, *prima facie* the City By-laws had no application to them, that the onus was on the prosecution to establish that in the circumstances of this case the By-laws did apply to the premises and that the prosecution did not discharge that onus. In support of this submission we were referred to *Cooper v. Hawkins* (2), [1904] 2 K.B. 164, and *Gorton Local Board of Health v. Prison Commissioners* (3) (1887), [1904] 2 K.B. 165 (n.), *Territorial and Auxiliary Forces Association of the County of London v. Nichols* (4), [1949] 1 K.B. 35, and *Rayner v. Drewitt* (5) (1900), 82 L.T. 718.

It is common ground that the City By-laws do not bind the Crown, but we are unable to agree with the submission of counsel for the appellant that because the appellant's premises are on Crown land, *prima facie* the By-laws can have no application to them. We can find nothing in the authorities to support such a proposition. Crown land may be let to a member of the public or a licence may be granted to a member of the public to occupy Crown land. In our view, if such a tenant or licensee of the Crown uses premises on the land as trade premises, then *prima facie* there is a contravention of By-law 2; a private tenant or licensee is not exempted from the operation of the By-law merely because he occupies Crown land. There may be circumstances which exempt the tenant or licensee from the By-law and, if a prosecution is brought, we think that the provisions of s. 105 of the Indian Evidence Act, as substituted by Ordinance No. 30 of 1936, apply, that the burden of proving the existence of such circumstances is on the accused and that it is not for the prosecution to prove the absence of such circumstances.

Our conclusion from the authorities is that the test to be applied in determining whether the appellant's premises were exempt from By-law 2 is: “Were the premises used by the Crown solely for the purposes of the Crown?”. That was the test applied in *Rayner v. Drewitt* (5) where the question for decision was whether certain Crown property was immune from rates. We do not think that the decision in *Territorial and Auxiliary Forces Association of the County of London v. Nichols* (4) is of any assistance to the appellant. The facts of that case were entirely different and the court found that the plaintiff had Crown status. In *Gorton Local Board of Health v. Prison Commissioners* (3) the property was property provided by the Crown for the purposes of the Crown and was occupied by servants of the Crown in connection with their duties as such.

But the position as disclosed by the record in the present case was that the appellant was using the premises as trade premises and that he was trading for profit with the general public. Although there was nothing in the evidence to show how the appellant came to be in occupation of the premises, it seems clear that he was a member of the public and not a servant of the Crown. There was nothing to indicate that he had any good claim to Crown status. On those facts there was a *prima facie* case against the appellant and the burden lay on him of proving the existence of circumstances which would exempt him from the operation of the By-law. In our view the appellant did not discharge that burden, even to the extent of raising a reasonable doubt. He did not give evidence himself or call witnesses and the judgment in Criminal Case No. 1070/56, even if it were admissible as proof of the facts found in the judgment, which it was not, did not in any way show that the premises were used by the Crown solely for the purposes of the Crown. We think, therefore, that the charge against the appellant was fully proved.

In Criminal Case No. 1070/56, one Hussein Mohamed Moti was charged with carrying on the business of a native eating house on these same premises without being in possession of a licence contrary to By-law 78 of the City By-laws. He was acquitted on the ground that as the premises were on military land, they must be excluded from the operation of the City By-laws. There appears to be some doubt as to whether Hussein Mohamed Moti was the appellant or his father, but, be that as it may, the appellant, as a consequence of that judgment, had good ground for believing that no licence under the By-laws was required. It is appreciated that the learned magistrate imposed a fine of Shs. 105/- so as to give the appellant a right of appeal. In the circumstances we think that a conviction should not be entered against the appellant and that the charge should be dismissed under s. 36 of the Penal Code.

For these reasons, although we are of opinion that the charge was proved against the appellant, we set aside the conviction and sentence and order that the charge be dismissed under s. 36 of the Penal Code. The fine, if paid, must be returned to the appellant.

Appeal dismissed.

For the appellant:

AR Kapila

Kapila & Kapila, Nairobi

For the respondent:

PA Clarke

The Nairobi City Council

Girdharlal N Tejura v Bhagwanji Lalji Limited
[1959] 1 EA 109 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	6 March 1959
Case Number:	677/1958
Before:	Bennett J

[1] *Infant – Contract – Infant living with father employed by company – Whether infant can sue company for salary – Whether father can give good receipt for earnings of son – Indian Contract Act, 1872, s. 11 and s. 70.*

Editor's Summary

The plaintiff, an infant, sued the defendant company for Shs. 262/50 as damages for wrongful dismissal and Shs. 23,480/81 as the balance of salary due to him for the years 1954 to 1957 inclusive and the first two months of 1958. The trial judge found on the facts that there was no wrongful dismissal, and, although it was disputed, that the plaintiff was in the employ of the defendant company for the period for which he claimed salary. The main issue at the trial was whether the balance of salary had been paid to the plaintiff. The defendant company admitted that there was a balance of Shs. 20,181/81 due and owing to the plaintiff but alleged that this balance was paid, or credited, to the account of the plaintiff's father, with whom the plaintiff had been living, with the full consent or at the request of the plaintiff. The plaintiff denied that he had consented to his salary being paid or credited to his father. Counsel for the defendant company submitted firstly that since the plaintiff was an infant he was not competent to enter into a contract and therefore the plaintiff could neither enforce his agreement with the defendant company nor sue for any benefit arising under it; secondly, that since the plaintiff was an infant living with and maintained by his father during the whole of the period of the employment his father was entitled to the whole of his son's earnings and could give a good receipt for them.

Held –

- (i) as the plaintiff had given value he was entitled to sue for his salary.
- (ii) whilst the right of a father to the fruits of his children's labour is not clearly defined, if a father has a right to the infant's earnings, it is a right which is maintainable only against the infant; there appeared to be no authority for the proposition that a father who maintained an infant child could sue in his own name for salary or wages earned by the infant.
- (iii) the father could not give a good receipt for the salary of the infant plaintiff.

Dagley v. Tolferry (1715), 1 P. Wms. 285; 24 E.R. 391, applied; *M'Creight v. M'Creight* (1849), 13 I. Eq. R. 314, and *Re Long, Lovegrove v. Long*, [1901] W.N. 166, distinguished.

Judgment for the plaintiff for Shs. 23,180/81 balance of salary.

Cases referred to in judgment

- (1) *Re Long, Lovegrove v. Long*, [1901] W.N. 166.
- (2) *M'Creight v. M'Creight* (1849), 13 I. Eq. R. 314.
- (3) *Dagley v. Tolferry* (1715), 1 P. Wms. 285; 24 E.R. 391.

Judgment

Bennett J: The plaintiff seeks to recover from the defendant company Shs. 262/50 as damages for

wrongful dismissal, and Shs. 23,480/81 as the balance of salary due to him for the years 1954 to 1957 inclusive, and for the first two months of 1958.

The defendant company is a family concern, and all its directors are brothers. The plaintiff was employed as a salesman at the Masaka branch, of which his father—a director of the defendant company—was in charge. The plaintiff's salary was Shs. 400/- per month during 1954; Shs. 500/- a month during 1955, and Shs. 600/- a month during 1956 and 1957. The plaintiff used to receive from time to time small advances on account of salary, and at the end of each year the outstanding balance due to him on account of salary was credited to his account in the books of the company.

I will deal first with the plaintiff's claim for damages for wrongful dismissal. The plaintiff claims that he was dismissed without notice on February 27, 1958. His evidence as to the circumstances under which he left the defendants' employment is as follows:

“At 6 p.m. on the 26.2.58 I asked my father for some cash on account of salary. My father said he had no money. He said if I did not wish to work for defendants I could go. I went to bed. On the 27.2.58 I came to Kampala and saw Bhagwanji. I told him I wanted my salary and told him of my conversation with my father on the previous day. He said he had no money on him and told me to ask my father for it. I told him I had worked for the firm since 1954 and there was a large balance owing to me . . . I returned to Masaka on the same day. I returned to my father's house where I was living with my wife. I asked my father to let me take my clothes and my wife's clothes and ornaments. He refused to let me have them. I came to Kampala without my possessions and stayed at my uncle's house . . . On the 8.3.58 I obtained a job with Singer Sewing Machines.”

There is no evidence of any dismissal here. On the contrary it is clear, if the plaintiff's evidence is true, that he left the defendants' employ of his own accord because defendants had refused to pay him cash on account of salary for which he had asked. The plaintiff's claim for damages for wrongful dismissal must therefore fail.

Turning to the plaintiff's claim for balance of salary, there is a dispute as to the period during which the plaintiff was employed by the defendants. The plaintiff says that he was in defendants' continuous employment up till February 27, 1958. The defendants say that the plaintiff was in their employ only up to the end of September, 1957. According to Narandas Lalji, the plaintiff's father, at the end of September, 1957, the plaintiff went to Kenya for a holiday without permission and returned to Masaka some three weeks later. Narandas said that the plaintiff was not re-employed after his return, although he conceded that on previous occasions when the plaintiff had absented himself without leave he was always re-employed on his return. The plaintiff alleges that before proceeding to Kenya he obtained the permission of his uncle Bhagwanji Lalji, who was the managing director of the company. Bhagwanji denies that he ever gave the plaintiff leave of absence. The plaintiff's evidence that he remained in the employment of the defendants up to February 27, 1958, is confirmed by numerous entries in his handwriting in the defendants' books of account. According to the plaintiff, he began to assist his father in keeping the books in January, 1957. Narandas concedes that he taught the plaintiff bookkeeping, at the plaintiff's request, but alleges that all the entries in the defendants' books were made by the plaintiff in his presence and under his supervision. It is common ground that the plaintiff helped defendants with their annual stocktaking at the end of December, 1957.

On the balance of probabilities, I am satisfied that the plaintiff continued in the defendants' employ up till February 27, 1958. The plaintiff was therefore entitled to salary up to that date. I am satisfied that no agreement was made between the parties as to the rate of salary to be paid to the plaintiff during the

year 1958. The presumption is that he was to continue at the same rate at which he was paid during the years 1956 and 1957, namely, Shs. 600/- a month.

I now turn to the main issue in the case, namely, whether the balance of wages due to the plaintiff has been paid. The defendants, in their written statement, admit that there was a balance of Shs. 20,180/81 due and owing by the defendants to the plaintiff, but allege that this balance was paid, or credited, to the account of the plaintiff's father with the full consent or at the request of the plaintiff. It is common ground that the plaintiff was an infant at all material times. At the end of each year the sums standing to his credit in the defendants' ledgers were, on the instructions of Narandas, transferred from the plaintiff's account and credited to Narandas's account. Narandas said that the plaintiff agreed to the transfer of his credits to his father's account. Narandas also said the plaintiff resided with and was maintained by him throughout the period that he was in the defendants' employ. I am satisfied that the plaintiff was not entitled to free board and lodging at the expense of his employers and that he was in fact maintained by his father.

There can be no doubt that the plaintiff consented to the arrangement whereby the balance of salary due to him at the end of the year was credited to his account in the books of the company, but it by no means follows that he agreed that these credits should be transferred to Narandas's account. Neither the plaintiff nor Narandas impressed me as being reliable witnesses. Narandas made no more favourable impression than did the plaintiff. The onus of proving that the plaintiff agreed to the transfer of these credits is upon the defendants, and they have failed to discharge it, as I am not satisfied that Narandas was telling the truth. It seems to me probable that the plaintiff discovered these transfers for the first time when he began to assist his father with the accounts in 1957. It may well be that it was this discovery which was responsible for the bitter quarrels between father and son and for the plaintiff's demands for cash payments.

Mr. Russell, for the defendant company, has raised two interesting points of law. Firstly, he contends that since the plaintiff was an infant he was not competent to enter into a contract, having regard to s. 11 of the Contract Act. Therefore, says Mr. Russell, the plaintiff cannot enforce his agreement with the defendants or sue for any benefit arising under it. This may well be so, but the answer to this argument appears in the commentary on s. 11 in Pollock and Mulla on Indian Contract and Specific Relief Acts (8th Edn.), p. 69. To quote from the commentary:

"A minor who gives value without promising any further performance to a person competent to contract is entitled to sue him for the promised equivalent. This may be properly not in contract but on a quasi-contract under s. 70 below."

Mr. Russell's second point was that since the plaintiff was an infant living with and maintained by his father during the whole of the period that he was employed by the defendants, his father was entitled to the whole of his earnings and could give a good receipt for them. Reliance was placed upon a passage in Halsbury's Laws of England (3rd Edn.), Vol. 21, p. 201, para. 444, which reads as follows:

"Unless expressly empowered so to do a father cannot give a valid receipt or discharge for the property of his infant child. If he receives it he does so as guardian or agent for the infant; but while infant children live with and are maintained by their father, he is entitled to the earnings of their labour."

The right of a father to the fruits of his children's labour is not as clearly defined as one would wish.

The subject is dealt with in greater detail in Simpson on Law and Practice Relating to Infants (3rd Edn.) at p. 161. To quote from this work:

“According to Blackstone, ‘A father may have the benefit of his children’s labour while they live with him and are maintained by him; but this is no more than he is entitled to from his apprentices and servants’. This may be taken as authority for the position that if a child work for his father he cannot afterwards claim wages on an implied assumpsit: whether the father has the same right to his children’s earnings as a master has to those of his apprentice seems open to much doubt. The author has been unable to find any case in the books bearing directly on the subject, but such a right seems inconsistent with the right of an infant to sue for wages.”

It would seem from this passage that if the father has a right to the infant’s earnings, it is a right which is maintainable only against the infant. I can find no authority in the books for the proposition that a father who maintains an infant child can sue in his own name for salary or wages earned by the infant.

The second question which falls to be decided is whether a father as the natural guardian of an infant can give a good receipt to the infant’s employer for the earnings of the infant. Mr. Russell, while conceding that a father cannot give a good receipt or discharge for the property of his infant child, contends that he can give a good receipt for the income of the child. In *Re Long* (1), *Lovegrove v. Long*, [1901] W.N. 166, it was held by Byrne, J., that the mother and guardian of an infant could give a valid receipt for the income of an infant’s legacy. Byrne, J., relied upon the authority of *M’Creight v. M’Creight* (2) (1849), 13 I. Eq. R. 314. A report of the latter case is not available in Kampala, but a note on it is to be found in 28 Digest, p. 195, footnote n., and in 22 Mews’ Digest, p. 1339. It would seem that the ratio decidendi of *M’Creight v. M’Creight* (2) was that the statute of 14 and 15 Car. 2, c. 19 (Ir); 12 Car. 2, c. 24 (Eng). (Tenures Abolition Act, 1660), enabled a guardian to give a good receipt for an infant’s property. It is, however, apparent from s. 8 of 12 Car. 2, c. 24, that the right of a guardian to the custody and control of the real and personal property of an infant (which right presumably includes the power to give a good receipt for the infant’s property), conferred by s. 9, is applicable only to guardians appointed by deed or by will. The powers of custody and control over an infant’s property conferred by s. 9 of 12 Car. 2, c. 24, were extended by s. 4 of the Guardianship of Infants Act, 1886, to the mother of an infant who became the infant’s guardian by virtue of s. 2 of the latter Act. This explains the decision in *Re Long*, *Lovegrove v. Long* (1). The decisions in *M’Creight v. M’Creight* (2) and *Re Long*, *Lovegrove v. Long* (1), do not apply to a natural guardian. It would appear that the capacity of a father as natural guardian to give a valid receipt or discharge for the property of his infant child is still governed by *Dagley v. Tolferry* (3) (1715), 1 P. Wms. 285; 24 E.R. 391, which decided that a father could not give a good discharge for a legacy of his infant child. That decision has been criticised, but has stood the test of time, and is still cited in Halsbury’s Laws of England (3rd Edn.), Vol. 21, p. 201, and in Simpson on Infants (3rd Edn.), p. 161. There would appear to be no good ground for any distinction between giving a receipt for the property of an infant and giving a receipt for the income of an infant. No such distinction was made in *M’Creight v. M’Creight* (2) and in *Re Long*, *Lovegrove v. Long* (1). Moreover, income is a species of property. The industry of counsel has failed to reveal any authority for the proposition that a father can give a good receipt for the earnings of his infant child to the child’s employer. It follows that the defendants are still liable to the plaintiff for the balance of his salary which they credited to Narandas in their books of account without

the plaintiff's consent. There will be judgment for the plaintiff for Shs. 23,180/81 (Shs. 300/- disallowed in respect of salary for January and February, 1958), and costs of the suit.

Judgment for the plaintiff for Shs. 23,180/81 balance of salary.

For the plaintiff:

R Hunt

PJ Wilkinson, Kampala

For the defendant:

RE Russell

Russell & Co, Kampala

Macgaw and others v R **[1959] 1 EA 113 (CAN)**

Division:	Court of Appeal at Nairobi
Date of judgment:	26 March 1959
Case Number:	216/1958
Before:	Forbes V-P, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Seychelles–Rassool, Ag. C.J

[1] *Criminal law – Practice – Conviction of lesser offence where original charge bad in law – Whether conviction valid – Supreme Court exercising summary jurisdiction – Whether court has power to allow amendment of charge – Penal Code, s. 238 (d) (S.) – Criminal Procedure Code, s. 75, s. 77, s. 159 (1), s. 187, s. 223, s. 224 and s. 304 (S.) – Seychelles Capital Offences Order-in-Council, 1903, s. 36.*

Editor's Summary

This report is confined to the power of the court to convict of a lesser offence than that charged. The first appellant was charged with two offences, by the second of which it was alleged that he had assaulted a person engaged in lawful execution of process contrary to s. 238 (d) of the Penal Code in that he “assaulted Marc Michaud an usher of the Supreme Court of Seychelles, while he was engaged in the lawful execution of process”. Section 238 (d) reads thus:

“(d) assaults, resists, or obstructs any person engaged in such lawful execution of process, or in making a lawful distress with intent to rescue any property lawfully taken under such process or distress.”

At the trial counsel for the appellant submitted that there was no case to answer as the charge disclosed

no offence. The attorney-general submitted that by virtue of s. 159 (1) of the Criminal Procedure Code the count was sufficient to support a charge of common assault. The Acting Chief Justice, who was exercising the summary jurisdiction of the Supreme Court accepted this submission and before evidence was taken for the defence the charge was read to the appellant as one of common assault and he was subsequently convicted. There appeared to be a misapprehension at the trial that the Supreme Court had no power to allow amendment of a charge.

Held –

- (i) sub-s. (1) of s. 159 of the Criminal Procedure Code was not intended to be, and cannot be, relied upon where the original charge was bad in law;
- (ii) when the Chief Justice exercises summary jurisdiction wide power of amendment and even of substitution is provided by s. 187 of the Code of

Criminal Procedure; the power is wide but must be exercised before the close of the prosecution case, a fresh plea to the amended charge must be taken and the accused given the right to have witnesses recalled.

Appeal on second count allowed.

Cases referred to in judgment

- (1) *Yuill v. Yuill*, [1945] 1 All E.R. 183.
- (2) *R. v. Clewer*, 37 Cr. App. R. 37.
- (3) *Lambert Houareau v. R.*, [1957] E.A. 575 (C.A.).
- (4) *Re Williams, Ex parte Jones* (1880), 42 L.T. 157.
- (5) *Galliard v. Laxton*, 121 E.R. 1109.
- (6) *Horsfield v. Brown*, [1932] 1 K.B. 355.
- (7) *Re Hastings*, [1956] 1 All E.R. 707.

Judgment

Gould JA: read the following judgment of the court: The four appellants were charged before the Supreme Court of Seychelles with the offence of obstructing a court officer contrary to s. 119 of the Penal Code, the particulars being set out in the information as follows:

“Particulars of Offence.

“Antoine MacGaw, Francis MacGaw, Henri MacGaw, all three civil servants and Paul MacGaw, a wireless operator, residing at Bel Air, Mahe, on the 2nd day of September, 1958, at the aforesaid place, obstructed Marc Michaud an usher of the Supreme Court of Seychelles who was lawfully charged with the execution of a warrant of the said Supreme Court of Seychelles.”

The first appellant was charged in a second count with assaulting a person engaged in lawful execution of process contrary to s. 238 (d) of the Penal Code. The particulars given were:

“Particulars of Offence.

“Antoine Macgaw, a civil servant residing at Bel Air, Mahe, on the 2nd day of September, 1958, at the aforesaid place assaulted Marc Michaud an usher of the Supreme Court of Seychelles, while he was engaged in the lawful execution of process.”

The matter came before this court as an application for extension of time for filing the memorandum of appeal which was unopposed by the Crown and which we duly granted. We then proceeded to the consideration of the appeal, the record for which had already been filed. The appellants did not appear personally or by counsel but their case was presented to the court in writing by their advocate under r. 39 (1) of the rules of this court.

The trial of the first appellant on the second count resulted in his conviction for the offence of common assault, a conviction which counsel for the Crown was unable to support. Section 238 (d) of the Penal Code, under which it was laid, is in the following terms:

“238. Any person who:

- (d) assaults, resists, or obstructs any person engaged in such lawful execution of process, or in making a lawful distress with intent to rescue any property lawfully taken under such process or distress;"

Clearly the charge is defective in that it has omitted the words "with intent to rescue any property lawfully taken under such process", which appear in the

sub-section. The point that the charge disclosed no offence was taken at the trial by counsel for the appellants, during a submission of no case to answer after the close of the evidence for the Crown. The attorney-general who appeared for the Crown submitted that by virtue of s. 159 (1) of the Criminal Procedure Code the second count was sufficient to support a charge of common assault. The learned Acting Chief Justice accepted this submission and his note shows that before evidence was given for the defence the second charge was “read as one of common assault to accused one”. Section 159 (1) of the Code of Criminal Procedure is as follows:

“159. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.”

It appears obvious to us, with respect, that this section was not intended to be, and cannot be, relied upon in circumstances such as these, where the original charge was bad in law. The opening words of the section themselves import this, for they pre-suppose that “a person is charged with an offence”, whereas a charge which is bad in law charges no offence. The section is intended, in our view, to make provision similar to the English common law rule that a prisoner may be convicted of a less aggravated felony or misdemeanour than that charged in the indictment, provided the indictment contains words apt to include both offences.

We were informed by counsel that he was instructed that there was no power of amendment in the Supreme Court of the Seychelles. That appears not to be strictly correct, though there was in fact no such power in the court in the present case after the close of the case for the Crown. The Supreme Court of the Seychelles exercises jurisdiction as a court of assize in which the Chief Justice sits with assessors, and also a summary jurisdiction in which he sits alone. The practice in the former jurisdiction is regulated by the Seychelles Capital Offences Order-in-Council, 1903 (see s. 224 of the Code of Criminal Procedure) and s. 36 of the order provides a limited power of amendment. With regard to the summary jurisdiction wide power of amendment and even of substitution is provided by s. 187 of the Code of Criminal Procedure. The power must however be exercised before the close of the prosecution’s case, a fresh plea to the amended charge must be taken and the accused has the right to have witnesses recalled; none of these conditions was fulfilled in the present case. The present proceedings were commenced by a document headed “Criminal Information–Information upon oath” but which was worded as a complaint on oath, for which the authority appears to be s. 75 of the Code of Criminal Procedure; it bears no resemblance to the form of information by the attorney-general prescribed by s. 223 for use after committal proceedings. The appellants attended court upon summons, issued under s. 77 of the Code of Criminal Procedure, and were tried by the Acting Chief Justice without assessors. It is clear therefore that the Supreme Court was sitting in its summary jurisdiction and that its power of amendment under s. 187 could not be called in aid to support the conviction of the first appellant of the offence of common assault on the second count. The only other section of the Code of Criminal Procedure which need be mentioned is s. 304 which provides, in brief, that no finding of a court of competent jurisdiction shall be reversed or altered on appeal for any error, omission or irregularity unless such error, omission or irregularity has in fact occasioned a failure of justice. It is not necessary to consider whether this section can be relied upon in a case where the charge discloses no offence as it appears evident that there is a failure of justice where an accused person is arraigned upon a count which does not inform him with

sufficient accuracy of the crime of which he is accused and which he is required to answer. For these reasons the conviction of the first appellant on the second count cannot be allowed to stand.

For the consideration of the first count, upon which all four appellants were convicted, some reference to the facts is necessary. The four appellants are brothers and their father, Edwin MacGaw, had been the defendant in a civil action No. 221/57 brought by one Zorah Bronze, as a result of which Edwin MacGaw was ordered by the court to remove a certain house and out-buildings from a certain piece of land by October 1, 1958, and to pay the costs of the suit. On September 2, 1958, a warrant to levy was issued by the registrar under his signature and the stamp of the court on the application of Zorah Bronze, whereby Marc Joseph Michaud, an usher of the Supreme Court, was commanded to levy the sum of Rs. 11115 being the costs of the civil action and Rs. 21117 the costs of the execution by distress and sale of the goods and chattels of Edwin MacGaw. On the same date the usher, Michaud, attempted to execute the warrant in respect of certain corrugated iron sheets, planks, and eternite sheets which had been removed from the buildings in question, demolition of which was in progress. The obstruction alleged in the first count relates to the events which took place at this time.

The registrar, usher Michaud and three police officers who were present at the scene gave evidence for the Crown. For the defence the four appellants gave evidence and called also their father, Edwin MacGaw, two workmen who were engaged in pulling down the buildings and a lorry driver and his assistant who were removing the various materials. The following passages from the judgment of the Acting Chief Justice give the essence of his findings on fact:

“Michaud said that on September 2, 1958, he went with a party of police in a police van to the house of Edwin MacGaw at Bel Air, which he knew well having executed a seizure in that house previously.

“On arrival there he had the warrant of seizure with him and saw the house being pulled down. Not finding Edwin MacGaw he enquired from Ad. 1 who was present where Edwin MacGaw was. On being told that he was at Belle Eau Michaud sent the police van to fetch Edwin MacGaw. In the meantime a lorry arrived with Ad. 4. On arrival Michaud told the driver and lorry men as well as the four accused not to touch the building materials on the ground. But Ad. 1 as well as the other three accused told the men in the lorry to load and they helped the men to load. Then Ad. 1 abused Michaud and assaulted him twice and he fell in the gutter.

“The four accused then loaded the lorry and assembled to beat Michaud and took such a threatening attitude that Michaud found himself unable to complete the seizure went away with the police after the van returned. His evidence is corroborated by that of Sgt. G. Butler and P.C. Benoiton.

“The defence version is that there was no obstruction and no assault that day and that the prosecution’s case has been concocted.

“For the defence all four accused gave evidence. Their story is they were pulling down the house on the orders of their father who had been ordered by the court to do so. They all said that Michaud stayed on the other side of the road after his arrival and that he never came near their house or where the lorry was loading.

“They called their workmen Frederic Jacqueline, Ward Rose, Andrea Nicholas and driver Joseph Diadoo. All these four men said that Michaud was on the same side of the road as the lorry i.e. on the side of the house.

“They all said that they did not see Ad. 1 assault Michaud.

“I have perused the evidence in this case very carefully and have no hesitation in accepting the evidence for the prosecution witnesses which I believe.

“Michaud’s evidence is corroborated by the evidence of Sgt. Butler and P.C. Benoiton. I am satisfied that Michaud told the four accused that he had a warrant of seizure to execute although he did not show the warrant to them and that Ad. 1 at least knew that Michaud had come to seize the materials from the house. Both Michaud and Butler said in evidence that Ad. 1 said ‘Vini, vine saizi’ come and seize.

“It is in evidence that a crowd gathered near the house. Why should a crowd gather if nothing happened and all was peaceful.”

.....

“As regards the obstruction the evidence is overwhelming. Ad. 1 himself has admitted that after Michaud had said not to load the materials on the lorry he himself helped the lorry men to load. There could not be better evidence of obstruction.

“As I have accepted the evidence of the prosecution witnesses as true I find that it has been proved that all four accused helped in loading the lorry, and therefore obstructed Michaud and the charge on count 1 proved.”

The Acting Chief Justice also found that the first appellant had assaulted usher Michaud and the evidence upon which he came to that conclusion remains relevant to the obstruction charge though the conviction for common assault must be quashed.

There was no application made under s. 301 (1) (a) (iii) of the Criminal Procedure Code for leave to appeal to this court on any question of fact, and these findings, which are in any event in our opinion based on ample evidence, must be accepted. Section 96 of the Courts Ordinance, 1950, requires that every warrant to levy shall be directed to an usher of the Supreme Court (or to certain other persons) and from the evidence of the registrar and from the warrant itself it is clear that usher Michaud was lawfully charged with the execution of a warrant of the Supreme Court. It has also been found that he was obstructed by the appellants when he attempted to execute the warrant; that he had informed them that he had a warrant but had not produced it. It is now necessary to set out and deal with the relevant grounds of appeal. They are:

- “3. That it is respectfully submitted that the learned Acting Chief Justice interfered unduly during the course of the trial and told the appellants before the defence had commenced that if they acted as outlaws outside the court he would not allow them to act as outlaws in court. This because one of the appellants was four minutes late in arriving. Furthermore that the learned Acting Chief Justice took upon himself after the attorney-general’s cross examination to cross question the defence witnesses at length although he only recorded two or three answers in each case. Further he told some of the defence witnesses that he would not allow them to come to court to tell lies.
- “4. That it is respectfully submitted that the learned Acting Chief Justice was wrong in holding that the usher Marc Michaud was lawfully charged in the execution of an order of the court under s. 119 of the Penal Code or that he was engaged in the lawful execution of process as he had not shown the warrant to Edwin MacGaw to whom it was addressed neither had he told the four appellants that he had such a warrant nor shown any

document of any kind to anyone. It is submitted that until he had properly shown a warrant he was not acting in the lawful execution of his duty.

- “5. That the appellants were when Marc Michaud arrived on the scene acting in accordance with an order from the Acting Chief Justice to remove the house and outbuildings by October 1, 1958. It is submitted that if the appellants had not done so that they would have been guilty of contempt of court and that the usher Marc Michaud who in his evidence admitted that he knew this order was wrong in trying to prevent them from carrying it out.”

The references to these grounds in the written case for the appellants carry them no further than does their mere statement.

In support of ground 3 a joint affidavit by the four appellants has been filed in this court. The material portion is as follows:

“On October 9, 1958, the learned Acting Chief Justice Mr. S. Rassool delivered a ruling as to whether the defence in our case had a case to answer. Antoine MacGaw was about four minutes late as he had been held up by his head of department and Director of Medical Services. When he arrived the judge asked him why he was late and he explained that he had been delayed by the Director of Medical Services. The judge became angry and said that that was no excuse as the Supreme Court came first and he then became angry and addressing all of us as follows:

“ ‘If you live as outlaws, live as outlaws outside and not inside this court. Had the case been adjourned for long, I would have all four of you put into custody and you would be released on substantial bail only.’

“The witnesses called for the defence were all cross questioned by the judge for a considerable time, after the attorney-general finished cross examination although one or two answers were recorded. The defence witness Diadoo was told that he was a liar and that it was the last time that he come to court as a witness.”

Even taking this document at its face value we are not quite sure of the basis upon which it is put forward as a ground of appeal. There is no submission anywhere that the questions asked by the Acting Chief Justice were objectionable in any way or that they were such either in number or nature as to prevent the advocate for the appellants from properly presenting their case, or in any way impeding him. If the threat which the appellants purport to quote was in fact uttered in those terms, it was no doubt injudicious, but does not in our view lend support to a suggestion, if one is being made (as to which we are left in the dark), that the Acting Chief Justice did not deal impartially with the appellants' case. Nor does perusal of the record or the judgment lend any countenance to such a suggestion. We are not in fact disposed to place much reliance on the affidavit of the appellants, even though it has not been answered. Apart from the fact that from the written record alone it seems obvious that they lied in the witness box, there was unchallenged evidence that the first and second appellants had, before the events of September 2, 1958, separately informed the registrar that they would assault the usher Michaud when next he went to their house. This does not present them in any favourable light. As to the alleged questions by the Acting Chief Justice, he was of course fully entitled to put questions to witnesses and he appears to have followed the suggestion made in *Yuill v. Yuill* (1), [1945] 1 All E.R. 183 at p. 185 in the following passage:

“If there are matters which the judge considers have not been sufficiently cleared up or questions which he himself thinks ought to have been put,

he can, of course, take steps to see that the deficiency is made good. It is, I think, generally more convenient to do this when counsel has finished his questions or is passing to a new subject.”

If it were intended to suggest that the questions so impeded the defence that the advocate for the appellants found it impossible to present his case fairly, so as to bring the matter within the scope of the decisions in *R. v. Clewer* (2), 37 Cr. App. R. 37, or *Lambert Houareau v. R.* (3), [1957] E.A. 575 (C.A.), we should have expected to find the suggestion put forward and supported by the advocate himself. That has not been done in our opinion for the reason that any such suggestion would be quite insupportable. There is nothing in this ground of appeal.

The only point in ground four which invites attention is the admitted fact that the usher did not show the warrant to Edwin MacGaw nor to the appellants. The allegation that he did not inform the appellants that he had it with him is negatived by the findings of the Acting Chief Justice. The question of production of the warrant does not therefore appear to us to be in the circumstances relevant to the charge. Section 119 makes it a misdemeanour to obstruct any person lawfully charged with the execution of a warrant of any court. Upon this simple basis the appellants were undoubtedly guilty, for that is what, on the evidence, they were found to have done. We do not need to consider whether it was essential that the appellants should have known that the usher was charged with the execution of a warrant for in fact they did know—they were so informed by Michaud and the evidence shows that they knew who he was. No authority has been cited to indicate that the production of a warrant to levy is mandatory in every case under the law of the Seychelles, though no doubt it would be the common practice. Usher Michaud said that he did not show it to the appellants as they were not concerned, nor did he show it to Edwin MacGaw as he was not present. If it is intended to rely upon an analogy with English law on the basis that the warrant to levy is equivalent to a writ of Fieri Facias the appellants are not in our view thereby assisted. We have found no authority to indicate that it is essential that a writ of Fieri Facias must be produced prior to a seizure being effected and it cannot be gainsaid that a debtor's goods may be seized in his absence. *Re Williams ex parte Jones* (4) (1880), 42 L.T. 157 decided only that a seizure was imperfect where no warrant had been produced and no other manifest act of seizure had been performed. Even in the case of a warrant to arrest on civil process the case of *Galliard v. Laxton* (5), 121 E.R. 1109 (discussed and relied upon in *Horsfield v. Brown* (6), [1932] 1 K.B. 355) is authority for saying that at common law all that is necessary is that the officer should have the warrant in his possession for production if required. In the present case, whether or not the appellants were entitled to ask for the production of the warrant, they did not in fact do so. They were aware of its presence and of the identity and purpose of the usher and there is therefore no need for us to decide whether proof of any of these factors is essential to a charge under s. 119. This ground of appeal also fails.

There is nothing of substance in ground 5. The appellants' father had been ordered by the court to remove certain buildings and compliance with that order by demolition and removal of materials was in process when the usher arrived. Whether the appellants were actively engaged in the work is immaterial. To suggest that the appellants would therefore have been in contempt of court if they failed to obstruct an officer of the court in the execution of a subsequent warrant is an absurdity which merits no discussion. Upon this ground also the appeal fails.

One further matter must be mentioned. The Acting Chief Justice convicted all four appellants upon the first count, but having sentenced the first appellant

on both counts he, according to the record, sentenced the second, third and fourth appellants on count 2, upon which, of course, they were not charged. This was an obvious inadvertence and the sentences of the last three appellants were obviously intended to be referable to the first count upon which alone they were charged.

It may be that these sentences (the word sentence is in fact inappropriate as the three appellants were ordered to be released on probation under s. 259 of the Criminal Procedure Code upon entering into a bond) should be regarded as valid sentences on the first count in view of the manifest intention of the Acting Chief Justice. As it is however a matter of inevitable inference as to an intention not carried into actual effect, rather than of construction of the sentence such as was relied upon in *Re Hastings* (7), [1958] 1 All E.R. 707, this may not be the correct approach and the alternative is to regard the sentences as void, in which case it is open to this court to pass the necessary sentences itself in exercise of its powers under r. 41 of the Eastern African Court of Appeal Rules, 1954. To remove any doubt we propose to adopt this course and to make orders in respect of the second, third and fourth appellants upon the first count in terms of those which the Acting Chief Justice purported to make.

In the result the appeal is allowed in respect of the second count, and the conviction thereon of the first appellant of the offence of common assault and his sentence in respect thereof are quashed. The appeal of all four appellants upon the first count is dismissed, the sentence of the first appellant thereon is confirmed, and it is ordered on that count that the second, third and fourth appellants be bound over on probation under s. 259 of the Criminal Procedure Code in the sum of Rs. 100/- for two years (to run from the date of conviction).

Appeal on second count allowed.

The appellants did not appear and were not represented.

For the respondent:

DS Davies (Crown Counsel, Kenya)

The Attorney-General, Seychelles

Darcy v Jones
[1959] 1 EA 121 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	25 February 1959
Case Number:	16/1958
Before:	Mayers J
Sourced by:	LawAfrica

[1] *Pleading – Reply introducing allegation inconsistent with allegation in plaint – Whether reply*

competent – Issues framed and decided upon by trial magistrate on allegations raised in the reply – Whether unsuccessful party can object on appeal – Civil Procedure (Revised) Rules, 1948, O. 6, r. 6 (K.).

Editor's Summary

Order 6, r. 6 of the Civil Procedure Rules prohibits any party from raising in any pleading a ground of claim which is new or inconsistent with his previous pleading. The appellant's contention on an appeal was that the respondent's reply to the appellant's statement of defence was incompetent in that the allegation put forward in the respondent's plaint was that of sale and delivery of a car while the allegation put forward by the reply and in support of which the respondent had given evidence was an allegation of an agreement for sale. The appellant also argued that the trial magistrate was wrong in framing and subsequently deciding on issues based on the allegations introduced by the reply. No objection was made at the trial to the issues framed by the magistrate.

Held –

- (i) the remedy for a breach of O. 6, r. 6 is an application to strike out the offending pleading either before or at the hearing; if a party omits to take that course and contests a suit on the pleadings as they stand, he cannot subsequently contend that the court ought not to have determined an issue which was open for decision on the pleadings as they then stood, although it would not have been so open had the pleadings been attacked at the proper time.

Sagarmull v. Galstaun (1930), A.I.R. P.C. 205, applied.

Observations of Lord Atkin in *Bell v. Lever Brothers Ltd.*, [1931] All E.R. Rep. 1; [1932] A.C. 161, considered.

- (ii) that issues framed by the court may go beyond issues raised by the pleadings is apparent from the provisions of O. 14, r. 1 (5).
- (iii) in view of the provisions of O. 14, r. 1 (5) the court not merely has a right but is under a duty when framing issues so to frame them as to ensure that no party is precluded from obtaining relief to which he is entitled by reason of some technical error in his pleadings.

Appeal dismissed.

Cases referred to in judgment

(1) *Bell v. Lever Brothers Ltd.*, [1931] All E.R. Rep. 1; [1932] A.C. 161.

(2) *Sagarmull v. Galstaun* (1930), A.I.R. P.C. 205.

Judgment

Mayers J: This is an appeal from a judgment of one of the resident magistrates, Nairobi, in a suit in which the respondent, the original plaintiff, recovered from the appellant, the original defendant, the sum of Shs. 2,000/- in respect of the purchase price of a motor car allegedly sold and delivered by the respondent to the appellant, or delivered to the appellant pursuant to an agreement for sale to him.

The only ground of appeal argued turns upon a point of pleading; to understand the point for determination it is necessary to summarise the history of

the matter and the allegations of fact respectively advanced by the parties in evidence.

By her plaint the respondent claimed Shs. 2,000/- in respect of the price of the motor car sold and delivered by her to the appellant in the year 1957. By particulars subsequently delivered the date of the alleged sale and delivery was specified as being between September 18 and 20, 1957.

By his written statement of defence the appellant denied his indebtedness to the respondent on the ground that the car had been delivered to him pursuant to an agreement that the appellant should have it mechanically examined with a view to determining whether or no he would buy it for the sum of £100 and that having had the car so examined he had informed the respondent that he did not desire to buy the car and had requested her to resume possession of it which, however, she had failed to do. Alternatively, the appellant alleged that if, which was denied, he had ever entered into any agreement to purchase the car he was entitled to avoid that agreement by reason of the fact that at the time when such agreement was entered into the car was, unknown to him, subject to a hire-purchase agreement.

The respondent by her reply admitted that the car was at all material times subject to a hire-purchase agreement but alleged that prior to the “agreement for sale” she had informed the appellant of that fact and that if he bought the car she would pay off the balance outstanding under the agreement, a course to which the appellant agreed.

At the commencement of the hearing the resident magistrate framed two issues:

- “(1) Was there an agreement for the sale of the motor vehicle?
- “(2) Was there prior information by the plaintiff to the defendant that the vehicle was the subject of a hire-purchase agreement?”

The respondent’s evidence was to the effect that she agreed to let the appellant have the car for a couple of days with a view to his having it tested and deciding whether he would buy it. Subsequently by arrangement she met the appellant and he agreed to buy it for £100 payable by two equal instalments. Some days later he repudiated this agreement. She had specifically informed the appellant of the existence of the hire-purchase agreement and when she delivered the car to him had handed over all relevant papers including the insurance policy which made it clear that the car was subject to such an agreement.

The appellant’s version was that he had merely had the car for the purposes of testing it, had never agreed to buy it and knew nothing about the hire-purchase agreement until after the respondent had agreed, on being informed that he did not intend to buy it, to collect it from the garage where it then was.

The magistrate believed the respondent and disbelieved the appellant.

Mr. Morgan, who now appears for the appellant, argues that O. 6, r. 6 of the Rules of the Supreme Court of Kenya prohibits any party from raising in any plea a ground of claim which is new or is inconsistent with his previous pleading. The reply was incompetent in that the allegation put forward by the plaintiff was an allegation of sale and delivery of the car while the allegation put forward by the reply and in support of which the respondent gave evidence, was an allegation of an agreement for sale. It is, of course, trite law that the sale and agreement to sell are distinct transactions. In effect, therefore, the allegation made by the reply was wholly inconsistent with the allegation made in the plaintiff and therefore, according to Mr. Morgan, not an allegation in support of which the respondent could properly give any evidence.

Although, as no argument upon this aspect of the matter has been addressed to me, I refrain from

expressing an opinion, it nevertheless appears at least arguable that as, in view of the magistrate's finding the so-called agreement

to sell took place after the delivery of the car immediately that the parties reached an agreement as to the price of the car a sale and not, merely an agreement to sell was completed.

Be that as it may, in my view the remedy for a breach of r. 6 of O. 6 is an application to strike out the offending pleading either before or at the hearing and whoever party omits to take that course and contests a suit on the pleadings as they stand, he cannot subsequently contend that the court ought not to have decided on the same ground which was open for decision on the pleadings as they then stood although it would not have been so open had the pleadings been attacked at the proper time. Mr. Morgan relied strongly on the observations of Lord Atkin in *Bell v. Lever Brothers Ltd.* (1), [1932] A.C. 161. The facts of that case so far as material for present purposes were that a trial judge left to a jury the question as to whether there had been a mutual mistake on the part of both parties to an agreement to which the action related; the pleadings having, however, alleged merely a unilateral mistake. At p. 216 Lord Atkin says:

“In these circumstances the judge on a trial with a jury has without consent of the parties no jurisdiction to determine issues of fact not raised by the pleadings; nor in my opinion would a general consent to determine issues not decided by the jury include a power without express further consent, after the jury had been discharged to amend the pleadings so as to raise further issues of fact.”

The above passage would at first sight appear conclusive in favour of Mr. Morgan’s contention that the court ought not to have determined an issue which, according to him was not raised by the pleadings inasmuch as the reply was not in his submission a good pleading. In *Sagarmull v. Galstaun* (2) (1930), A.I.R. P.C. 205, however, Lord Tomlin in delivering the judgment of the Privy Council says at p. 208:

“Their lordships are satisfied that notwithstanding the form of the plaint the suit was fought by the parties deliberately upon issues substantially as framed by the trial judge and ought upon that footing to be determined.”

Should it appear that there is a direct conflict of authority between a decision of the House of Lords and a decision of the Privy Council in this jurisdiction, I am, of course, bound by the decision of the Privy Council except in the case of a matrimonial cause under the Indian and Colonial Divorce Jurisdiction Acts. Whether or no it was open to the magistrate upon the pleadings to determine, as he in fact determined, that there was an agreement to sell and that the appellant was well aware of the existence of a hire-purchase agreement in relation to the car at the time that he agreed to buy, it is indisputable that the conclusions of the magistrate as to both the foregoing questions were conclusions about matters raised by the issues framed by him and upon which the suit was fought. In other words the judgment of the magistrate would appear to come within the four corners of Lord Tomlin’s observations already referred to. I do not think, however, that in reality there is any conflict between the observations of Lord Atkin and those of Lord Tomlin. Lord Atkin in the passage cited is using the word “issues” in the sense in which it is familiar to common lawyers, that is to say as meaning those questions of law or fact raised in the pleadings as being matters in controversy between the parties which are necessary to be resolved for the purpose of determining the action in which they are so in controversy. Lord Tomlin, however, appears to me to be using the word “issue” in the more technical sense in which it was used in the old Courts of Chancery as being those questions formerly postulated by the court as being the questions to which either evidence or argument should

be addressed and as being the questions the answers to which would determine the matters in dispute between the parties.

In effect in any jurisdiction such as this where the system of procedure is based, it no longer directly derived from that of India. Issues in the narrower sense used by Lord Tomlin may be regarded as virtually replacing the pleadings as the ultimate factor in determining the matters to which evidence and argument ought to be directed and to which the court should have regard in arriving at its judgment. That issues framed by the court may go beyond issues raised by the pleadings is apparent from the provisions of sub-r. (5) of r. 1 of O. 14. Those provisions can conveniently be paraphrased as follows: The court shall frame the issues

“on which the right decision of the case appears to depend, after reading the pleadings”,

and

“after such examination of the parties as may appear necessary to ascertain about what material propositions of fact or law the parties are at variance”.

If the court could not go beyond the pleadings in determining what issues ought to be framed it would be useless to confer upon the court the power to examine the parties or their advocates for the purpose of determining in what respects they were at variance. In view of the provisions of O. 14, r. 1 (5) it seems to me therefore quite clear that the court not merely has a right but is under a duty when framing issues so to frame them as to ensure that no party is precluded from obtaining relief to which he is entitled by reason of some technical error in his pleadings.

For these reasons this appeal will be dismissed with costs.

Appeal dismissed.

For the appellant:

MJE Morgan

Mervyn Morgan & Co, Nairobi

For the respondent:

Mrs L Kean

Sirley & Kean, Nairobi

Isadore M K Bagorogoza v Bazilio Mbarinda
[1959] 1 EA 125 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	3 February 1959
Case Number:	849/1958
Before:	Lyon J
Sourced by:	LawAfrica

[1] Practice – Trial – Place of trial – Discretion of court – Factors to be taken into account – Civil Procedure Rules, 0.44, r. 8 (U.) – English Rules of Supreme Court, 0. 36, r. 1.

Editor's Summary

The plaintiff instituted proceedings in the Kampala Registry of the High Court against the defendant for unlawful arrest and unlawful imprisonment by the defendant or his askari at Karungu, Kabale. The plaintiff resided at Mbarara which is 90 miles from Kabale and some 150 miles from Kampala. In support of an application that the place of trial be fixed at Kabale the defendant argued that the alleged incident occurred in or near Kabale, that a view of the locus in quo might be necessary, that his witnesses lived in or near Kabale, and that during the hearing it might be necessary to send for additional witnesses to meet unexpected allegations that might be made by the plaintiff.

Held –

- (i) neither in Uganda nor in England has the plaintiff any longer the right to fix the venue, subject to the discretion of the court to alter the same.
- (ii) the first consideration was the convenience of the parties and witnesses, and the balance of convenience was very much in favour of Kabale.

Application granted.

No Cases referred to in judgment in judgment

Judgment

Lyon J: This is an application by the defendant that the place of trial in this civil case should be fixed at Kabale.

The plaintiff has alleged that in July, 1958, when he was in the market place at Karungu, Kabale, and ready to begin a political meeting, defendant arrived with an askari and plaintiff was arrested. The plaintiff may be summarised in this way, that plaintiff was unlawfully arrested and unlawfully imprisoned by the defendant or his askari, and thereby suffered damage.

I agree with Mr. Starforth that 0. 44, r. 8 gives this court a wide discretion in ruling on an application of this kind.

The plaintiff, I am informed, resides at Mbarara, which is some 90 miles from Kabale and some 150 miles from Kampala. The suit has been filed in the Kampala Registry.

As I understand it, neither in Uganda nor in England has the plaintiff any longer the right to fix the venue subject to the discretion of the court to alter the same. 0. 36, r. 1, Annual Practice (1959) 814. Note:

“Since 1902 the plaintiff has been deprived of the right which he formerly possessed to fix the venue subject to the discretion of the court to alter the same.”

The discretion here must be exercised in accordance with the provisions of 0. 44, r. 8:

“There shall be no local venue for the trial of any suit, cause or issue, except where expressly provided by

Ordinance, but in every suit, cause or issue the place of trial shall be fixed by the court.

“In fixing the place for trial the court may move upon its own motion or upon the application of any party to the suit, cause or issue, and shall have regard to the convenience of the parties and their witnesses, and the date at which the trial can take place, and, when a view may be desirable, the locality of the object to be viewed, and to the other circumstances of the case, including the wishes of and the expense to the parties and the relative facilities for persons attending the trial.”

Mr. Starforth says he will call probably four witnesses, all of whom live in or near Kabale. The case concerns alleged facts which took place in or near Kabale. A view of the locus in quo may be necessary. And further, during the hearing it may be necessary for Mr. Starforth to send for additional witnesses to meet unexpected allegations that may be made by the plaintiff. On the other hand it is true that counsel will have to travel either from Entebbe or Kampala to Kabale if the trial is to take place there, and plaintiff and perhaps one or two witnesses may have to go to Kabale from Mbarara. The first consideration is the convenience of parties and witnesses; and there I think the balance of convenience is very much in favour of Kabale. The trial will not take place for some four or five months. If a view becomes desirable, that will mean that the court will have to go to Karungu.

Finally, I am of opinion that the total expenses in this trial will be considerably less if it is heard in Kabale.

Application granted.

For the applicant/defendant:

MJ Starforth (Crown Counsel, Uganda)

The Attorney-General, Uganda

For the respondent/plaintiff:

AWK Mukasa

BKM Kiwanuka, Kampala

Erimiya Serunkuma v Elizabeth Nandyose for Robert Kyagaba
[1959] 1 EA 127 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	25 February 1959
Case Number:	69/1956
Before:	Bennett J
Sourced by:	LawAfrica

[1] *Review – Appeal from principal court of Buganda dismissed by High Court – Whether High Court has jurisdiction to review its judgment – Whether High Court derives its power in such cases from Civil Procedure Rules or Buganda Courts Ordinance – Civil Procedure Rules, O. 42, r. 1 (U.) – Civil Procedure Ordinance, s. 3 and s. 83 (U.) – Buganda Courts Ordinance, s. 26 (U.).*

Editor's Summary

This was an application by the appellant for review of a judgment of the High Court disposing of an appeal from the principal court of Buganda. The application was made under O. 42, r. 1 of the Civil Procedure Rules and the question argued was whether the court had jurisdiction to hear the application.

Held –

- (i) the legislature intended that the appellate jurisdiction of the High Court under the Buganda Courts Ordinance should be regulated by rules made under that Ordinance and not by rules made under the Civil Procedure Ordinance; and therefore,
- (ii) the court had no jurisdiction to entertain the application for review.

Application dismissed with costs.

Cases referred to in judgment

- (1) *Paulo Shaku v. Alexandra N. Bamuta* (1946), 13 E.A.C.A. 48.
- (2) *Amiri Ntambi v. Alideki Jumbi*, [1959] E.A. 129 (U.).
- (3) *R. v. Joswa M. Kivu* (1942), 9 E.A.C.A. 82.

Judgment

Bennett J: This is an application for a review of a judgment of this court disposing of an appeal from the principal court of Buganda. The application purports to be made under O. 42, r. 1 of the Civil Procedure Rules. There is no right of appeal to the Court of Appeal for Eastern Africa from the judgment of which a review is sought: see *Paulo Shaku v. Alexandra N. Bamuta* (1) (1946), 13 E.A.C.A. 48. It is contended that in these circumstances the applicant's proper remedy is to apply to this court to review its own judgment, and that the case falls within the four corners of O. 42, r. 1. There is certainly nothing in the language of O. 42 which is necessarily inconsistent with its application to judgments of the High Court given in exercise of its appellate jurisdiction under the Buganda Courts Ordinance (Cap. 77). On the other hand, it was held by Sir Audley McKisack, C.J., in *Amiri Ntambi v. Alideki Jumbi* (2), [1959] E.A. 129 (U.), that the Civil Procedure Rules apply only to appeals from subordinate courts and not to appeals from native courts or Buganda courts.

It has not been contended that this court has any inherent power to review its own judgments. I agree with the contention of the respondent's counsel that review, like appeal, is the creature of statute and that a court has no inherent power to review or alter its own judgments, except for the limited purpose of correcting clerical or mathematical errors. In my judgment, unless the present application falls within s. 83 of the Civil Procedure Ordinance it must fail.

Section 3 of the Civil Procedure Ordinance (Cap. 6) reads as follows:

- “3. In the absence of any specific provision to the contrary nothing in this Ordinance shall be deemed to limit or otherwise affect any special jurisdiction or power conferred, or any special form of procedure prescribed by or under any other law for the time being in force.”

As I see it, the appellate jurisdiction created by s. 26 (1) of the Buganda Courts Ordinance is a “special jurisdiction” within the meaning of s. 3 of the Civil Procedure Ordinance and, if this is so, then the Civil Procedure Ordinance and the rules made thereunder do not affect it. I am fortified in this view by the judgment of the Court of Appeal for Eastern Africa in *R. v. Joswa M. Kivu* (3) (1942), 9 E.A.C.A. 82, in which it was held that the appellate jurisdiction of the High Court of Uganda on appeal from the judicial adviser is derived not from the Criminal Procedure Code but from s. 26 (3) of the Buganda Courts Ordinance. To quote from the judgment:

“The appellate jurisdiction which the High Court was exercising in this case was not ‘under this part’ nor, indeed, under the Criminal Procedure Code at all. It was under the special appellate jurisdiction conferred upon the High Court by s. 26 (3) of the Buganda Courts Ordinance.”

Admittedly, in that case the Court of Appeal was considering the appellate jurisdiction created by sub-s. (3) of s. 26 of the Buganda Courts Ordinance, whereas in the instant case I am concerned with the appellate jurisdiction created by sub-s. (1). However, the distinction does not appear to me to affect the principle that s. 26, whether it is dealing with appeals direct from the principal court or with second appeals from the judicial adviser, creates a special jurisdiction, the exercise of which is not governed by the Civil Procedure Ordinance or by the Criminal Procedure Code. Section 26 (2) of the Buganda Courts Ordinance (Cap. 77) provides that

“The Chief Justice may make rules governing the filing and hearing of appeals in the High Court”.

Admittedly no rules have been made. Be that as it may, the fact that the power to make rules has been conferred would seem to indicate that the legislature intended that the appellate jurisdiction of the High Court under the Buganda Courts Ordinance should be regulated by rules made under that Ordinance, and not by rules made under the Civil Procedure Ordinance. For these reasons I hold that this court has no jurisdiction to entertain the present application, and it is accordingly dismissed. The applicant will pay the respondent’s taxed costs of this application.

Application dismissed with costs.

For the appellant:

ES Mbazira

ES Mbazira, Kampala

For the respondent:

GL Binaisa

GL Binaisa, Kampala

Amiri Ntambi v Alideki Jumbi

[1959] 1 EA 129 (HCU)

Division: HM High Court for Uganda at Kampala
Date of judgment: 19 February 1959
Case Number: 35/1958
Before: Sir Audley McKisack CJ
Sourced by: LawAfrica

[1] *Practice – High Court – Reinstatement of dismissed appeal – Powers – No appearance of appellant – Appeal dismissed with costs – Application to reinstate – Civil Procedure Rules, o. 39, r. 14 and r. 16 (U.) – Civil Procedure Ordinance, s. 2 and s. 67 (U.) – Buganda Courts Ordinance, s. 26 (U.).*

Editor's Summary

The appellant had appealed to the High Court from a judgment of the judicial adviser exercising his appellate jurisdiction in respect of a judgment of the principal court of Buganda. When the appeal was called for hearing the advocate for the appellant failed to appear and the appeal was consequently dismissed with costs. The appellant now applied to set aside the order dismissing the appeal and filed an affidavit in support of his application, but did not state whether or not there was any sufficient excuse for his advocate's failure to appear. The respondent did not oppose the application. The only question was whether the High Court had jurisdiction to restore to the list an appeal which had been dismissed by reason of the appellant's failure to appear.

Held – the absence of express statutory provision for restoring the appeal to the list does not preclude this court from subsequently hearing an appeal if there are good grounds for doing so.

Brooksbank v. Rawsthorne (J. L.) & Co., [1951] 2 All E.R. 413, applied.

Application granted subject to payment of costs.

Case referred to in judgment

(1) *Brooksbank v. Rawsthorne (J. L.) & Co.*, [1951] 2 All E.R. 413.

Judgment

Sir Audley McKisack CJ: This is an application to set aside an order of the High Court made on December 22, 1958, dismissing an appeal with costs. The record shows that on the date fixed for the hearing of the appeal the respondent appeared, by his advocate, but there was no appearance by the appellant. The appeal was from a judgment of the judicial adviser exercising his appellate jurisdiction in respect of a judgment of the principal court of Buganda.

The present application is made on grounds set out in an affidavit by the applicant in which he states that the advocate who was then acting for him, Mr. Stanley Sessanga, failed to appear when the appeal was called. There is no affidavit by the advocate himself, nor does the applicant's affidavit reveal whether or not there was any sufficient excuse for Mr. Sessanga's failure to appear. Were this application opposed on the merits, I should be inclined to hold that the affidavit in support of the application was

inadequate, but Mr. Mukasa, who appears for the respondent, says that he does not oppose the application, provided the applicant is ordered to pay the costs involved.

But I must also consider whether the High Court has jurisdiction to restore to the list an appeal which has been dismissed by reason of the appellant's failure to appear. Were this an appeal from a subordinate court, the necessary

power would be found in the Civil Procedure Rules, O. 39, r. 14 and r. 16. But those rules apply only to appeals from subordinate courts, and not from native courts or Buganda courts (see s. 67, Civil Procedure Ordinance and the definition of “subordinate court” in s. 2). Appeals from the judicial adviser are governed by the Buganda Courts Ordinance (Cap. 77), and that Ordinance contains no provision relevant to the question I am considering. Nor have any rules applicable to that question been made under s. 26 (2) of that Ordinance. There is, therefore, no express statutory power enabling me to do what this application asks me to do. But I should be loath to have to decide that the application, which is not in fact opposed, must nevertheless be rejected on that ground, since it might amount to a denial of justice. I do not doubt that, although there are no rules or other statutory provision saying that an appeal from the judicial adviser may be dismissed if the appellant fails to appear when the appeal is called on for hearing, the High Court nevertheless has power to do so, since that is obviously a proper course to take. Similarly, it seems to me to follow that the absence of express statutory provision for restoring the appeal to the list does not preclude this court from subsequently hearing the appeal if there are good grounds for doing so. In so deciding, I find assistance in the short report of *Brooksbank v. Rawsthorne (J. L.) & Co.* (1), [1951] 2 All E.R. 413. There the appellant had failed to appear and the Court of Appeal made an order dismissing the appeal with costs; subsequently the appellant moved for the appeal to be reinstated, the other party opposing on the ground that the appeal had already been heard and determined; the Court of Appeal held that the appeal had not been heard and determined and that they had jurisdiction to hear the application.

In the case now before me the position is very similar. When the appeal came before the High Court on December 22 last it was not “heard and determined” but, for want of the appellant’s appearance, dismissed without a hearing. This application will accordingly be granted, but subject to the applicant paying within fourteen days (if he has not already paid them) the respondent’s costs awarded in the lower courts. The applicant will also pay the costs of this application, and of the proceedings on December 22, 1958, in any event.

Application granted subject to payment of costs.

For the appellant:

ES Mbazira

ES Mbazira, Kampala

For the respondent:

AWK Mukasa

BKM Kiwanuka, Kampala

Norman v Overseas Motor Transport (Tanganyika Limited)
[1959] 1 EA 131 (CAD)

Division: Court of Appeal at Dar-Es-Salaam

Date of judgment: 26 February 1959

Case Number: 88/1958

Before: Forbes V-P, Gould and Windham JJA
Sourced by: LawAfrica
Appeal from: H.M. High Court of Tanganyika–Crawshaw, J

[1] Sale of goods – Motor-car – Claim for damages for delivery of defective car – Stipulation by vendor that liability ends when car delivered in roadworthy condition – Car delivered in England for use in East Africa – Material defect due to modifications for tropical use not being effected – Whether purchaser can repudiate contract – Sale of Goods Ordinance, s. 13, s. 16, s. 37 and s. 56 (T.) – Indian Code of Civil Procedure, O. 14, r. 1 (5) – Indian Evidence Act, 1872, s. 91 and s. 92 – English Sale of Goods Act, 1893, s. 11, s. 14, s. 35 and s. 55.

Editor's Summary

The appellant, after a demonstration of a similar model took delivery of a new Morris Isis saloon car in England in pursuance of a written agreement with the respondent. The written agreement, amongst other things, stipulated that the supplier's liability ends with the arrival of the vehicle in a roadworthy condition at the place of delivery. During the first three days after delivery the appellant had trouble with the gearbox and rust appeared on the bumper. The car was returned to the suppliers who replaced these parts. The appellant also complained of the paint flaking in places but decided to get this attended to when the time for his return to East Africa was nearer. Further trouble developed with the car and by mid-July the car could not be driven at less than 25 m.p.h. in top gear or less than 15 m.p.h. in third. The suppliers again attended to the car but the trouble later returned. He wrote to Morris Motors Ltd. complaining about the defects and asked for a new car in replacement. They refused this but offered to give him the full benefit of the warranty which had been supplied with the car. On August 28 he shipped his car to Cape Town as he proposed to drive it from there, and Nuffield Exports Ltd. informed him they had made arrangements for their distributors in Cape Town to take the necessary action to put the car right. The appellant declined to stay at Cape Town as he had to return to Tanga in time to resume work with the Tanganyika Government. On the way trouble persisted and between Bloemfontein and Bulawayo the water in the radiator began to boil and he could not drive the car at more than 40 m.p.h. during the hot hours of the day. At Bulawayo he handed in the car to the Nuffield agents who worked on it for seven days but were unable to prevent the overheating. While there he wrote to Sir Leonard Lord of the British Motor Corporation. A reply addressed to Tanga stated that a special radiator cap was being sent to Bulawayo as this might have caused the overheating. The appellant drove on to Dar-es-Salaam with the same troubles persisting and before the radiator cap had arrived. The day following his arrival in Dar-es-Salaam, he handed the car in to the respondent, explained what had happened and asked for either a new car or the refund of the purchase money. He had by then done 8,200 miles and the only trouble then was overheating of the engine. The respondent informed the appellant that the defect in the car could be repaired but the appellant said he did not want the car. On November 20, 1957, the appellant sued the respondent for Shs. 17,566/- for the cost of the car and the further sum of Shs. 40/- per day from October 1, 1957, until judgment for inconvenience caused. The respondent in the meantime was engaged in curing the defect and on December 4, 1957, wrote to the

appellant that certain modifications had been carried out and that, subject to final road tests, the car was perfectly fit for use. At the trial the appellant contended that the present condition of the car did not affect his right to reject the car. The trial judge found that the defects had been cured, rejected the appellant's claim for Shs. 17,566/- and awarded him Shs. 390/- damages for inconvenience at the rate of Shs. 10/- per day, but ordered him to pay the costs. The appellant thereupon appealed and the substantial point argued on appeal was whether the car was in a roadworthy condition at the time of delivery. The appellant also contended that as the trial judge did not frame issues he had failed to apply his mind to the question whether the vehicle was in fact fit for use at the time of delivery.

Held –

- (i) the appellant must be held to have treated any breach of condition arising from the defects other than overheating as a breach of warranty under s. 13 of the Ordinance, and since the defects were all remedied and he continued to use the car, he could not now rely on them to repudiate the contract.
- (ii) the overheating of the car was due to the failure to effect modifications which it is usual to effect when, and not before, a car is brought to the tropics; in the circumstances, therefore, it could not be said that the car was not in a roadworthy condition when delivered.
- (iii) the failure to frame issues was an irregularity, but notwithstanding such failure, the parties at the trial knew what the real question between them was, evidence on the question had been taken and the court had duly considered it. *Mt. Mitna v. Syud Fuzl* (1870), 13 Moo. I.A. 573, applied.

Obiter: “Another issue in the case . . . is whether the appellant's action in continuing his journey after the development of the overheating defect was reasonable in the circumstances, or whether it was such an exercise of rights of proprietorship as to deprive him of his right, if any, to reject the car subsequently upon his arrival in Dar-es-Salaam.”

Appeal dismissed. Damages increased to £34 10s. 0d. owing to miscalculation thereof.

Cases referred to in judgment

- (1) *Bristol Tramways, etc., Carriage Co. Ltd. v. Fiat Motors Ltd.*, [1910] 2 K.B. 831.
- (2) *Grant v. Australian Knitting Mills Ltd.*, [1935] All E.R. Rep. 209; [1936] A.C. 85.
- (3) *Mt. Mitna v. Syud Fuzl* (1870), 13 Moo. I.A. 573.

February 26. The following judgments were read by direction of the court:

Judgment

Forbes V-P: This is an appeal from a judgment and decree of the High Court of Tanganyika in a suit wherein the appellant (the original plaintiff) claimed from the respondent damages in the sum of Shs. 17,566/- together with the further sum of £2 per day from October 1, 1957, until judgment, and the costs of the suit. The High Court awarded the appellant the sum of £19 10s. 0d. as damages and ordered him to pay the costs of the suit. The appellant appeals against this decision.

At the material time the appellant was an inspector of works in the Public Works Department at

Tanga. The respondent is a limited liability company incorporated in Tanganyika and carrying on business in Dar-es-Salaam.

The material part of the plaint for the purposes of this appeal is as follows:

- “3. On or about April 8, 1957, the plaintiff entered into a verbal contract to buy from the defendant a new Morris ‘Isis’ saloon motor-car at the price ex works in England of Shs. 12,160/- which sum was paid by the plaintiff to the defendant on April 8, 1957. The said contract was made and the money paid after the defendant had, by its servants, demonstrated and shown a similar motor-car to the plaintiff. It was an implied term of the said contract that the vehicle would be fit for use in all respects by the plaintiff. It was further agreed that the plaintiff would take delivery of the said vehicle in England. The plaintiff duly took delivery of the said vehicle on May 16, 1957.
- “4. The defendant created a breach of the said contract by supplying the vehicle in a defective condition in that the cooling system, engine, transmission, gearbox and rear bumper bar were not of the quality necessary to enable the vehicle to be reasonably used by the plaintiff and the vehicle was not capable of performing the purpose for which it was supplied. The paintwork of the vehicle also was defective and of poor workmanship and quality. A breach of the said implied term of the contract was also created by the defendant in supplying a vehicle which was not fit for use by the plaintiff and which was grossly inferior in quality and workmanship to the vehicle exhibited and demonstrated to the plaintiff by the defendant.”

In the written statement of defence it is pleaded, *inter alia*:

- “1. The allegation in para. 3 of the plaint is admitted.
- “2. With regard to the allegations in para. 4 of the plaint the defendant denies that—
 - (a) the vehicle was delivered to the plaintiff in a defective condition.
 - (b) the cooling system, engine, transmission system, gearbox and rear bumper bar were defective as alleged.
 - (c) the vehicle was not capable of performing the purpose for which it was supplied.
 - (d) the paintwork was defective and of poor workmanship and quality.
 - (e) the vehicle was not fit for use.
 - (f) the vehicle was grossly inferior in quality and workmanship to the vehicle exhibited and demonstrated to the plaintiff.
- “3. The defendant denies that the defendant committed a breach of contract.
- “4. It is a term of the contract between the plaintiff and the defendant that the supplier’s liability ends with the arrival of the vehicle in roadworthy condition at the place of delivery, a copy of the said contract is annexed thereto and marked ‘A’.
- “5. The defendant says that the vehicle was delivered in roadworthy condition to the plaintiff in England by Nuffield Exports Ltd., and the defendant is not liable to the plaintiff for the alleged defects in the car.
- “6. In the alternative to para. 4 and para. 5 above the defendant says that on or about October 7, 1957, the plaintiff complained to the defendant of overheating of the car engine and delivered the car to the defendant for attending to it. The defendant carried out the necessary modification and informed the plaintiff to inspect the car and recover it from the defendant’s

premises, and take it. The defendant says that the car is in roadworthy condition and the plaintiff is not entitled to claim any damages, for the alleged implied terms of the contract that the vehicle would be fit for use.”

I take the following statement of the facts from the judgment of the learned trial judge:

“On April 8, 1957, the plaintiff, prior to going to England on leave, purchased from the defendant company in Dar-es-Salaam a new Morris Isis (Series II) saloon motor-car for delivery in England, having first had a demonstration trial in an estate car of similar type in Dar-es-Salaam. He took delivery of the saloon in England on May 16 from the Morris Motors Ltd. dealers, Marshalsea Brothers, of Taunton. The evidence is that it was a new model that year and had only just come on the market. The next day he motored to Wales and during the three days he was there he says the gearbox caused trouble in that the gear would not remain in third position. Two days later rust appeared on the bumper. He returned the car to Marshalsea on the fifth day after delivery, and on June 11, Marshalsea informed him that a new gearbox and bumper had been received. He says that about this time ‘the paintwork started flaking’ on various parts of the body, but it was thought it would be better to defer attending to this until nearer the time of his departure for Africa as, not unnaturally, he wanted the use of the car. He says that after this rainwater penetrated through the windscreen and the hinged side lights on the front doors, and that by the middle of July the engine gave trouble in that the car could not be driven at less than 25 m.p.h. in top gear or less than 15 m.p.h. in third, it having four forward gears; below these speeds it jerked. He returned it to Marshalsea the second week in August for attention to this, and he says they made some improvement but that the trouble later returned.

“2. The plaintiff wrote to Morris Motors Ltd. asking for a new car in replacement, and by a reply of August 1 (exhibit B. 3; there was also a second letter from Morris Motors Ltd. of the same date, exhibit B. 4) he was informed in para. 3 thereof:

‘We are needless to say extremely sorry to learn of the further defects you bring to our notice being in existence on your abovementioned car, and although we will be perfectly prepared to provide you with the full benefit of the warranty, we cannot make any arrangements for an exchange vehicle to be supplied.’

“They suggested he took the car again to Marshalsea who would ‘carry out whatever repairs they consider necessary under the terms of the warranty, subsequently submitting a charge to this department’. At some time before it was shipped to Africa it seems that the paintwork was ‘touched up’ by Marshalsea.

“It seems that at one time Marshalsea had suggested to Morris Motors Ltd. that the car should be returned to the factory for attention, but in their letter of August 1 (exhibit B. 3) the plaintiff was informed that this was impracticable because the works were then on holiday and owing to pressure of work it would not be possible for them to attend to the matter during the period immediately following.

“3. On August 24 the plaintiff wrote direct to Sir Leonard Lord of the British Motor Corporation. This was a general letter of complaint, setting out the car’s defects to date, but making no specific request. In it he expressed it as his opinion that the car was ‘unsuitable for export under the conditions in which it will have to operate’, and ‘was it not for the

question of the purchase tax I would sell the car and cut my losses'. These last three words may be indicative of what the plaintiff thought at the time was the limitation of his legal rights.

- "4. He drove the car up to August 23, by which time it would seem that he had travelled approximately 5,000 miles in it, and shipped it on August 28 to Cape Town, accompanying the vehicle himself as he intended driving it from there to Tanganyika. The letter to Sir Leonard Lord was passed to Nuffield Exports Ltd., who on September 6 wrote in reply to the plaintiff's Tanga address. From the evidence of the plaintiff it would seem that he received this letter before leaving Cape Town; para. 3, para. 4 and para. 5 read as follows:

'We have pleasure, therefore, in informing you that we have requested the technical director of our distributors in Cape Town to make contact with you upon arrival in order to examine your car and take the necessary action to give you satisfaction.

'Mr. Weldon is well known to us as a man of complete integrity and sound judgment and we are convinced that you may have complete confidence, both in his will and ability to assist you.

'Overcoming the water leaks should not take very long, but should any extensive rectification of the paintwork prove necessary, we would much prefer you to delay your departure from Cape Town for a day or two so that such work could be completed at Norton Motors Ltd. When you have examined the facilities at Cape Town, we are sure you will agree that your satisfaction is more likely to be assured there than in Tanga.'

- "5. The plaintiff says that in Cape Town Mr. Weldon tried out the car and said he would like the plaintiff to stay there whilst he tried to put it right and that he, Weldon, would not personally drive the car in its then condition, but that it would not harm it to do so. The plaintiff says he declined to stay as he was on a 'tight' schedule to get back from leave to Tanga, where he was to resume work, being an employee of the Tanganyika Government. The trouble with the engine at that time was, he says, the same difficulty of low speed in top and third gears. No repairs were therefore carried out in Cape Town.

- "6. He left Cape Town on September 8, and he says that during the 600 miles' drive to Bloemfontein he suffered no overheating troubles; in fact there had not previously been this trouble. After leaving Bloemfontein, however, the water in the radiator began to boil, and he says he could not drive it more than 40 m.p.h. without this happening during the hot hours of the day between 10.30 a.m. and 4 p.m. At Bulawayo he handed the car to Nuffield's agents or dealers, Motor and Cycle Supplies Ltd., who, he says, worked on it continuously for seven days but were unable to prevent the overheating. From there he wrote another letter of complaint to Sir Leonard Lord on September 27. Again Nuffield Exports Ltd. replied to Tanga, by letter dated October 4, in which they said:

'... After our previous correspondence with you we are extremely concerned to learn of this fresh trouble which you are experiencing with your car.

'As you are already aware, a number of similar complaints have been received from Central Africa within the last ten days and as this complaint is new to us since its cure in the very early "Isis" production we have not yet been able to establish the underlying cause.

‘A special meeting was held this morning to go into your case at which senior technical officials of the experimental development and radiator manufacturing department were in attendance.

‘It was reported that the appropriate tests were already in progress, the outcome of which we are now awaiting.

‘The first positive report to hand suggests that there may be an error in the radiator pressure cap and we are therefore sending Motor and Cycle Supplies Ltd. by air today a specially tested radiator cap for use on your vehicle.’

“The cap, he says, did not arrive in Bulawayo before he left, nor, I suppose, on the dates, did he receive the letter there either.

“7. From Bulawayo to Dar-es-Salaam, he says, the overheating was as bad, or worse, than before. In spite of all, he averaged about 350 miles per day throughout the eight days of actual motoring from Cape Town, but this could, of course, have been mostly done during the cooler hours of the day. He was three days late from leave on arriving in Dar-es-Salaam on October 3, and the next day he handed the car in to the defendants. The plaintiff had not previously communicated with the defendants but says that on handing it in he informed Mr. Moss, their service manager, of all the troubles and showed him letters he had written to Sir Leonard Lord and Nuffield Exports Ltd., and explained exactly what was wrong with the car. He says he had written from Bulawayo to Nuffields saying that he was going to hand back the car and that he wanted either his money back or a replacement, and this he told Moss. He says he thinks he had then done about 8,200 miles in the car in all. He says he did not ask the defendants to try out the car, or give them an opportunity to repair it on his behalf, and it is clear on the evidence as a whole that right up to the time of his cross-examination in this court he persisted in his attitude that he would have nothing further to do with it. When asked in cross-examination, ‘What do you say now, do you want the car back or do you want that O.M.T. should take it away?’, he replied, ‘I don’t want the car’. Moss, in evidence says he told the plaintiff he thought he could cure the trouble and that the plaintiff replied, ‘I am not interested, I don’t want the car. You can do what you like with it, here are the keys’.

“Moss says that he tested the car and readily admits it was running very badly and was overheating, and that there was very little power because of bad timing. He described a number of adjustments he did to the car, including the removal of the ‘thermostat which was all corroded up and would definitely cause overheating’, and resetting of the tappets, which he said was also desirable in a hot climate. He says that after the work was done he took it for two tests, the second being over 200 miles of tar-macadam road, extensively using the gears, and was satisfied it was not then overheating, and he so wrote and informed Nuffields. The plaintiff admitted that he received a letter from the defendants of December 4 saying they had carried out modifications, and subject to final road tests, the car was perfectly fit for use, and this he handed to his lawyers, but did not thereafter himself test the car or have it tested by a representative; he explains he was in Tanga.”

When the letter of December 4, 1957, was sent, the suit had already been instituted, the plaint having been filed on November 20. Further tests of the car were subsequently carried out, some during the hearing of the suit, and it was conceded by Mr. Dodd for the appellant that the evidence established that the car had, in fact, been put in order since the institution of the suit, though he claimed that this did not affect the appellant’s right to reject the car.

The learned trial judge found that “the witnesses have all appeared to be refreshingly frank and honest” and he continued:

- “17. Leaving aside for the moment the question of overheating, there can be no doubt that the plaintiff had accepted the car within the meaning of s. 37 of the Sale of Goods Ordinance (Cap. 214) and s. 35 of the Sale of Goods Act, 1893. Admittedly at one time in England he had requested the manufacturers to replace it or else to return his money, but this had been refused and the plaintiff continued to run the car in England and subsequently to bring it out to Africa. In fact, had it not been for the overheating, which did not occur until he reached the hotter parts of Africa, the matter would presumably never have been brought to court at all for the plaintiff says that this latterly was the only trouble he had with the car.
- “18. Although the case of *Baldry v. Marshall*, [1925] 1 K.B. 260, was referred to by Mr. Dodd, the question whether there was a condition as to fitness under s. 16 (a) to our Sale of Goods Ordinance or s. 14 (1) of the English Act was not mentioned by counsel for either party. After reading *Baldry* and also *Bristol Tramways, etc., Garage Co. Ltd. v. Fiat Motors Ltd*, [1910] 2 K.B. 831, it is my view that this Morris Isis (Series II) saloon was sold under its trade name and that the plaintiff was not relying on the skill and judgment of the defendants. Admittedly Sargant, L.J., in delivering his judgment in the *Baldry* case, expressed his view that the proviso to s. 14 (1) did not apply to an article like a motor-car, but this obiter seems to me to have gone further than did the judgments of the other appeal judges in that case and the *Bristol Tramway* case, which by no means appeared to rule out the possibility of motor-cars being sold under their trade names for purposes of the proviso. Admittedly cl. 6 of the agreement says, ‘No variation in vehicle specification . . . shall invalidate this contract’; there is no suggestion of course that there was any variation, or that any variation was contemplated by that clause of a nature which would affect the general description of the car. I suppose that many articles, other than motor vehicles, which are incontrovertibly sold under trade names, may from time to time be modified in one way or another as the manufacturers think best, without losing their character under the trade name. There are, of course, these days many different models of very similar specifications, mostly mass produced, from which a purchaser can choose, and a person I would say normally makes his decision from what he hears from friends and from his own experience and from what he reads in the press reports which frequently appear on the production of a new model. There is certainly nothing in the evidence to suggest that he was influenced by the defendants, other than by his own experience in the car of similar type (although I understand of a somewhat dissimilar model) which he was allowed to try out. I doubt if it could be said, however, in these days of world-wide distribution of most makes of cars, that high speeds in tropical climate was a particular purpose, within meaning of the proviso.
- “19. I do not, however, think I need to decide this point for reasons which will follow. Mr. Dodd has said that the plaintiff, even though he may have accepted the car, was entitled to return it to the vendors as being not of merchantable quality for the purpose for which it was sold. It is true, of course, that this right of rejection may arise after a purchaser appears to have accepted an article if that article has a latent defect which a purchaser cannot by reasonable inspection or early trial detect. Such a defect may not appear for some considerable time, as in this instance if the car was to be used for a period in a cool climate and only subsequently in a very hot climate. Even if this right of rejection would in certain circumstances

still be available to the plaintiff after the very considerable mileage he had done in the car, and after several months of ownership, it does not mean that the right can be exercised if the defect is of a nature which can reasonably be cured. The defects in the car and the troubles experienced by the plaintiff from time to time with it are not, apart from the overheating, now relevant in my opinion, for they were apparently all remedied at the expense of the manufacturers or their agents or dealers, and the plaintiff continued to use the car thereafter. Indeed, he has not particularised them in his plaint, nor made any specific claim in respect of any of them.

- “20. When he arrived in Dar-es-Salaam the only remaining trouble was, he says, overheating. It was a defect readily admitted by the defendants and a failure apparently recognised by the manufacturers as peculiar to the model, for they said in a letter that they had had other similar complaints from owners in Central Africa and were endeavouring to find a suitable remedy. A defect does not, however, necessarily give a purchaser the right to reject or return the article purchased if that defect can be remedied. In the instant case the defect was a recent one and the plaintiff's only attempt at having it remedied was at the garage in Bulawayo, where he says they informed him that they could do no more than they had done, and that that was unsuccessful. The defendants, however, the sellers, informed him that they thought that they could remedy it and it seems to me that he could not rightly withhold from them the opportunity to try and do so. He was, however, unprepared to give them the chance.
- “21. When this action started, the plaintiff was not apparently prepared to call in evidence that the car could not be, or had not been put right by the defendants (what the Bulawayo garage is alleged to have said can hardly be regarded as conclusive against the defendants), and it is difficult to see how his claim could have been successful, except to the small extent I shall mention later. When the hearing was interrupted to enable the plaintiff to inspect the car and for a possible settlement, a chance was then introduced for the plaintiff to produce this evidence, evidence which is all important to the plaintiff's claim. I am afraid it falls short, however, of satisfying me that the car has not been put right. It amounts in effect to no more than that on the tests at which he was present the temperature gauge needle showed well above the normal. In spite of high speeds in tropical conditions, carried out with the sole intent of checking if the old trouble was still present, the engine did not boil or become sluggish; in fact there was no indication of overheating at all, apart from the needle. More than one expert witness has said that the needle might not be accurate. The plaintiff admits that after the test he did not speak about it with Moss or anyone belonging to the defendant company; in other words he was prepared to assume that the machine was still defective, even though he had found that the engine did not now boil as it used to do, which was surely at least a pointer.
- “22. Not only has the plaintiff failed to satisfy me that as a result of this test overheating is proved to be still present, but there is positive evidence which I see no reason to disbelieve that at a later test with a new temperature gauge the needle remained at normal in spite of sustained high speeds. Admittedly this last test was only a few days before the date fixed for the continued hearing and it gave the plaintiff little opportunity to avail himself of a further one. As, however, the test related to such a vital matter, I find it rather surprising that he did not, if he was himself in Tanga, call an expert (there are many qualified people in Dar-es-Salaam) to test out the new gauge. If necessary the court might well have been

prepared in the circumstances to adjourn the hearing further for this to be done.

- “23. It is no use the plaintiff relying on letter from the manufacturers or admissions by the defendants prior to December, 1957, for it was only on December 4 that the defendants wrote to the plaintiff that the car was then in order. The plaintiff should then have satisfied himself that this was so, and I think he acted unreasonably in not doing so; he would not, presumably, at that stage even have seen the correspondence between the defendants and Nuffields, but even had he done so he could not rightly ignore the possibility that a remedy had been found. If the trouble had been cured his relief was in damages, not rejection.
- “24. The only evidence that I have found rather confusing is that relating to the actual modification and tests carried out to the car by the defendants between the time it was handed to them by the plaintiff on his arrival in Dar-es-Salaam and their writing to him on December 4. I at first gathered from the evidence of Moss that the modifications which he had carried out within, I understood him to say, nine days or so of receiving the car, had been entirely satisfactory, but the plaintiff was not then informed of this nor would it appear from the letter from the defendants to Nuffields of October 26, 1957, to have been so, for that letter refers to the engine still overheating in spite of the completion of the several modifications referred to therein. Part of the modifications were, I understand, done at Bulawayo, although the letter reads as if they have all been done by the defendants. Whether the observation in the letter, ‘It still continues to overheat’ is because of the position which the temperature gauge needle took up or is based on some other ground, I do not know. Moss says that this letter was based on what the plaintiff had told them, and to some extent anyway that may be so, for it says, ‘Mr. Norman reports that he has a serious falling off in performance following the overheating’. Anyway, Nuffields replied in their letter of November 22 to the defendants suggesting further tests, and the defendants on December 4 wrote to the plaintiff and to Nuffields saying that the car was then fit for use; as I have said, the plaintiff was not then in my opinion justified in assuming that it was not.
- “25. For the reasons given I disallow the plaintiff’s claim for Shs. 17,566/-.”

The memorandum of appeal sets out a number of grounds of appeal, two of which I will refer to specifically later. In general, however, Mr. Dodd’s principal arguments for the appellant, as I understood them, were as follows: That the appellant’s claim must be considered on the basis of the oral contract alleged in para. 3 of the plaint since this contract is admitted in para. 1 of the defence and it is not pleaded that the oral contract was superseded by the written contract; that the learned trial judge was wrong to hold that the vehicle was bought under a trade name, as there was no evidence to support such a finding; that accordingly para. (a) of s. 16 of the Sale of Goods Ordinance (Cap. 214) applied and it was therefore an implied condition of the contract that the car would be reasonably fit for the purpose for which it was required; that para. 3 of the plaint alleged, *inter alia*, that “It was an implied term of the said contract that the vehicle would be fit for use in all respects by the plaintiff”, and that this was admitted by para. 1 of the defence; that in any case the appellant was entitled to the benefit of para. (b) of s. 16 of the Sale of Goods Ordinance; that the car as supplied was neither fit for the purpose for which it was required, within the meaning of para. (a) of s. 16 of the Sale of Goods Ordinance, nor was it of “merchantable quality” within the meaning of para. (b) of that section; that this is clear from admissions of the respondents and of

persons who must be taken to be agents of the respondent, e.g. Morris Motors Ltd. and Nuffield Exports Ltd.; that the defects were not capable of ascertainment at the time of delivery and were not remedied until after the car was handed back and the suit filed; that accordingly the appellant was entitled to reject the car at the time he handed it back to the respondent and that there was nothing to show that the rejection had not been accepted by the respondent; and that the appellant was therefore entitled to succeed in the action.

The first question for decision, as it seems to me, is whether the contract to be considered is the oral contract alleged in para. 3 of the plaint, or the written contract mentioned in para. 4 of the defence. Mr. Master for the respondent submitted that every written contract is preceded by an oral contract and that the admission in para. 1 of the defence of the existence of such an oral contract in this case did not exclude the subsequent written contract; that the oral contract was embodied in the subsequent written contract; that the written contract was sufficiently pleaded; and that, as the contract had been reduced to writing, under either English law or s. 91 and s. 92 of the Indian Evidence Act (which applies in Tanganyika) regard can only be had to the written contract.

There is no doubt that the oral agreement between the parties was reduced into writing, and I think that this written agreement was sufficiently pleaded in the defence. A copy of the written agreement was annexed to the defence, and it is clear from para. 4, para. 5 and para. 6 of the defence that the respondent relied on terms of the written agreement. A copy of the written agreement was also in evidence as exhibit F. It is dated April 8, 1957, the date on which the oral agreement is alleged to have been made, and it was admitted by the appellant in evidence that it contained the terms of purchase. Paragraph 10 of the written "Supplier's Conditions of Sale" on the reverse of this written agreement of April 8, 1957 (which I will refer to hereafter as the written agreement), requires that the written agreement is to be construed in accordance with English law. I think this provision excludes the application *eo nomine* of s. 91 and s. 92 of the Indian Evidence Act, which provide, in effect, that where the terms of a contract have been reduced to the form of a document, regard can only be had to the document itself, and that no evidence of any oral agreement is to be admitted for the purpose of contradicting, varying, adding to, or subtracting from the terms of the document. However, the point is immaterial, for the principle applicable under English law is essentially the same—see Pollock on Contracts (11th Edn.) at p. 201 and the cases there cited.

I am accordingly of opinion that regard must be had to the written agreement only, and not to the oral agreement which preceded it. This does not necessarily mean, however, that terms to be implied in a contract of sale under the Sale of Goods Ordinance (hereinafter referred to as the Ordinance) or (in view of para. 10 of the "Supplier's Conditions of Sale") the English Sale of Goods Act, 1893 (hereinafter referred to as the Act) would be excluded. (The Ordinance and the Act are in *pari materia*, though the numbering of the sections is different. Counsel in the course of argument referred to the provisions of the Ordinance, and for convenience I propose to do the same, merely inserting bracketed references to the corresponding provisions of the Act.) Mr. Master, however, referred to s. 56 of the Ordinance (s. 55 of the Act) and submitted that here the rights of the parties were governed by express agreement which excluded the conditions implied under s. 16 of the Ordinance (s. 14 of the Act). Section 56 of the Ordinance, so far as it is material, reads as follows:

"56. Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, . . ."

I incline to the view that Mr. Master's contention is correct, but I do not think that the difference is significant. The written agreement, which is in the form of a purchase order, states:

"Conditional upon acceptance by Nuffield Exports Ltd. of this purchase order the purchaser agrees to buy and the supplier to sell the vehicle and services set out herein at the price stated in the schedule above or such other price as shall become payable in accordance with the terms and conditions of supply set out on the reverse hereof."

Among the terms and conditions set out on the reverse of the written agreement are the following:

First, under the heading "Supplier's Conditions of Sale" (to which I have already referred)–

- "1. Conditions of Sale and Warranty.–All vehicles supplied under the purchase options listed overleaf are subject to Nuffield Exports Ltd. terms of business and sold with benefit of the manufacturer's warranty."

Secondly, under the heading "Nuffield Exports Ltd. Terms of Business"–

"All vehicles manufactured for export by Morris Motors Ltd., Wolseley Motors Ltd., Riley Motors Ltd., and the M.G. Car Company Ltd., are initially marketed by Nuffield Exports Ltd. (hereinafter called 'the company'.)"

Thirdly, under the heading "Warranty"–

"The goods sold by Nuffield Exports Ltd. (hereinafter called 'the company') are supplied with the following express warranty of the manufacturing company, hereinafter called 'the manufacturer', which excludes all warranties, conditions and liabilities whatsoever implied by the common law, statute or otherwise:

.....

- "2. For a period of six months from the date on which a new vehicle or part supplied by the company is delivered to the first owner-user thereof the manufacturer will exchange or repair any part or parts thereof which needs or need replacing or repair by reason of defective materials or defective workmanship.
- "3. The manufacturer will not be responsible for any expense which the purchaser may incur in removing or having removed or in replacing or having replaced any part or parts to be sent for inspection or in fitting or having fitted any new parts supplied in lieu thereof."

It is not entirely clear to me that, in so far as the supplier is concerned, there is an express exclusion of conditions implied by s. 16 of the Ordinance (s. 14 of the Act). The manufacturer's warranty contains such an express exclusion, and that warranty is incorporated by reference into the conditions of sale of Nuffield Exports Ltd. So far as the supplier is concerned, however, cl. 1 of the "Supplier's Conditions of Sale" merely states that "All vehicles supplied" are "subject to Nuffield Exports Ltd. terms of business and sold with benefit of the manufacturer's warranty". I do not think it necessary to decide the point, however, as it seems to me that the last sentence of cl. 6 of the "Supplier's Conditions of Sale" is of substantially the same effect as the conditions to be implied under s. 16. The clause reads as follows:

- "6. Supplier's Liability.–No variation in vehicle specification, place or time of delivery, or change in cost of ancillary services shall invalidate this contract or impose any liability whatsoever on the supplier. The supplier's liability ends with the arrival of the vehicle in roadworthy condition at the place of delivery."

In the absence of any authority on the point (and I have not found any) I would read the words “roadworthy condition” in the contract as meaning “fit for use upon the road”, that is, in relation to a motor vehicle, that it is substantially of “merchantable quality” within the meaning of s. 16 (b) of the Ordinance. If I am right in this construction, the authorities cited by Mr. Dodd for the appellant will still be relevant even if the implied conditions under s. 16 of the Ordinance do not apply.

Before considering the authorities it is convenient to deal with two specific matters in the learned trial judge’s judgment to which Mr. Dodd objected. The first point is the learned judge’s finding that “this ‘Morris Isis (Series II) saloon’ was sold under its trade name”. With respect, I doubt whether this finding is correct. As was remarked by the learned judge himself in the first paragraph of his judgment,

“The evidence is that it was a new model that year and had only just come on the market”.

In the circumstances it is difficult to see how the name “Morris Isis” could yet have attached to this type of engine.

“A trade name has to be acquired by user, and whether it has or has not been so acquired is a question of fact in each case.”

Per Farwell, L.J., in *Bristol Tramways, etc., Carriage Co. Ltd. v. Fiat Motors Ltd.* (1), [1910] 2 K.B. 831 at p. 840. I do not think it necessary to decide the point, however, since, on the view I take, it is not material. In my view the matter depends on cl. 6 of the “Supplier’s Conditions of Sale”.

The second matter is more important. In paragraph 23 of his judgment the learned trial judge said:

“It is no use the plaintiff relying on letters from the manufacturers or admissions by the defendants prior to December, 1957, for it was only on December 4 that the defendants wrote to the plaintiff that the car was then in order”.

It is not entirely clear whether the learned judge is referring to admissions in respect of the overheating of the engine only, or to admissions in respect of the other several defects which developed in the car after delivery. Mr. Dodd argued that the appellant was entitled to rely on all these defects; that the admissions in respect of all the defects clearly showed that the car was in a defective condition when supplied; and that therefore, following *Grant v. Australian Knitting Mills Ltd.* (2), [1936] A.C. 85, the appellant was entitled to reject the car even if the defects could be remedied. *Grant v. Australian Knitting Mills Ltd.* (2) was not cited to the learned trial judge, but, so far as the defects other than the overheating are concerned, I do not think it helps the appellant. The learned judge said at para. 17 of his judgment:

“17. Leaving aside for the moment the question of overheating, there can be no doubt that the plaintiff had accepted the car within the meaning of s. 37 of the Sale of Goods Ordinance (Cap. 214) and s. 35 of the Sale of Goods Act, 1893. Admittedly at one time in England he had requested the manufacturers to replace it or else to return his money, but this had been refused and the plaintiff continued to run the car in England and subsequently to bring it out to Africa. In fact, had it not been for the overheating, which did not occur until he reached the hotter parts of Africa, the matter would presumably never have been brought to court at all for the plaintiff says that this latterly was the only trouble he had with the car.

And again at para. 19 and para. 20 the learned judge said:

“The defects in the car and the troubles experienced by the plaintiff from time to time with it are not, apart from the overheating, now relevant in my opinion, for they were apparently all remedied at the expense of the manufacturers or their agents or dealers, and the plaintiff continued to use the car thereafter . . . When he arrived in Dar-es-Salaam the only remaining trouble was, he says, overheating.”

In the circumstances I think that the appellant must be held to have treated any breach of condition arising from the defects other than overheating as a breach of warranty under s. 13 of the Ordinance (s. 11 of the Act). Since the defects were all remedied and he continued to use the car I do not think he can now rely on them to repudiate the contract. It might, perhaps, be argued that the condition of the car should be treated as a whole, that is, that it must be regarded as not having been in a roadworthy condition at the time of delivery by reason of the existence of a number of defects; that though some of the defects may have been remedied, yet the car continued in an unroadworthy condition until all the defects were remedied; that s. 13 of the Ordinance would not apply until the car as a whole had been put into a roadworthy condition; that at the date of the suit at least one defect remained, and that accordingly the appellant was still entitled to reject the car. This argument seems attractive at first sight, but I do not think it is sound. On any view of the matter, I think that, on the facts, the appellant must be held to have treated the earlier defects as breaches of warranty and that the cause of action now rests entirely on the alleged defect which caused the overheating. In so far as the other defects are concerned, therefore, I think the learned trial judge was right to ignore them and admissions relating to them. The position is not the same as regards the overheating, however, and I think that all admissions relating to this defect are relevant.

It is also convenient at this stage to refer to the last ground in the memorandum of appeal, namely

“That the learned judge erred in not framing and recording issues as required by O. 14, r. 1 (5) of the Code of Civil Procedure”.

Mr. Dodd contended that this is mandatory; that the failure of the learned judge to frame issues resulted in his failing to apply his mind to the question whether the vehicle was in fact fit for use at the time of delivery; that this has occasioned a failure of justice; and that the case ought at least to be sent back for re-trial.

In Mulla, Code of Civil Procedure (10th Edn.) at p. 641, in the commentary on O. XIV, r. 1, it is stated:

“If, though no issue is framed on the fact, the parties adduce evidence on the fact and discuss it before the court, and the court decides the point, as if there was an issue framed on it, the decision will not be set aside on appeal on the ground merely that no issue was framed.”

And the following passage is cited from the judgment of the Privy Council in *Mt. Mitna v. Syud Fuzl* (3) (1870), 13 Moo. I.A. 573:

“In this case the omission to raise the issues was brought before the notice of the appellate court; the appellate court expressed its regret and their lordships are glad to observe that it did express its regret, that the principal Sudder Ameen had omitted to settle the issues. The (appellate) court, however, nevertheless conceived that it was not under any positive obligation to remand the case; but seeing that the parties had gone to trial knowing what the real question between them was, that the evidence had been taken, and that the conclusion had been in the opinion of the appellate court correctly drawn from that evidence, they thought it within their

competence to affirm that decision without sending the case back for a re-trial. Their lordships sitting here are not prepared to say that the court had not power to do so under the 35th section (now O. 41, r. 25) of the Civil Procedure Code . . . [Their lordships] think that, under all the circumstances of the case, substantial justice having been done, there has not been that fatal mis-trial of the cause which vitiates all the proceedings and renders a new trial necessary.”

In the instant case it would seem that the failure of the court to frame issues was to some extent the fault of counsel on both sides. Nevertheless the failure to frame the issues is an irregularity. On the authority of the passage from *Mt. Mitna v. Syud Fuzl* (3) cited, the question would appear to be whether, notwithstanding the failure to frame issues, the parties at the trial knew what the real question between them was, that the evidence on the question had been taken and that the court duly considered it. Mr. Dodd, at the invitation of this court, suggested issues which he contended should have been framed. But the particular issue upon which he bases his complaint is that mentioned above, namely, whether the vehicle was in fact fit for use at the time of delivery. In the view I have taken of the matter, this should, perhaps, be

“whether the vehicle was in fact in a roadworthy condition at the time of delivery”,

but, as I have already indicated, I think the two questions are virtually synonymous. At first sight there appears to be force in Mr. Dodd’s contention. The issue was clearly raised on the pleadings. Paragraph 4 of the defence alleges that it was a term of the contract that the supplier’s liability ended with the arrival of the vehicle in roadworthy condition at the place of delivery; and in para. 2 of the reply to the defence the plaintiff “denies that the vehicle was delivered in roadworthy condition”. And the evidence on the issue would appear to be complete. Nevertheless at first sight the learned judge does not appear to have considered the point whether the car was in roadworthy condition (or “of merchantable quality”, or “fit for use”) at the time of delivery by reason of a latent defect which gave rise to the overheating trouble. He says, at para. 19 of the judgment:

“Mr. Dodd has said that the plaintiff, even though he may have accepted the car, was entitled to return it to the vendors as being not of merchantable quality for the purpose for which it was sold. It is true, of course, that this right of rejection may arise after a purchaser appears to have accepted an article if that article has a latent defect which a purchaser cannot by reasonable inspection or early trial detect. Such a defect may not appear for some considerable time, as in this instance if the car was to be used for a period in a cool climate and only subsequently in a very hot climate. Even if this right of rejection would in certain circumstances still be available to the plaintiff after the very considerable mileage he had done in the car, and after several months of ownership, it does not mean that the right can be exercised if the defect is of a nature which can reasonably be cured.”

And he proceeds to deal with the matter on the basis of whether or not the defect is one which can reasonably be cured. I think, however, that in this passage the learned judge is, in fact, considering the point, but is saying that if the defect is of a nature which can reasonably be cured then it does not render the vehicle of unmerchantable quality, and, as his finding on this point is in the affirmative, he makes no finding on the issue of “merchantable quality”. I think the real complaint is that the learned judge is wrong in law in adopting this test. If he is wrong, I think it would be open to us, on the pleadings and on the evidence, to consider and decide the issue, notwithstanding the failure to frame it at the hearing.

I do not think that the view of the law taken by the learned judge is entirely in accord with that adopted by the Privy Council in *Grant v. Australian Knitting Mills Ltd.* (2), which, as I have said, was not cited to him. There, woollen garments bought by the appellant in that case contained an irritant as a result of which the appellant contracted dermatitis. It was held that the retailers from whom he bought the garments were liable in contract for breach of implied warranty or condition under the section of the Australian Sale of Goods Act which correspond with s. 14 of the English Act. In the judgment of Lord Wright ([1936] A.C. at p. 99) it is said:

“... whatever else merchantable may mean it does mean that the article sold, if only meant for one particular use in ordinary course, is fit for that use; merchantable does not mean that the thing is saleable in the market simply because it looks all right; it is not merchantable in that event if it has defects unfitting it for its only proper use but not apparent on ordinary examination; that is clear from the proviso, which shows that the implied condition only applies to defects not reasonably discoverable to the buyer on such examination as he made or could make. The appellant was satisfied by the appearance of the underpants; he could not detect, and had no reason to suspect, the hidden presence of the sulphites; the garments were saleable in the sense that the appellant, or anyone similarly situated and who did not know of their defect, would readily buy them; but they were not merchantable in the statutory sense because their defect rendered them unfit to be worn next the skin. It may be that after sufficient washing that defect would have disappeared; but the statute requires the goods to be merchantable in the state in which they were sold and delivered; in this connection a defect which could easily be cured is as serious as a defect that would not yield to treatment.”

It is, no doubt, a question of fact in each case whether a particular defect renders an article unfit for its proper use. But if, by reason of the defect, the article is unfit for its proper use, the fact that it can easily be remedied is, on the authority of *Grant's* case (2), immaterial.

If I am right in my view that the effect of cl. 6 of the “Supplier’s Conditions of Sale” is substantially the same as the condition as to merchantable quality contained in s. 16 (b) of the Ordinance, and if the overheating of the engine of the car was caused by a latent defect which rendered the car unroadworthy at the time of delivery, I think that *prima facie* the appellant would have been entitled to reject the car on discovery of the defect or within a reasonable time thereafter.

Since the learned judge has not made a finding on the question whether the car was or was not roadworthy at the time of delivery by reason of a defect which subsequently resulted in overheating of the engine, I think that, as I have already said, it is open to us to consider the point on the evidence.

In the first place, the condition is that the supplier’s liability ends with the arrival of the vehicle in a roadworthy condition at the place of delivery. The “place of delivery” was in England. So far as overheating was concerned, there was no evidence that this defect would have developed if the car had been kept in England. However, it was clearly understood between the parties that the car was required for use in East Africa, and I think cl. 6 must be read accordingly. The evidence of Mr. Moss, as I read it, is to the effect that when the car was turned in to him he removed the thermostat and opened up the tappets; that these are modifications which ought to be effected when a car is brought into the tropics; that the car then appeared to be satisfactory except that the temperature gauge appeared to register an abnormally high temperature; that on changing the gauge a normal running temperature was registered; and that the car is now satisfactory. There were, apparently, some other modifications

effected in Bulawayo, but these do not seem to have made much difference. It was not until the modifications mentioned were effected that the overheating was overcome. If Mr. Moss's evidence is to be accepted (and the learned judge accepted him as a reliable witness) it would seem that the overheating of the car engine was due to the failure to effect modifications which it is usual to effect when, and not before, a car is brought to the tropics. To judge from their letters, Messrs. Nuffield Exports Ltd. were not themselves conversant with the necessity for these modifications, but the respondent, in the person of the service manager, Mr. Moss, does seem to have been familiar with them, and the modifications, in fact, proved effective. In these circumstances can it be said that the car was not in a roadworthy condition when delivered, by reason of a defect which would cause overheating of the engine when the car was brought to the tropics? I think not. The car was "roadworthy" (apart from the other defects which, as I have said, I do not think are now relevant) when it was delivered in England, and there is nothing in the evidence to indicate that the overheating condition would have developed if the car had remained in England. The evidence is that, to make it "roadworthy" in the tropics, certain modifications would later become necessary which it was normal to effect upon arrival in the tropics, so as to adapt a car to the changed conditions there. I do not think it can be said that the car was unroadworthy because, without the modifications, the engine did overheat, whereas, after the modifications had been carried out, it was satisfactory. The appellant was not, in my view, entitled to reject the car until the respondent had had an opportunity of effecting these modifications. I appreciate that after the earlier trouble he had had with the car the appellant's patience was understandably short, but this does not affect the position.

Another issue in the case, which was not decided in the High Court and which, in the view that I have taken of the matter, I do not think it necessary to decide here, is whether the appellant's action in continuing his journey after the development of the overheating defect was reasonable in the circumstances, or whether it was such an exercise of rights of proprietorship as to deprive him of his right, if any, to reject the car subsequently upon his arrival in Dar-es-Salaam—v. s. 37 of the Ordinance (s. 35 of the Act). The question is one of some difficulty on account of the position in which the appellant found himself, but the distance travelled (some 2,000 miles) was substantial.

For the reasons I have given I think that the learned judge's conclusion was correct, and that the appellant must fail on his main grounds of appeal.

There is, however, one minor matter arising out of the first ground of appeal. The learned judge awarded damages for inconvenience suffered at the rate of

"Shs. 10/- per day from and including October 4, 1957, to December 11, 1957, inclusive, or £19 10s. 0d. in all."

Mr. Dodd, in relation to his main argument, objected that the award of these damages was inconsistent with the learned judge's findings on the main issue, but I understand that it was conceded that the appellant ought to receive some damages for inconvenience, presumably on the basis that there had been an unusual delay in making necessary adjustments, and I do not think the award can affect the decision on the main issue. Apart from this, Mr. Dodd pointed out, and Mr. Master for the respondent conceded, that the learned judge's calculation had been wrong, and that the damages at Shs. 10/- per day for the period in question amounted to £34 10s. 0d. In the circumstances I would order that the decree be varied by the substitution of the figure £34 10s. 0d. for the figure £19 10s. 0d. This, as was pointed out by Mr. Master, was a matter which could have been rectified under s. 152 of the Civil Procedure Code, and cannot affect the costs of the appeal.

Accordingly, subject to this amendment of the decree, I would order that the appeal be dismissed with costs.

Gould JA: I agree and have nothing to add.

Windham JA: I also agree.

Appeal dismissed. Damages increased to £34 10s. 0d. owing to miscalculation thereof.

For the appellant:

Henry G Dodd

Dodd & Co, Dar-es-Salaam

For the respondent:

KA Master QC and JB Patel

JB Patel, Dar-es-Salaam

The Eastern Bank Limited v Jamnadas Sakerchand [1959] 1 EA 147 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	12 February 1959
Case Number:	98/1958
Before:	Sir Kenneth O'Connor P, Forbes V-P and Gould JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Aden–Campbell, C.J

[1] Bank – Letter of credit – Purchase by customer of goods on terms agreed with bank – Discrepancy between bill of lading, invoice and letter of credit – Payment by bank against bill of lading and invoice – Goods not packed as specified in letter of credit – Refusal of customer to accept goods – Repudiation of liability to bank – Goods sold by bank – Whether bank negligent in making payment – Whether bank can claim reimbursement from customer for loss sustained on sale of goods.

Editor's Summary

The appellant granted to the respondent an irrevocable letter of credit for £1,625 which was in the same terms as a letter of agreement between them, to enable the latter to import from England a consignment of sugar. The appellant received two documents: one was an invoice which stated that the sugar was packed in “250 new single sound jute bags”, and the other, a bill of lading which stated “250 sacs jute sucre crystallise (sound bags)”. The words “(sound bags)” were in ink. In the letter of agreement the

sugar was required to be packed in “new single sound jute bags”. When the sugar arrived it was found to be packed in second-hand and not new bags. The appellant paid the bill but the respondent refused to accept or pay for the sugar saying that the appellant should not have paid for it as the documents were not in order. The appellant sold the sugar at a loss and claimed this sum from the respondent. At the trial the discrepancy between the description in the documents upon which the respondent relied to justify repudiation was the omission of the words “new” and “single” in the bill of lading. Both these words appeared in the letter of credit and in the invoice. It was argued on behalf of the respondent that the descriptions in the letter of agreement and the bill of lading were contradictory, that the omission from the bill of lading of the word “new” and the insertion of the words “sound bags” in ink should have suggested to the bank that the bags were not new and that the appellant had been negligent

in paying on these documents. The Chief Justice accepted these arguments, held that the descriptions were contradictory and dismissed the appellant's claim. The appellant contended on appeal that in the circumstances it could not be considered negligent. The respondent while supporting the decision of the Supreme Court claimed, *inter alia*, that the appellant had recovered only half the amount representing a shortfall in the sugar, on a compromised claim against an insurance company, a course which they had no right to take, that the appellants were under a duty to mitigate and should have sold the sugar sooner. The appellant replied that under the letter of agreement the date of sale was expressly left to their discretion.

Held –

- (i) the discrepancy in description was an omission and not a contradiction in the bill of lading and the omission was cured by the full description contained in the invoice;
- (ii) there was *prima facie* nothing in the description "sound" to point to a conclusion that the bags were not new; nor was there anything in the fact that someone had written "sound bags" on the bill of lading which should have suggested to the appellants that the bags were not new; had there been a remark that the bags were unsound, or sound but not new, the matter would have been different;
- (iii) the appellant in compromising the claim against the insurance company acted within the powers conferred upon it by the letter of agreement;
- (iv) though in the letter of agreement the date of sale was left to the discretion of the appellant, this provision would not have absolved it from its duty to mitigate damages if it maliciously negligently or unreasonably delayed a sale; in this case, the delay was neither malicious, negligent nor unreasonable.

Appeal allowed.

Cases referred to in judgment

- (1) *Equitable Trust Co. of New York v. Dawson Partners Ltd.* (1926), 27 Lloyd's Rep. 49.
- (2) *Midland Bank Ltd. v. Seymour* (1955), 2 Lloyd's Rep. 147.

February 12. The following judgments were read by direction of the court:

Judgment

Sir Kenneth O'Connor P: The appellant (plaintiff in the court below) sued in the Supreme Court of Aden to recover from the respondent (defendant), an Indian merchant, the sum of £1,625 in respect of a loss which had been incurred by reason of the respondent having failed to take delivery of, and pay for, a cargo of sugar. I take the following statement of facts from the judgment of the learned Chief Justice:

"The defendant was granted an irrevocable letter of credit by the plaintiffs for the sum of £1,625 in order to import, from a firm in England, 25 metric tons of sugar. In the letter of credit it was stated that the sum was payable against documents representing

" 'a shipment or shipments of about twenty-five metric tons French white crystal sugar No. 3 grain equal about Formosan SWC, price £65 per metric ton C. & F. Aden. Packing 100 Kilos net in new single sound jute bags. Shipment June/July, 1957. Part shipment allowed. Transshipment prohibited. Shipment latest July 30, 1957, from U.K. Port to Aden. Bills to be drawn at sight. Goods of U.K. origin. Importation under open general licence. All bank charges outside Aden are on account of the

beneficiaries.’

“The documents which were delivered to the plaintiffs were two in number. Firstly, the invoice which sets out that the sugar is ‘packed in 250 new single sound jute bags of 100 Kilos net’. Secondly, the bill of lading of which the relevant portion reads:

“ ‘250 sacs jute sucre crystallise (sound bags)’

“A bill of exchange had been drawn by the English shippers on the defendant for £1,625, which the plaintiffs would ordinarily accept. When the sugar arrived it was found that it was packed in second-hand and not new bags. The plaintiffs paid the bill. The defendants thereupon refused to accept the sugar or pay for it saying that the bank should not have paid since the documents were not in order. The plaintiffs thereupon sold the sugar at some loss and claim to be refunded this sum together with expenses and interest.”

The words “sound bags” appearing in the column headed “Nos. and Descriptions of packages” under the words “250 sacs jute” had been added in ink. It was not known by whom they had been added.

The shipment arrived in Aden on August 21, 1956. At that date the price of sugar was falling and between that date and September 4, 1957 (when the sugar was finally sold), the price had dropped from Shs. 109/- per 100 kilo bag to Shs. 105/- per 100 kilo bag. The respondent in evidence said that there was a difference of five to six shillings per bag between the prices obtainable for sugar in new and in second hand bags. Instead of accepting the consignment and claiming against the shippers for the loss due to inferior packing, (in which case the respondent would have had on his hands a consignment of sugar the price of which was falling) he elected to repudiate his liability to reimburse the bank.

The discrepancy between the descriptions in the documents upon which the respondent relied to justify repudiation was the omission of the words “new” and “single” in the bill of lading. Both of these words appeared in the letter of credit and in the invoice. It was said on behalf of the respondent that the descriptions in the letter of credit and the bill of lading were contradictory. It was also contended that the omission from the bill of lading of the word “new” and the insertion of the words “sound bags” in ink should have suggested to the bank that the bags were not new, and that the bank had been negligent in paying on these documents. The learned Chief Justice accepted these arguments. He dealt with the matter as follows.

“But I think that this case is quite distinguishable. The full description given in the present invoice really does nothing to cure any defect in the bill of lading. We do not here have a case of a mere omission in the bill of lading, the omission being cured in the invoice. What we have are two contradictory descriptions. One description is ‘new single sound jute bags’ and the other ‘sound bags’. The description of the bag as ‘sound’ gives no indication whatever that it is ‘new’. It would make the ordinary person suspect the contrary.”

The learned Chief Justice later speaks of an “element of antagonism” between the descriptions in the letter of agreement and the bill of lading. With great respect, I am unable to see that the descriptions are either contradictory or antagonistic. The relevant part of the description in the letter of agreement is “new single sound jute bags” and the description in the bill of lading is “250 sacs jute sound bags”. The difference, as has already been stated, is the omission of the words “new single”. This is purely an omission and is not a contradiction. Possibly new bags, if of good quality, may be more likely to be sound than second-hand bags. But since a sound bag may be new or second-hand, and a new bag may be pierced or damaged no less than a second-hand bag, there is

prima facie nothing in the description “sound” to point to a conclusion that the bags were not new. In my opinion, there was nothing in the fact that someone (possibly a representative of the ship) had written “sound bags” on the bill of lading which should have suggested to the bank that the bags were not new. Had there been a remark in the bill of lading that the bags were unsound, or sound but not new, the matter would have been different. What we have here is nothing more than an omission from the bill of lading of part of the description of the packing contained in the letter of agreement, an omission which was cured by the full description contained in the invoice. The two are not inconsistent.

No doubt, it is essential that a bank should strictly follow its mandate and provided that the mandate is unambiguous, it cannot recover, if it fails to do so. *Equitable Trust Co. of New York v. Dawson Partners Ltd.* (1) (1926), 27 Lloyd’s Rep. 49. But under the letter of agreement in the present case the bank was authorised to make payment against

“documents purporting to be invoices, shipping specifications, bills of lading and policies and/or certificates of insurance.”

The bank was, accordingly, authorised to make payment against a set of documents, and unless the documents were inconsistent, the bank was entitled to supplement the description contained in the bill of lading by referring to the Invoice. *Midland Bank Ltd. v. Seymour* (2) (1955), 2 Lloyd’s Rep. 147.

Further, as was said by Devlin, J., in the *Midland Bank* case (2):

“When an agent acts upon ambiguous instructions, he is not in default if he can show that he adopted what was a reasonable meaning. It is not enough to say afterwards that if he had construed the documents properly he would on the whole have arrived at the conclusion that in an ambiguous document the meaning which he did not give to it could be better supported than the meaning he did give to it. If I am wrong in adopting the construction that Mr. Diplock gives to this document I am quite clear that at the best it is ambiguous. It is impossible to say that the document specifies in reasonably clear terms that the bill of lading has to contain the description and quantity.”

Similarly in the present case, if I am wrong in adopting the construction which I have given to the letter of agreement, it is, at the least, impossible to say that the letter of agreement specifies in reasonably clear terms that the bill of lading (as well as the invoice) must contain the words “new single”. So far as I am aware, a bill of lading need not, and frequently does not, contain every word of the description of the goods and packing contained in the invoice and the letter of credit. It must, of course, contain sufficient particulars to make it a valid document: *Midland Bank v. Seymour* (2).

The learned Chief Justice did not have the *Midland Bank* case (2) before him. If he had had this advantage, he might well have come to a different conclusion. I would allow the appeal and set aside the decree dated September 19, 1958.

Mr. Westby Nunn for the appellant bank does not now claim the amounts of Shs. 173/- and Shs. 50/- for survey fees and documentation respectively claimed in the plaint.

Mr. Joshi for the respondent pointed out that there had been a sum of Shs. 1,965/- representing a short-fall in the sugar, of which the bank had recovered half only on a compromised claim against the insurance company. He contended that the bank had no right to compromise the claim; alternatively that it should have sued the shipper; and, in any event, could not claim this amount from the respondent. I think, however, that the bank in taking the action it did acted within the powers conferred upon it by the letter of agreement

and is entitled to recover the amount from the respondent. There is no reason why the respondent should not claim against the shippers for half the amount of the short-fall, if so advised.

Mr. Joshi also argued that the bank were under a duty to mitigate its damage and should have sold the sugar sooner, and he objected to a portion of the charge for demurrage (i.e. rent of port godown space) and said that the loss should have been calculated at an earlier date than September 25, when the sugar was sold. Mr. Westby Nunn contended that, under the letter of agreement, the date of sale was expressly left to the discretion of the bank. I do not think that this provision in the letter of agreement would absolve the bank from its duty to mitigate damages if it maliciously, negligently or unreasonably delayed effecting a sale. The evidence is that the bank, as a normal practice, allows a month before selling to permit time for a dispute to be settled; and that it takes about a fortnight for the bank to sell a cargo of sugar. The delay in this case was neither malicious nor negligent and I do not think it was unreasonable.

I would allow the appeal and set aside the decree dated September 19, 1958. There should be judgment for the appellant for the amount claimed, less survey and documentation fees, that is for Shs. 11,099/40, with interest at 6 per cent. from the date of filing the plaint till payment. The appellant should have its costs both here and below to be taxed.

Forbes VP: I agree and have nothing to add.

Gould JA: I also agree.

Appeal allowed.

For the appellant:

E Westby Nunn

Westby Nunn and Kazi, Aden

For the respondent:

VK Joshi

VK Joshi, Aden

Erukana Kyakulagira v The Attorney-General of Uganda [1959] 1 EA 152 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	20 March 1959
Case Number:	103/1958
Before:	Sir Kenneth O'Connor P, Forbes V-P and Windham JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court for Uganda–Lewis, J

[1] Evidence – Child – No enquiry by trial judge whether child understood difference between truth and falsehood – No express law requiring such enquiry – Desirability of trial judge holding voir dire – Evidence Ordinance, s. 116 (U.) – Indian Evidence Act, 1872, s. 118 – Oaths and Statutory Declarations Ordinance (Cap. 20), s. 19 (1) (K.).

Editor's Summary

The appellant, as personal representative, had sued the attorney-general for damages under s. 2 (1) of the Suits by and against the Government Ordinance in respect of the death of his infant son, which was caused by a police constable of the Uganda Police Force riding a motor cycle. At the trial two children, aged nine and seven years respectively gave evidence. There was nothing in the record to show whether the trial judge considered the children to be worthy of credence or that they understood the nature of an oath or affirmation or the difference between truth and falsehood. Neither child was sworn or affirmed.

Held – although there is no statutory provision in Uganda corresponding to s. 19 (1) of the Oaths and Statutory Declarations Ordinance (Cap. 20) of Kenya, before a child of tender years is questioned, the court should, following the practice under s. 118 of the Indian Evidence Act, 1872 (s. 116 of the Uganda Evidence Ordinance), test, his capacity to understand and to give rational answers, and to understand the difference between truth and falsehood.

Appeal allowed. Order for a new trial.

No Cases referred to in judgment in judgment

March 20. The following judgments were read:

Judgment

Sir Kenneth O'Connor P: This is an appeal from a judgment of the High Court of Kampala dismissing with costs a claim by the appellant for damages. The claim arose out of an unfortunate accident which took place on October 3, 1956, on the road between Kampala and Mityana when the infant son of the appellant was knocked down and killed by a motor cycle ridden by Police Constable Bayi of the Uganda Police Force. The attorney-general was sued, under s. 2 (1) of the Suits by and against the Government Ordinance, by the appellant suing as the personal representative of the deceased boy.

The plaint, which was filed on September 13, 1957, alleged that the driver of the motor cycle was negligent. In the defence the defendant/respondent denied that the accident resulted from the negligent driving of Police Constable Bayi and said that it was caused by the negligent conduct of the deceased in attempting to cross the road in so sudden and negligent a manner that P.C. Bayi was unable to avoid coming into collision with him. Liability was denied.

The versions of the accident set up by the plaintiff and the defendant respectively were widely different. In brief, the plaintiff alleged that the

deceased was one of four children returning from school: three of the children were on the left-hand side of the road facing Kampala, walking in line on the grass verge, the deceased in front, followed by his sister, Nanteza, and another child: the fourth child was on the right-hand side of the road facing Kampala: there was a stationary car on the right side of the road facing Kampala, stationary on the grass verge. According to the evidence of Nanteza, a child of nine years of age, the deceased was walking along the grass verge on the left of the road when he was struck by a motor cycle coming from behind and going in the direction of Kampala. A plan of the scene which was made by the police was not put in evidence in the High Court and we have not, therefore, had the advantage of referring to it. Mr. Kiwanuka, for the appellant, asked leave to put it in; but, as it had been available and was not put in the High Court and might have been the subject of further evidence there, we did not think that it should be admitted on appeal. The evidence of Nanteza given in the High Court was substantially corroborated by the fourth child, Monday Mukwaya, aged seven, who was on the other (right) side of the road. He said that a stationary car was unloading passengers on the right (his) side of the road: the last of several motor cyclists who came along the road turned to look at the car, lost control, and knocked down the deceased who fell into the ditch on the left side of the road. Monday Mukwaya stated definitely that the deceased was not hit while on the road and that he had not seen him run on to the road. The next witness for the plaintiff was a man called Lubinga, who said that there was a stationary car on the right side of the road (as you face Kampala) unloading passengers: he saw seven police motor cyclists with "L" plates: as the last motor cyclist came near the car, the driver turned to look at the car and hit the boy who was on the left side of the road. This boy, the witness said, was leading three others all walking towards Kampala. The witness thought that the cyclist lost control and swerved to the left. He said he saw the boy near the front wheel of the motor cycle and a piece of glass on the verge of the road. Cross-examined, he said that the collision took place about two ft. from the road surface.

The next witness for the plaintiff was Mitiya Kibirige, a deputy Muluka Chief, who was not an eye-witness of the accident, but was 300 yards away and went to the scene at once. He said that he found a dead boy on the grass verge on the left side facing Kampala: he saw a broken lamp (it was agreed by counsel that he meant broken glass from a lamp) near the body, and a motor cycle. This witness said he saw skid marks 3 ft. from the body on the grass verge.

For the defence, P.C. Bayi (the rider of the motor cycle in question) said that he was with a party of eight on motor cycle parade all carrying "L" plates, and that he was the last of the parade, all of whom were returning to Kampala. At about 11.30 a.m. at mile 2 1/2, he saw a car parked on his left side of the road. As he was about to pass, a small child ran on to the road from his left in front of the car. His speed was 25 to 30 miles an hour. He then said

"I looked at car and slowed down. I swerved to the right and braked. My wheels missed him, but crash-guard connected with him. I came to a stop very shortly after impact. I pointed out place to D. 2. I did not go on to grass verge. The boy fell on to murrum between tarmac and grass verge. I bandaged boy's head and he was put in a car and taken to Mityana hospital. There were pieces of glass at point of impact."

In cross-examination he said that he glanced at the stationary car before passing it: he did not look at it for a long time: the road was flat and straight at the scene of the accident: he did not see any children on the road and could not say whether the little boy was alone. He said further

"After accident car turned round and went to Mityana. Later, before D. 2 and D. 3 came, car returned and stopped in same place. The car was

not coming from Kampala. I did not see passengers get out of car. Crash bar on left of machine struck child. I cannot say how exactly my headlamp got broken.”

A defence witness, Police Constable Eulu, said that he was returning to Mityana on his cycle. At mile 2 1/2 he saw eight motor cyclists coming from Mityana. He saw a boy crossing the road in front of a stationary car on his right side. The boy ran into the road and was knocked down by the last motor cycle. He said that the stationary car was on the left side facing Kampala. P.C. Otiano visited the scene subsequently and made the plan referred to above. He stated that the road was 21 ft. wide and was tarmacadamised: there was a grass verge on each side: the scene of impact was 20 ft. from the stationary car and 6 ft. on the tarmac: he found broken pieces of glass at this point: the body was found about 23 ft. from the scene of impact “and in grass verge 7 ft.” He found blood at this point. There was a grass bank on edge of verge: he found a motor cycle 35 ft. from point of impact on the main road: he saw no skids. Cross-examined he said he saw no stationary car: it had been moved: the owner pointed out where the car had stood: P.C. Bayi, P.C. Eulu and the driver of the stationary car pointed out the point of impact: the glass led up to where the deceased was found: there was a small ditch below the bank. Another defence witness, sub-Inspector Otieno, recorded statements. He first said that the stationary car was on the right side going towards Mityana, (i.e. the left facing Kampala) but after further questioning, admitted he was not certain on which side of the road the car was. He said he found skid marks on the left side facing Kampala: he could not remember where; he found blood on the verge and pieces of glass on the road.

The learned judge in a short judgment dealt with the matter as follows:

“This was a claim by the plaintiff for damages for the death of his son at mile 2½ Mityana-Kampala Road on October 3, 1956. To succeed in his claim the plaintiff had to prove that P.C. Bayi negligently drove his motor-cycle into the child.

“The plaintiff called two child witnesses and a man named Manweri Lubinga. The children said that the motor-cycle swerved while passing a stationary car on its right side and struck the deceased. There was evidence that the road at the place was 21 ft. wide. To this must be added another two or three feet of murrum, plus the grass verge. I found it difficult to believe that the motor-cycle swerved on to the grass verge as the witnesses alleged. The witness M. Lubinga did not make a statement to the police or give evidence at the inquest. I did not believe the explanation of P. 1 for not including his name in his letter to the coroner.

“The defendant’s story of the boy running on to the road in front of the stationary car was a far more likely one and I considered that that was what did happen.

“There were at least four witnesses that must have seen this accident and were never called by the plaintiff. In my opinion, the witnesses called did not satisfy me that the negligent driving of P.C. Bayi caused the boy’s death. In the result I dismissed the claim. If I should be found wrong on this I would allow Shs. 1,000/- as damages under the Law Reform (Miscellaneous Provisions) Ordinance, 1953.”

It will at once be clear that there was a complete conflict as to whether the stationary car was on the right-hand side of the road facing Kampala, as alleged by the plaintiff/appellant, or on the left-hand side facing Kampala, as alleged by the defence. This was an issue of primary importance. If the car was on

the left-hand side of the road as P.C. Bayi approached it, then this would support his story that the little boy was screened by it as he started to run across the road in front of it. If, on the other hand, the car was on the right-hand side of the road as P.C. Bayi passed it, then there would be no excuse for not seeing the children on the left of the road and support would be lent to the plaintiff's story that he turned to look at the car on the right of the road and momentarily lost control and swerved to the left. Moreover, if the car was not on the left of the road and if the impact took place on the grass verge, as alleged by the plaintiff's witnesses, it would be a question whether the doctrine of *res ipsa loquitur* would not apply to cast the onus of proof on to the defendant. It was, therefore, of cardinal importance to decide where the stationary car was and where the impact took place. Unfortunately, there is no evaluation of the evidence or of the credibility of the witnesses and no definite finding in the judgment upon either point, the judge merely stating that he found it difficult to believe that the motor cycle swerved on to the grass verge as the plaintiff's witness alleged, and that the story of the boy running on to the road in front of the stationary car was the more likely, and that he considered that this was what happened.

There is nothing impossible in either story and if the witnesses for the plaintiff were worthy of credit, the stationary car was on the right-hand side of the road and the child was hit on the grass verge. The learned judge does not say that he disbelieves any of the alleged eyewitnesses, except that he implies that the evidence of Lubinga may not be reliable as it was not produced before the coroner. There is no finding, for instance, that the evidence of the deputy Muluka chief (ostensibly a neutral witness) was unreliable. If his statement that he saw skid marks 3 ft. from the body on the grass verge was true, then, unless these were skid marks caused by some other vehicle, this was almost conclusive in favour of the plaintiff's story and against that told by the defence. This witness also said that he found no broken glass on the road, and that he did find some near the body which was on the grass verge. There is, in the judgment, no express mention of this witness's important evidence.

There is nothing in the record to show whether the learned judge did or did not consider the children, Nanteza and Monday Mukwaya, aged nine and seven respectively, to be worthy of credence, and there is no *voir dire* in respect of either of them. Neither child was sworn or affirmed. They may have been too young to understand the nature of an oath or affirmation. If an enquiry was made to ascertain this, there is nothing noted on the record. It seems that there is, as yet, no statutory provision in Uganda corresponding to s. 19 (1) of the Oaths and Statutory Declarations Ordinance (Cap. 20) of Kenya. It would seem very desirable that some such provision should be introduced. Notwithstanding that there may be no provision in Uganda dealing in detail with the evidence of children of tender years, it has been held in India under s. 118 of the Indian Evidence Act, corresponding to s. 116 of the Uganda Evidence Ordinance, that before a child of tender years is questioned, the court should test his capacity to understand and to give rational answers, and to understand the difference between truth and falsehood. Woodroffe and Amir Ali's *Law of Evidence* (9th Edn.) p. 920. This practice obtains in England also, where it is a rule of considerable antiquity, and it should certainly be followed in Uganda.

There is nothing in the judgment to show that the learned judge gave any consideration to the question whether it was likely, or even possible, that the boy's body would be thrown, by an impact such as described, 23 ft. from an alleged point of impact on the road to a point 7 ft. inside the verge, partly over grass and over a bank.

There is no evidence of the width of the murrum between the tarmac and the grass verge or how, if the boy fell on to the rim between the tarmac and the

grass verge, as alleged by P.C. Bayi, his body was found 7 ft. in on the grass verge. His body may have been moved; but no inquiry seems to have been made as to this.

It does not appear how, if the boy was hit by the crash bar, as alleged by P.C. Bayi, the head-lamp of the motor cycle was broken.

No consideration seems to have been given to the evidence of P.C. Bayi that the stationary car turned round and went to Mityana and later, before the witness who made the plan and the sub-Inspector arrived, “returned and stopped in same place”.

No comment was made upon a statement given to the police by Nanteza (Ex. 1) which, on the face of it, seemed to cast some doubt on her evidence as given in court.

The impression on an appellate court is that the evidence was not adequately evaluated or fully considered. The learned judge’s conclusion may well have been right; but the trial was unsatisfactory and there should be a new trial before another judge. I would order accordingly. The appellant should have the costs of the appeal and the costs of the first trial should be reserved to the judge at the new trial.

Forbes V-P: I agree and have nothing to add.

Windham JA: I also agree.

Appeal allowed. Order for a new trial.

For the appellant:

BKM Kiwanuka

BKM Kiwanuka, Kampala

For the respondent:

HSS Few (Crown Counsel, Uganda)

The Attorney-General, Uganda

Choitram v Lazar **[1959] 1 EA 157 (CAN)**

Division:	Court of Appeal at Nairobi
Date of judgment:	12 March 1959
Case Number:	83/1958
Before:	Sir Kenneth O’Connor P, Forbes V-P and Windham JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya—Miles, J

[1] *Sale of goods – Contract – Words “taken over” written by one party on list of damaged materials –*

Disagreement as to price – Whether this can be evidence of contract for sale of goods – Sale of Goods Ordinance (Cap. 290), s. 6 (1), s. 10 and s. 36 (K.) – English Sale of Goods Act, 1893, s. 4 (1) and s. 8 – English Statute of Frauds, 1677, s. 17.

[2] Evidence – Sale of Goods – Words “taken over” written on list of damaged goods – Oral evidence admitted at trial to explain words used – Whether oral evidence admissible – Indian Evidence Act, 1872, s. 91, s. 92 (illustrations (f) and (g)) and s. 94.

Editor’s Summary

The appellants, a firm dealing in piece-goods, occupied shop premises on the ground floor and the respondent who had a hairdressing business occupied premises on the first floor above the shop. By the negligence of one of her employees, water escaped from the respondent’s premises and damaged a quantity of cloth and fabric in the shop. The respondent through her husband admitted negligence and did not deny liability in tort for such damage as might be proved. In pursuance of an agreement between the parties, a surveyor on either side was appointed to assess the damage. After a list had been compiled stating the landed price, selling price and yardage of the materials damaged, the respondent’s husband endorsed thereon the following: “Taken over only 181 pieces of various materials . . . Not taking over the prices mentioned”, and later, took over a further but smaller quantity of materials in circumstances which were disputed. Negotiations regarding the value of the materials taken over failed and eventually the appellants sued the respondent for damages for negligence and alternatively for nuisance, for Shs. 33,546/86, this being what they stated to be the selling prices of the damaged materials. The respondent denied liability in damages to the amount claimed, undertook to account for the proceeds of the materials taken over and paid Shs. 1,000/- into court. The appellants later filed an amended plaint and in para. 6A they alleged for the first time a contract for sale of the damaged goods and also claimed in the alternative in tort as before; the sum claimed as the purchase price being the same, namely, Shs. 33,546/86, and damages in tort for an unspecified amount. There was also a prayer for “such other relief as may be just”. The amended defence denied the alleged or any contract of sale of the damaged goods. The trial judge found largely but not entirely on grounds of demeanour and credibility, that there had never been any agreement between a partner in the appellant firm, and the respondent’s husband to purchase the damaged goods and accordingly dismissed the appellants’ claim in so far as it was founded in contract. He also accepted an explanation that by the words “taken over” the respondent’s husband meant that he had “removed” and that he had not bought the goods. As regards the alternative claim in tort, the trial judge found that, while liability was not denied, the appellants had failed to prove the damage suffered and accordingly held himself unable to award any damages upon their claim for negligence, while in respect of their claim for nuisance he awarded nominal damages in the sum of Shs. 40/- without costs, and ordered that the respondent should have her costs incurred subsequent

to her payment of Shs. 1,000/- into court. The appellants appealed on the following two grounds, namely: (a) that upon the pleadings and evidence the court ought to have found that there was a sale of the materials by the appellants to the respondents although no price was agreed and that in the absence of an agreement on price, the price payable must be a reasonable one by virtue of the provisions of s. 10 of the Sale of Goods Ordinance, and (b) that if there was no contract at all whether express or implied, nor any quasi-contract then the court ought, upon the claim in tort, to have awarded substantial damages based on the full value of the goods.

Held –

- (i) the case was within the scope of s. 10 (2) of the Sale of Goods Ordinance;
- (ii) were it not for the words “taken over” written on the list of materials, it would not have been open to the appellate court to interfere with the trial judge’s finding that there was no contract;
- (iii) the words “taken over” which were both an admission and a memorandum in writing sufficient to satisfy s. 6 (1) of the Ordinance were clear and such as to render inadmissible any attempt to explain orally that what was meant was something different: accordingly, there was a contract for a sale of goods but with no price agreed;
- (iv) silence as to price within s. 10 of the Ordinance includes not only non-mention of price but also non-agreement on price: *Foley v. Classique Coaches Ltd.*, [1934] All E.R. Rep. 88; [1934] 2 K.B. 1 and *May and Butcher Ltd. v. R.*, [1929] All E.R. Rep. 679; [1934] 2 K.B. 17 applied;
- (v) a reasonable price for the piece goods taken over by the respondent would be their total landed cost plus five per cent for profit.

Appeal allowed.

Per **Windham, J.A.:** “Quasi-contract, together with the special circumstances giving rise to it, must be specially pleaded . . .”

Cases referred to in judgment

- (1) *Harnor v. Groves* (1855), 15 C.B. 667; 139 E.R. 587.
- (2) *Smith v. Jeffryes* (1846), 15 M. & W. 561; 153 E.R. 972.
- (3) *Rickman v. Carstairs* (1833), 5 B. & Ad. 651; 110 E.R. 931.
- (4) *May and Butcher Ltd. v. R.*, [1929] All E.R. Rep. 679; [1934] 2 K.B. 17.
- (5) *Hillas & Co. Ltd. v. Arcos Ltd.*, [1932] All E.R. Rep. 494; 147 L.T. 503.
- (6) *Foley v. Classique Coaches Ltd.*, [1934] All E.R. Rep. 88; [1934] 2 K.B. 1.

March 12. The following judgments were read:

Judgment

Windham JA: The appellants are a firm carrying on business on the ground floor of a building owned by them in Government Road, Nairobi, as dealers in piece-goods. On the first floor, immediately above their shop, their tenant the respondent carries on a hairdressing establishment. On the evening of April 4,

1956, a tap was negligently left running on the respondent's premises by an employee of the respondent, with the result that water flooded through the floor and into the appellants' shop and fell on to a number of pieces of the appellants' cloth and fabric of various descriptions, causing damage to some or all of it. The respondent, through her husband Mr. Lazar, who acted as her agent in all the ensuing negotiations, admitted her negligence to have been the cause of the flooding and never denied liability in tort for such damage as it might be proved to have caused to the appellants' fabrics. Subsequently, apparently at the insistence of a Mr. Doulatram Bheroomal, a

partner in the appellant firm, Mr. Lazar purported to “take over” the cloth and fabric affected by the water. The negotiations between Mr. Lazar and Mr. Doulatram Bheroomal and their respective advocates included two alternative offers by the respondent to make payment of suggested amounts in full settlement, but the appellants rejected them. Negotiations ensued in which it appeared that, at different times, the appellants would have been content to accept the cost price of the damaged rolls of materials plus 10 per cent. or 15 per cent. for profit. These suggestions were not accepted by the respondent who alleged that some of the damaged cloth was unsaleable, being shop-soiled or of an out-of-date design, that many pieces were entirely free from damage, and that in others the damage was of a superficial nature and extended at most to the second or third fold of the roll. It was suggested that the appellants should take back the undamaged cloth; but to this they did not agree. Eventually, in November, 1956, the appellants sued the respondent in the Supreme Court of Kenya for damages in negligence, or alternatively in nuisance, for Shs. 33,546/86, this being their total figure for what they stated to be the selling prices of the materials in respect of which they claimed, the whole of which they alleged to have been rendered unmerchantable. The respondent, in a statement of defence filed in February, 1957, denied liability in damages to the amount claimed, undertook to account for the proceeds of the cloth taken over and paid Shs. 1,000/- into court to answer any damages which the appellants might have suffered. In June, 1958, the appellants filed an amended plaint in which by a new clause, 6A, they, for the first time, based their claim upon an alleged contract of sale of the damaged goods by the appellants to the respondent, and in the alternative in tort as before, the figure claimed as purchase price on the cause of action in contract being the same, namely Shs. 33,546/86, as was previously claimed in tort, and the damages claimed in tort now being in an unspecified amount. There was also a prayer for “such other relief as may be just”. The amended defence denied the alleged or any contract of sale of the damaged goods to the respondent.

Paragraph 6A of the amended plaint is in the following terms:

“6A. By verbal agreements entered into between Doulatram Bheroomal above-named on behalf of the plaintiffs and the husband of the defendant on behalf of the defendant at Nairobi between April 4 and 7, 1956, it was agreed:

- (a) that a survey of the damaged goods belonging to the plaintiffs should be made by two surveyors one to be appointed on behalf of the plaintiffs and the other to be appointed by the defendant and that the said surveyors should jointly ascertain the amount of the said damage and the value of the damaged goods;
- (b) that the defendant should purchase all such goods as were ascertained in the manner aforesaid to have been damaged and should pay to the plaintiffs the full undamaged value thereof;

in pursuance of the said agreement a surveyor was appointed by each of the said parties and the amount of damaged material was ascertained by agreement between them and the values thereof based on landed cost price and selling price were agreed at the respective sums of Shs. 20,313/71 and Shs. 33,546/86 between the plaintiffs and the surveyor appointed on behalf of the defendant: in further pursuance thereof the defendant by her agent on or about April 7, 1956, took delivery from the plaintiffs of the said damaged goods.”

The learned trial judge, after hearing evidence at length, which included that of the partner Doulatram Bheroomal for the plaintiffs and the respondent’s husband Lazar for the defence, gave judgment in which he found, largely but

not entirely on grounds of demeanour and credibility, that there never had been any agreement between Doulatram and Lazar whereby the latter bought the damaged goods from the former at their “full undamaged value” or at all, and accordingly he dismissed the appellants’ claim in so far as it was founded in contract. With regard to their alternative claim in tort, he found that, while the respondent’s liability was not denied, the appellants had failed to prove, as indeed they did fail to prove, what if any damage they had suffered through the water having fallen on their fabrics. Accordingly he held himself unable to award them any damages upon their claim for negligence, while in respect of their claim for nuisance he awarded them nominal damages in the amount of Shs. 40/- without costs, with an order that the respondent should have her costs incurred subsequent to her payment of Shs. 1,000/- into court. Against this judgment the appeal lies.

The main grounds of appeal that have been argued are two. The learned trial judge found as a fact that the respondent never agreed to buy the appellants’ fabrics upon which water had fallen, whether at the appellants’ figure or for any specified price. Learned counsel for the appellants, quite properly in my view upon the evidence, does not seek to attack this finding. But he does attack the conclusion at which the learned judge arrived on the finding, namely that there was no contract of sale concluded between the parties, as represented by Doulatram on the one side and Lazar on the other. For he contends that, upon the pleadings it was open to the court to find, and that upon the evidence the court ought to have found, that there was a sale of the fabrics by the appellants to the respondent although no price was agreed, and that, in the absence of such agreement on price, the price payable by the respondent must be a reasonable one, by virtue of the provisions of s. 10 of the Sale of Goods Ordinance (Cap. 290). In short, it is contended that the court should have found an implied contract to pay a reasonable price, and should thereupon have decided what was in the circumstances of the case a reasonable price. That is the first ground of appeal. The second and alternative ground is that, if there was no contract at all whether express or implied, nor any quasi contract, then the court ought upon the claim in tort to have awarded substantial damages based on the full value of the goods to the appellants at the time when the damage occurred, and not merely nominal damages.

I turn to the first of these contentions; and the first point for decision is whether, upon the pleadings and the presentation of the case in the court below, it was open to the appellants to rely on any contract other than an express one with the price expressly agreed to. Although para. 6A of the amended plaint alleges that the values of the damaged material

“based on landed cost price and selling price were agreed at the respective sums of Shs. 20,313/71 and Shs. 33,546/86”,

and although it is this latter sum which is claimed in the prayer to the plaint to be due “under para. 6A hereof”, yet para. 6A nowhere states that the respondent agreed to buy the goods for Shs. 33,546/86, or for the “selling price”. It does no more than allege that the respondent agreed that Shs. 33,546/86 was the selling price. The agreement there alleged is that the respondent should purchase the damaged goods for “the full undamaged value thereof”, and it is nowhere stated that it was agreed that such value should be taken to be the selling price or the landed cost price or any specified figure in between, although the highest figure is not unnaturally the one hopefully inserted in the prayer. In short the claim under para. 6A is a claim upon a consensual contract of sale for a price expressed not in figures but in a phrase the meaning of which it is not alleged that the parties were agreed upon. It does not seem to me that such a claim is far removed from a claim upon a consensual contract in which the price, not being expressly agreed upon, is to be deemed, by operation

of s. 10 (2) of the Sale of Goods Decree, to be a “reasonable price”. Whether in the light of decided authorities the facts bring the case within the scope of s. 10 (2) at all is a question that I will consider presently. For the moment, I am concerned with whether on the pleadings and presentation of the case the appellants can be allowed to advance the contention. I would hold that they can, upon a not unduly liberal interpretation of para. 6A of the plaint, considered together with three further factors. One is the prayer for “such other relief as may be just”. Another is issue No. 4, framed by the learned trial judge in the following sufficiently wide terms: “If there was such an agreement” (sc: as alleged in para. 6A of the plaint) “what is the price payable for the goods?” Lastly, in opening his case below, learned counsel for the appellants said, with regard to his contractual claim:

“By agreement damaged stocks taken over, i.e. sold to the defendant. I rely on s. 36, Sale of Goods Ordinance, delivery. Section 10; reasonable price. I submit something more than cost price should be allowed”,

thereby making it clear at the outset that he would contend that s. 10 (2) was applicable. There was no objection to these opening submissions, and thereupon the issues, including issue No. 4, were framed.

I would here pause to make it clear that the pleadings, framed issues and opening submissions would preclude, in my view, any alternative contention that, failing the establishment of a consensual contract of sale with no agreement upon price, the court should have found for the appellants upon quasi-contract, that is to say upon some non-contractual relationship between the parties of such a nature that the law, upon equitable principles, would treat them as if they had contracted although they had not. Quasi-contract, together with the special circumstances giving rise to it, must be specially pleaded, as in the present case it was not. The learned trial judge rightly came to the same conclusion on this point.

I come now to the most difficult matter for decision in this appeal, namely whether this court can and ought to hold that there was any agreement at all for the sale of the fabrics by the appellants to the respondent, represented by Doulatram and Lazar respectively, in view of the learned trial judge’s finding of fact that there was not. The sequence of events following upon the discovery of the running tap and the flooding through the ceiling of the appellants’ shop on the evening of April 4 is described in the following passage from his judgment:

“It was agreed that evening by Mr. Doulatram and Mr. Lazar that each side should appoint an assessor to examine the damages caused. In pursuance of this arrangement Mr. T. P. H. Scade of Scade and Pentreath Ltd. was appointed on behalf of the plaintiffs and Mr. J. E. Higginson of Higginson Wiseman Ltd. on behalf of the defendant. These two gentlemen, both of whom are experienced assessors, examined the damaged goods on April 5. They agreed that a total of 184 pieces of cloth had been damaged by water. At this stage Mr. Scade took no further part in the examination but Mr. Higginson proceeded to make a detailed examination of each piece of damaged cloth and to ascertain the price and yardage. He drew up a schedule (exhibit 1) containing details of the landed price, selling price and yardage of each item. This was later sent to Mr. Scade who accepted it. On April 7 Mr. Lazar removed 181 pieces of cloth. He endorsed the schedule (exhibit 1) as follows: ‘Taken over only 181 pieces of various materials (bale No. 142 not taken over). The yardage will be checked. Not taking over the prices mentioned.’ Later on the remaining three pieces of material were taken by Mr. Lazar. The circumstances in which this material was taken away by Mr. Lazar are in dispute. Mr. Lazar sold some of the material privately at Limuru realising according to him

between Shs. 700/- and Shs. 750/-. The remainder were put up for sale by auction, the sale being conducted by Mr. Higginson. This sale realised Shs. 3,301/50 gross, less charges of Shs. 319/-, the net proceeds being Shs. 2,982/50. In fact only a small portion of the cloth was sold at the auction. In pursuance of an arrangement between Mr. Higginson and Mr. Lazar, Mr. Lazar bought back 166 items since the prices which were being realised were in his opinion too low. The defendant's solicitor subsequently sent a cheque for Shs. 1,000/- to the plaintiff on account of the proceeds of sale. This was returned by the bank because of mutilation. I am informed that this sum still remains unpaid. It does not however enter in this action. The unsold material is still in the defendant's possession."

In the foregoing passage from the judgment it is stated with justification that the
"circumstances in which this material was taken away by Mr. Lazar are in dispute."

In brief, Doulatram gave evidence in which, while he was inconsistent and self-contradictory on the question whether Lazar bought the material at its "full undamaged value" or whether on the other hand no price or measure of value was agreed upon, he never wavered from his assertion that Lazar did buy them when he took possession of them and did not merely take possession of them as his (Doulatram's) agent. Lazar, on the other hand, testified that, upon Doulatram becoming hysterical and insisting that he should take the materials away, he took them away, but merely in order to dry them and then to dispose of them as best he could on Doulatram's behalf, and not as their purchaser. When asked in cross-examination to explain what he had meant by the words "taken over" which he had endorsed on the priced list of the materials, exhibit 1, which the respondent's assessor Mr. Higginson had prepared, he said:

"by 'taken over' I meant 'removed'. I might have used the wrong expression. I am by birth a Czech. I was taking them over because Mr. Doulatram was insisting. He was quite hysterical. I took them over on no arrangement. I don't know what was the intention eventually. I simply removed and dried them myself. I did not buy them."

This explanation of what he had meant by "taken over" was accepted by the learned trial judge, along with his denial of any sale, the learned judge observing that:

"having seen both these gentlemen in the witness-box I have no hesitation in preferring the evidence of Mr. Lazar where it is at variance between (sic) that of Mr. Doulatram."

If it were not for what Lazar wrote on the list of materials, exhibit 1, it would not in my view have been open to this court to interfere with the learned judge's finding of fact, to the extent that it was based on Lazar's oral evidence which he accepted, that there was no contract for the sale of the materials by Doulatram to Lazar. But it seems to me, after very careful consideration, that the meaning of those words written by Lazar, which may be regarded both as an admission by him and as a memorandum in writing sufficient to satisfy s. 6 (1) of the Sale of Goods Ordinance, is clear, and is such as to render inadmissible any attempt on his part to explain orally that he meant by them something different.

Under s. 91 of the Indian Evidence Act, when the terms of a contract have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall

be given in proof of the terms of such contract or of such matter except the document itself or secondary evidence of its contents in cases in which secondary evidence is admissible; and, under s. 92, when such a document has been so proved, no evidence of any oral agreement or statement is to be admitted as between the parties to it for the purpose of contradicting, varying, adding to or subtracting from its terms. The rule is the same in England.

Section 6 (1) of the Kenya Sale of Goods Ordinance is identical, to all intents and purposes, with s. 4 (1) of the English Sale of Goods Act, 1893, which reproduces the provisions of s. 17 of the Statute of Frauds in relation to the sale of goods. It was held in several cases in England, before the passing of the Sale of Goods Act, 1893, that the rule excluding parole evidence applies to contracts of which a note or memorandum in writing was required under s. 17 of the Statute of Frauds in order to render them enforceable. For instance in *Harnor v. Groves* (1) (1855), 139 E.R. 587, 588, which was an action for breach of warranty, the plaintiff received from the defendant a contract note:

“Sold Mr. W. Harnor, per Mr. Howard, twenty-five sacks Whites, X.S., at Shs. 68/- per sack net. J. T. Groves.”

The plaintiff sought to show that the bargain was that the flour should be of the same quality as flour sold to one M., and he argued that the sold-note was not the contract, but only an incomplete memorandum of a prior oral agreement. It was held, the plaintiff not having repudiated it, that the note was the contract and that that alone could be looked at. Maule, J., said at p. 590:

“The contract between the parties was reduced into writing; and the rule is, that, where a contract, though completely entered into by parole is afterwards reduced into writing we must look at that, and at that alone, even though part of the terms previously agreed upon are not inserted in the written contract. It is by the written contract alone—subject, of course, to be interpreted by the usages of trade, as in *Syers v. Jonas*—that the parties are bound. And more especially is that so in a case where, as here, the contract is one which by the statute of frauds is required to be in writing. The object of that statute, as appears from its title and preamble, was to prevent frauds and perjuries; the legislature knew that parties who make bargains with each other often take very different views of them; and therefore they provided, in order to remove the temptation as much as possible, that, in cases of contracts for the sale of goods exceeding the value of 10L., the contract, or some note or memorandum thereof, shall be in writing. The intention of the legislature was that the writing should be the evidence, and the only evidence, of the contract, and that there should be no occasion to look beyond it.”

Harnor’s case (1) is still good law in England. It is cited at p. 616 of Phipson on Evidence (9th Edn.). That learned author says, at p. 601:

“Where private documents are required by law to be in writing—e.g. . . . contracts within the Statute of Frauds . . . and the like, extrinsic evidence is generally inadmissible to contradict, vary, or supplement their terms.”

I have no doubt that the same rule which applied to contracts within s. 17 of the Statute of Frauds applies to contracts within its modern equivalent s. 4 (1) of the Sale of Goods Act and applies in Kenya to contracts within s. 6 (1) of the Sale of Goods Ordinance.

In the present case it is clear that Doulatram and Lazar came to an agreement that Lazar should take over 181 pieces of various materials (bale No. 142 not being taken over) and that the yardage would be checked. It is also clear that Lazar did not agree to pay the prices demanded by Doulatram. The endorsement by Lazar made upon the list of materials prepared by the parties’ surveyors,

in my opinion, exactly sets out the agreement between the parties. It is the contract between them, and s. 91 of the Indian Evidence Act applies to it not only because the terms of the contract were reduced to the form of a document, but because, in my opinion, it was a contract for the sale of goods of the value of more than Shs. 200/- and its subject matter was required by s. 6 (1) of the Sale of Goods Ordinance to be reduced to the form of a document. I will consider later the question whether this agreement constituted a contract of sale, and the question of price. The fact that the document was not signed by Doulatram does not, of course, prevent it from being a written contract upon which the party signing could be sued, particularly if the parties have acted upon it: *Harnor v. Groves* (1); *Smith v. Jeffryes* (2) (1846), 153 E.R. 972; and see illustrations (f) and (g) to s. 92 Indian Evidence Act.

Again, by s. 94 of the Indian Evidence Act:

“When language in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.”

These sections give effect to the time honoured rule of interpretation of documents, expressed by Denman, L.C.J., in *Rickman v. Carstairs* (3) (1833), 110 E.R. 931 at p. 935 in the words:

“The question . . . is, not what was the intention of the parties, but what is the meaning of the words they have used”;

or, in the words of the commentary on s. 94 in Sarkar on Evidence (9th Edn.) at p. 744, which perhaps have peculiar application to Lazar in the present case:

“It means that when the language is crystal clear and it applies correctly or definitely to existing facts, no evidence can be allowed to show that the parties intended to mean something else, even though they have acted long in a different way without understanding the true effect of the plain words in a document.”

The words written by Lazar at the foot of the list of 182 pieces of material with their respective cost and selling prices were:

“Taken over only 181 pieces of various materials (bale No. 142 not taken over). The yardage will be checked. Not taking over the prices mentioned.”

Later Lazar took over bale No. 142.

Now the expression “taken over” at the beginning of this entry might perhaps, if the first sentence be read alone, be considered not in itself so crystal clear as to exclude a reasonable possibility of its having been used loosely to mean no more than a mere physical taking of possession, without change of ownership, although the latter is its face meaning. But it is impossible to attach the meaning of a mere handing over of possession to the words “taking over” in the final sentence—“Not taking over the prices mentioned”. That sentence, if so read, would be meaningless. The “prices mentioned” would be wholly irrelevant if a mere taking of possession on Doulatram’s behalf were intended. They would only be relevant if the words “taken over” and “taking over” meant, what indeed on the face of them they do mean, purchasing. Clearly the whole entry means, and can only mean—“I agree to buy the stuff, but not at the prices set out in this list”. Finally, while a reference to the dictionary meaning of the expression to “take over” is not conclusive, it may be noted that it is defined in the Shorter Oxford Dictionary as meaning—“to take by transfer from, or in succession to, another”, a meaning which imports a change of ownership, such as occurs in a sale but not in a mere bailment.

I consider, therefore, that the learned trial judge erred in admitting and accepting Lazar's evidence, and in interpreting certain circumstantial evidence, to show that by these words he merely meant that he was taking possession of the materials as agent for the appellants. The subsequent correspondence between the parties' advocates upon which the learned judge relied (even if admissible for that purpose) was not sufficient to oust the plain meaning of the endorsement. The learned judge's conclusion, upon all the evidence, is expressed in the following words in his judgment:

"I find as a fact that the agreement was that the defendant should dispose of the goods on behalf of the plaintiffs without incurring any responsibility for the prices obtained."

That is a finding which, in my view, with the greatest respect, is not only unwarranted on the evidence for the reasons which I have given, but is inherently improbable. What clearly happened, I think, in the light of Lazar's own evidence, his written memorandum on exhibit 1, and his subsequent conduct in selling some of the goods by auction, withdrawing others from sale, and keeping the rest, was that he was constrained by Doulatram, no doubt unwillingly but in circumstances falling short of duress, to buy the materials from Doulatram at a price not agreed upon, thereby obliging himself to recoup himself as best he could by selling them for such prices as he could obtain. This conclusion is supported by an unexplained admission by Lazar during the course of his evidence, when he said:

"I since treated these goods as my property and gave Mr. Doulatram to understand that I was treating them as my property."

Regarding the question whether any price was agreed upon between Lazar and Doulatram, the latter's evidence on the point was inconsistent, and at one stage he stated that the defendant agreed to buy them at their "full undamaged value". But this evidence was rejected by the learned trial judge, and rightly so in view not only of the denials of Lazar (whose evidence he preferred) but of Doulatram's admissions elsewhere in his evidence. These admissions included the following statement in cross-examination:

"We were demanding the selling price. There was no agreement. He was offering landing price, we were demanding selling price. We had not worked out any figure of agreement. He had no ready money to discharge the debt. The agreement was to differ. I did not give way. He did not give way."

From this evidence, and from Doulatram's insistence that there was a sale, and from Lazar's written admission on exhibit 1, it is clear in my opinion that there was a sale of the goods at a price not agreed, neither party insisting on his price as a condition of there being a sale at all.

In these circumstances learned counsel for the appellants contends that s. 10 (2) of the Sale of Goods Ordinance (Cap. 290) came into operation, with the result that a "reasonable price" became payable by operation of law. Section 10 provides as follows:

- "10. (1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties.
- "(2) Where the price is not determined in accordance with the foregoing provisions, the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case."

It is argued by learned counsel for the respondent that s. 10 (2) is only applicable if nothing was said by the parties about price and not, as here, if at the time of the formation of the contract the question of price was discussed but not agreed on; and in support of this contention the House of Lords case of *May and Butcher Ltd. v. R.* (4), [1934] 2 K.B. 17, decided in 1929, is relied on. That case, and two others which I will now consider, were decided, in so far as they touch upon the point now under consideration, with s. 8 of the Sale of Goods Act, 1893, in view, whose terms are identical with those of s. 10 of the Sale of Goods Ordinance of Kenya.

All that *May and Butcher Ltd. v. R.* (4) was concerned with, however, and all that it laid down, was the proposition that an agreement between two parties to enter into another agreement regarding an essential term, as for instance price, is itself no agreement. Such was not the position in the present case, as we have seen. There was no agreement to agree later on about the price. There was an agreement to sell with the question of price left open. The following passage from the judgment of Viscount Dunedin, at p. 21, puts the legal position clearly:

“To be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. Of course it may leave something which still has to be determined, but then that determination must be a determination which does not depend upon the agreement between the parties . . . No doubt as to goods, the Sale of Goods Act, 1893, says that if the price is not mentioned and settled in the contract it is to be a reasonable price. The simple answer in this case is that the Sale of Goods Act provides for silence on the point and here there is no silence, because there is a provision that the two parties are to agree.”

Lord Warrington of Clyffe, at p. 22, said this:

“It is said that this case is to be treated on the same footing as if there had been no fixing of the price; as if the contract had been silent as to the price, and the law may then imply a reasonable price; but in the present case the facts preclude the application of any such principle. To do that would not be to imply something about which the parties have been silent; it would be to insert in the contract a stipulation contrary to that for which they have bargained to give them, not the result of their own agreement, but possibly the verdict of a jury, or some other means of ascertaining the stipulated price. To do that would be to contradict the express terms of the document which they have signed.”

From these passages it is contended that, in order that the statutory imposition of a “reasonable price” should apply, there must have been silence as to price, in the sense of nothing having been said about it at all. But that is neither what s. 10 provides nor what *May and Butcher* (4) decides. The limited scope of that decision was later explained by the House of Lords itself when their Lordships discussed and distinguished it in *Hillas & Co. Ltd v. Arcos Ltd.* (5), (1932), 147 L.T. 503. That silence as to price includes for this purpose not only non-mention of price but also non-agreement on price is made clear not only in the words of Lord Warrington of Clyffe in *May and Butcher’s* case (4) already quoted, where he puts a “no fixing of the price” on the same footing as a “silence as to the price”: it is also made clear in *Foley v. Classique Coaches Ltd.* (6), [1934] 2 K.B. 1, where Greer, L.J., at p. 11 says this:

“I think the words of Bowen, L.J., in *The Moorcock* are clearly applicable to a case of this kind, and that in order to give effect to what both parties intended the court is justified in implying that in the absence

of agreement as to price a reasonable price must be paid, and if the parties cannot agree as to what is a reasonable price then arbitration must take place. It is quite true that one cannot add to a contract an implied term inconsistent with or which contradicts the express terms of the contract, but in a suitable case one can imply a term, and in my judgment to imply a term in this contract that the price of the petrol supplied by the respondent shall be reasonable is in no way inconsistent with the agreement.”

In short, the effect of the decided authorities appears to me to be this. If one man says “I will sell, but only at my price, which is X”, and the other says “I will buy, but not at that price”, then there is no contract at all, since each party has refused to contract except at a price to which the other will not agree. But if, in agreeing to buy and sell, either nothing is said about price or (as is the case here) price is discussed without agreement being reached on it but without at the same time each party refusing to contract at all save on his own terms as to price, then in either of those cases s. 10 of the Sale of Goods Ordinance will apply and the law will imply an agreement to pay a reasonable price. In my view, therefore, the respondent having bought from the appellants the 182 pieces of cloth listed in exhibit 1, was liable to pay the appellants a reasonable price for them. It only remains to decide what would be a reasonable price.

In deciding what is a reasonable price s. 10 (2) requires that the surrounding circumstances shall be taken into account. In the present case there was a paucity of evidence to enable any court to assess what would be a reasonable price for this cloth, and the best that this court can do, as I see it, is to take the landing cost price of each item as set out in the list exhibit 1 and to add to each some percentage for profit. After perusing all the evidence I feel no more sympathy than did the learned trial judge for the appellants, who through Mr. Doulatram were clearly endeavouring throughout to exploit the accidental soaking of their cloth by making an exaggerated claim based on a selling price averaging, for the whole of the materials, over fifty per cent. more than the landed cost prices. Mr. Doulatram stated in evidence that, even in clearance sales, the appellants generally made from 5 to 10 per cent. profit on cloth sold, and that they never sold below cost price. But Mr. Doulatram was not believed by the learned trial judge, who considered that he was either very ignorant of his own business or was endeavouring to conceal his knowledge. And a manufacturer’s representative, Mr. Mohindra, who dealt in piece-goods textiles and had examined the materials in dispute, gave evidence that some of the material was old stock purchased not later than 1950 (that is to say some six years before the accident) while of other pieces which he had examined he stated, with regard to eleven bales of small yardages, that:

“the designs at that time were outmoded. When a design is outmoded I think it has often to be sold at a loss; very much so.”

The burden of proving what was a reasonable price for the goods taken over was upon the plaintiffs. They proved their landed prices and selling prices, but did not prove, to the satisfaction of the court, that the whole of the goods taken over were saleable.

Taking all these factors into consideration I would hold a “reasonable price” for the 182 pieces taken over by the respondent to be their total landed cost price plus five per cent. for profits. This would amount to Shs. 20,313/71 plus Shs. 1,015/68, namely Shs. 21,329/39. I would accordingly allow the appeal, set aside the judgment below, and order the respondent to pay to the appellants the sum of Shs. 21,329/39. Counsel have expressed their desire to submit their arguments regarding costs, here and below, after the delivery of judgment.

Sir Kenneth O'Connor P: I agree. The appeal is allowed and there will be an order in the terms proposed by the learned justice of appeal.

An opportunity will be given for argument on costs.

Forbes V-P: I also agree.

Appeal allowed.

For the appellants:

DN Khanna and JK Winayak

Johar & Winayak, Nairobi

For the respondent:

Mrs L Kean

Sirley & Kean, Nairobi

Ekadelio s/o Lomuli v R
[1959] 1 EA 168 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	12 March 1959
Case Number:	28/1959
Before:	Forbes V-P, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	First-Class Magistrate's Court at Lodwar Exercising Supreme Court Powers

[1] Criminal law – Trial – Murder – Non-direction on question of malice aforethought – Failure to sum up case to assessors – Failure to ascertain whether child witness understood nature of oath – Whether trial a nullity – Criminal Procedure Code (Cap. 27), s. 15 and s. 318 (1) (K.) – Oaths and Statutory Declarations Ordinance (Cap. 19), s. 19 (1) (K.).

Editor's Summary

The appellant had killed his brother by coming from behind and to one side of him and, from a distance of about eight feet, throwing at his head a stone measuring about six by four by two inches. The stone struck the deceased in the region of the temple killing him instantly. On appeal from a conviction of murder by the first-class magistrate's court exercising Supreme Court jurisdiction by virtue of powers delegated under s. 15 of the Criminal Procedure Code, the points considered were (a) the failure of the

trial magistrate to direct his mind expressly to the question of malice aforethought; (b) the failure to sum up the case to the assessors before obtaining their opinions, and (c) the failure of the trial magistrate to satisfy himself that a child witness understood the nature of an oath before being sworn.

Held –

- (i) the failure in (a) above is not necessarily fatal provided that the accepted evidence on the record makes it clear beyond a reasonable doubt that malice aforethought must have been present. *Yoweri Damulira v. R.* (1956), 23 E.A.C.A. 501, followed.
- (ii) in the present case the evidence established malice aforethought beyond reasonable doubt.
- (iii) the failure to sum up a case to the assessors is not necessarily fatal; nor is a summing up to the assessors required by law, since s. 318 (1) of the Criminal Procedure Code provides only that “the judge may sum up the evidence” to them; but it is desirable to do so in all but the simplest cases and it ought to have been done in the present case. *Washington s/o Odindo v. R.* (1954), 21 E.A.C.A. 392, followed.

- (iv) the trial magistrate satisfied the procedural requirements for a child whose evidence is to be given unsworn, but not for one who was to be sworn or affirmed; in the present case the omission was of no material consequence in view of two other eye-witnesses to the killing and of the appellant's own admissions.

Appeal dismissed.

Cases referred to in judgment

- (1) *Yoweri Damulira v. R.* (1956), 23 E.A.C.A. 501.
- (2) *Washington s/o Odindo v. R.* (1954), 21 E.A.C.A. 392.
- (3) *Kibangeny arap Kolil v. R.*, [1959] E.A. 92 (C.A.).

Judgment

Windham JA: read the following judgment of the court: This was an appeal from a conviction of murder by the first-class magistrate's court exercising Supreme Court jurisdiction in the Turkana district by virtue of powers delegated under s. 15 of the Criminal Procedure Code of Kenya. The conviction was duly confirmed by the Kenya Supreme Court. We dismissed the appeal, intimating that we would later give our reasons for doing so, in view of one or two points which in our opinion merited consideration. We now give those reasons.

The appellant killed his brother, the deceased, by coming from behind him and to one side of him and, from a distance of about eight feet, throwing at his head a stone measuring about six by four by two inches. The stone struck the deceased in the region of the temple, killing him instantly. So much was testified to by more than one eye-witness and (save as to the size of the stone) was admitted by the appellant in sworn evidence. The only element of murder on which there was any question was that of malice aforethought, and one of the points to which we have given our consideration was the fact that the trial magistrate in his judgment did not expressly direct his attention to this question. Such a failure, however, is not necessarily fatal provided that the accepted evidence on the record makes it clear beyond a reasonable doubt that malice aforethought must have been present: see *Yoweri Damulira v. R.* (1) (1956), 23 E.A.C.A. 501. In the present case the dimensions of the stone, the range from which it was flung, and the fact that it was thrown at the side of the deceased's head, were themselves sufficient, in our view, to indicate an intention on the appellant's part at least to cause grievous harm, or knowledge that the act would probably cause grievous harm. But the matter is put beyond a doubt by the appellant's admission in evidence that "I knew it could do him serious harm". In our view, therefore, malice aforethought was established beyond a reasonable doubt upon the evidence.

The second point which we considered was that the learned trial magistrate (so far as appears from the record) failed to sum up the case to the assessors before obtaining their opinions, which were that the appellant was guilty of murder. Such a failure, again, is not necessarily fatal; nor is a summing-up to the assessors required as a matter of law, s. 318 (1) of the Criminal Procedure Code providing only that "the judge may sum up the evidence" to them. But, as this court has pointed out more than once, to do so is a sound practice which ought to be followed in all but the simplest cases, and it ought in our view to have been followed in the present case: see *Washington s/o Odindo v. R.* (2) (1954), 21 E.A.C.A. 392. Here, however, the evidence was so clear that we think it highly unlikely that the assessors would have given

opinions other than those which they gave, even if the evidence had been summed up to them.

Lastly, our attention has been directed to the fact that before taking the sworn evidence of one of the three eye-witnesses to the killing, a boy of about

twelve years of age, the learned trial magistrate does not appear to have complied with the requirement of s. 19 (1) of the Oaths and Statutory Declarations Ordinance (Cap. 20) that if a child of tender years is to be sworn the court must first be satisfied that he understands the nature of an oath. The learned magistrate merely recorded that he “appears to understand that he must speak the truth”. That is the requirement, under the same section, for a child whose evidence is to be given unsworn, but not for one who is to be sworn or affirmed. The point was made clear in a very recent judgment of this court in *Kibangeny arap Kolil v. R.* (3), [1959] E.A. 92 (C.A.). In the present case the omission was of no material consequence, however, in view of the two other eye-witnesses to the killing and of the appellant’s admissions.

It was for these reasons that, after considering the above points, we dismissed the appeal.

Appeal dismissed.

The appellant did not appear and was not represented.

For the respondent:

DS Davies (Crown Counsel, Kenya)

The Attorney-General, Kenya

Motor Mart and Exchange Limited and another v Fateh Mohamed [1959] 1 EA 170 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	23 January 1959
Case Number:	312/1957
Before:	Bennett J
Sourced by:	LawAfrica

[1] Negligence – Excavations – Subsidence of neighbouring land and building – Subsidence due to lack of support for soil along boundary of neighbouring land – Insufficient strength of retaining wall – Liability of land owner excavating – Whether breach of statutory duty – Building Rules, r. 152 (4) (U.).

Editor’s Summary

The first plaintiff owned plot 19, First Street, Kampala, on which two identical buildings stood with a drive running between them. The second plaintiff was a subsidiary of the first plaintiff company and carried on the business of retreading tyres in one of the two buildings on plot 19. The defendant owned the adjacent plot, No. 17. Early in 1954, the defendant began excavations along the boundary between plots 17 and 19. As a result of the excavations there was a subsidence on plot 19 which caused such

damage to the building in which the tyre business was carried on that the second plaintiff was forced to move its retreading business to the other building on the same plot. The defendant had submitted plans to the town engineer showing that he intended to build a retaining wall along the boundary where the excavations were made but when the retaining wall was built it was not in accordance with the plans which had been submitted to and approved by the authorities. The plaintiffs sued the defendant for damages for negligence or breach of a statutory duty.

Held –

- (i) the defendant was negligent in failing to take prompt and effective steps to support the soil on plot 19 after excavating plot 17 to a considerable depth and in erecting a retaining wall less thick than that advised.

- (ii) an owner of land has a right to prevent such use of neighbouring land as will withdraw the support which the neighbouring land naturally affords to his land.
- (iii) a breach of r. 152 (4) of the Building Rules (Laws of Uganda (Revised Edn.), Vol. 7) does not give rise to a claim for damages independently of negligence, nuisance or the infringement of a natural or acquired right of support.
- (iv) the first plaintiff was entitled to Shs. 55,000/- damages and the second plaintiff to Shs. 35,583/05.

Judgment for the plaintiffs.

Cases referred to in judgment

- (1) *Bower v. Peate* (1876), 1 Q.B.D. 321.
- (2) *London Passenger Transport Board v. Upson*, [1949] 1 All E.R. 60; [1949] A.C. 155.
- (3) *Monk v. Warbey*, [1934] All E.R. Rep. 373; [1935] 1 K.B. 75.
- (4) *Square v. Model Farm Dairy (Bournemouth) Ltd.* [1939] 1 All E.R. 259; [1939] 2 K.B. 365.
- (5) *Liesbosch, Dredger v. Edison S.S.*, [1933] A.C. 449; sub nom. *The Edison* [1933] All E.R. Rep. 144.

Judgment

Bennett J: In this suit the two plaintiffs claim damages from the defendant for negligence and breach of statutory duty.

The first plaintiff is a limited liability company incorporated in Kenya, and carrying on business in Uganda. The second plaintiff is a wholly owned subsidiary company of the first plaintiff which also carries on business in Uganda.

The first plaintiff was at all material times the registered proprietor of plot No. 19, First Street, Kampala, and the defendant was at all material times the occupier of the adjoining plot known as plot No. 17, First Street, Kampala.

In 1949 the first plaintiff erected two identical buildings on plot 19 with a drive or carriage way between them. These buildings had been designed as go-downs, but in the building adjacent to plot 17 a tyre retreading factory had been established and had been operated by the second plaintiff, with the approval of the chief factories inspector since 1950.

In January or February, 1954, the defendant began excavating a trench on his land against the boundary of plot 19, presumably for the purpose of laying the foundations of a building which he proposed to erect. This excavation left the boundary of plot 19 a vertical face. The building in use as a retreading factory on plot 19 was built right up to the boundary. The work of excavation seems to have been spread over a long period of time. On December 17, 1955, Mr. Rickard, the manager of the second plaintiff's tyre retreading factory, during a routine inspection of the factory, observed a vertical crack in the rear wall of the factory, which appeared to have gone right through the wall. He also found a crack along the base of one of the side walls. As a result of these discoveries he went to plot 17. There he found that the excavation which was sheer and in line with the wall of the factory, had, in one or two places, caved in under the foundations of the factory. There had been much rain during the previous twenty-four

hours.

It would seem that during the ensuing months further cracks in the walls and cracks in the floor of the building developed, and on April 19, 1956, the factory was closed on the advice of the chief factories inspector who considered it was no longer safe. The second plaintiff moved the tyre retreading machinery from the factory into the twin building on the opposite side of the drive. This

building had been in use as a store. The removal and installation of the machinery occupied nearly a month during which the machinery could not be operated. Considerable expenses were incurred by the second plaintiff in defraying the cost of removal and installation.

There is no evidence to show that, after the defendant began to excavate, he did any shoring or timbering to protect the building on plot 19 from subsidence, apart from the building of a retaining wall. The foreman to whom the defendant entrusted this work of excavation and the building of a retaining wall was not called as a witness. The date upon which work began on the construction of a retaining wall has not emerged in evidence. It has, however, emerged that the plans for the retaining wall prepared by the defendant's architect, Mr. Radford, were submitted to the town engineer on February 23, 1955, and were approved by the town engineer on February 24, 1955.

It is alleged in the plaint that this retaining wall has been so negligently constructed that it is of insufficient strength to provide adequate support for the land on plot 19. The plaintiffs called a considerable body of evidence in proof of this allegation.

Mr. Farr, a member of the Institute of Constructional Engineers, said that he visited plots 17 and 19 on April 13, 1956, and that he found extensive cracks in the walls and floor of the factory on plot 19. He came to the conclusion that these cracks were caused by subsidence of the foundation of the wall of the factory building, and that the subsidence had resulted from excavations on plot 17 and from the lack of an adequate retaining wall. He observed a slight outward bulge in the retaining wall. He expressed the opinion that the soil would have collapsed had there been no building standing on plot 19, since the weight of the land was alone sufficient to cause slipping and the retaining wall was of insufficient bulk to withstand the natural earth thrust against it.

Mr. Bicknall, the assistant architect to the Kampala Municipal Council, visited plots 17 and 19 in July, 1957. He observed that the retaining wall did not conform to the drawings and calculations submitted to the town engineer by Mr. Radford, on behalf of the defendant, on February 23, 1955, to which the town engineer had given his approval. The horizontal dimensions of the wall were very much less than the dimensions submitted by Mr. Radford, and approved by the engineer. Mr. Bicknall gave it as his opinion that the wall was generally weak and liable to move. He further expressed the opinion that the cracks in the factory building were due to the plot boundary moving as a result of the instability of the retaining wall. He said that had the retaining wall been built on plot 17 immediately excavations had taken place, there would be no reason for any movement of soil on plot 19.

Mr. Manwaring, an architect, who visited plot 19 in January, 1958, expressed the view that the cracks in the walls and floor of the building adjacent to plot 17 were compatible with a leaning-out of the building into the next door plot, and to a drop in the foundations. He said that the building was definitely unsafe and concluded that the cracking of the walls and floor was caused by the excavations next door, and to the unstable condition of the retaining wall. He also said that the weight of the building on plot 19 would really have no effect upon the liability of the soil to collapse, in that its weight was small in comparison with the weight of the soil being held up by the retaining wall. He expressed the view that a subsidence would have occurred even had there been no building on plot 19. He did not think that the cracks on the floor of the building could have been caused by the weight of machinery since the cracks were not round the place or places where the machinery had been installed.

Mr. Radford, the architect who designed the two buildings on plot 19 and who supervised the laying of the foundations, said that there was nothing in

or connected with the foundations which could have caused any subsidence of the soil.

In cross-examination he conceded that if heavy machinery was placed on a concrete floor four inches thick the floor would be liable to subside and break up.

Mr. Aggawal, a chartered constructional engineer, gave evidence on behalf of the defendant. He visited the plots 17 and 19 on December 18, 1957, and on several occasions thereafter. He examined the defendant's retaining wall and the adjacent building on plot 19. He expressed the opinion that the cracks in the rear wall and floor of the building were due to the absence of a hard core beneath the concrete floor of the factory. He estimated the thickness of the concrete floor to be four inches only. He said that the crack in one of the walls had occurred because the wall was not bonded with the wall of the adjoining yard, and that there had been a shrinkage of the joints. He said that a large crack in the rear wall of the building was due to failure to provide support for the brickwork above a hole in the wall which had been used for the exhaustion of steam. He also expressed the opinion that the exhaustion of steam through the hole in the wall had caused or contributed to the consolidation of the soft clay underneath the floor, thus causing cracks in the cement floor. He conceded that had machinery been placed on the floor of the factory which was too heavy for the floor to bear he would have expected to find cracking of the floor round the base of the machinery, and not in the places where cracking had in fact occurred.

He said that the retaining wall on plot 17 was quite adequate, that he could find no evidence of it having moved, and that it did not require any restoration. He conceded, however, that had he been called upon to design it he would have increased the thickness somewhat.

I was not impressed by Mr. Aggawal's opinion that the damage to the floor of the factory building was caused by the soft clay underneath the floor becoming compacted. Mr. Aggawal admitted that he would have expected the earth underneath the floor to have become compacted within two years from the time when the floor was subjected to the weight of machinery. The floor had in fact been bearing the weight of the machinery for over three years before the excavations on plot 17 were begun, during which period it had withstood the weight of the machinery. It was not till more than five years after the machinery had been installed that the floor began to crack.

Nor was I favourably impressed by Mr. Aggawal's theory that the exhaustion of steam through the hole in the wall of the factory caused the soil under the floor to consolidate. This theory was never put to the plaintiff's expert witnesses but was propounded for the first time after the plaintiffs had closed their case. On the assumption that steam was exhausted through this hole, although there is no evidence to prove that it was, I fail to see how the steam could have affected the soil under the floor when the soil was insulated from the steam by four inches of concrete. There is no evidence to show that the concrete floor itself became heated due to the exhaustion of steam.

It would have been a simple matter to cross-examine Mr. Rickard, the manager of the factory, or the chief factories inspector, who inspected it at intervals, as to the liability of the floor of the factory to become heated, but this was not done.

In my judgment, the evidence adduced by the plaintiffs raises a probability that the damage to the building on plot 19 was due to a movement of the soil, and that the movement resulted from the excavations on plot 17. I am also satisfied that no movement of the soil would have resulted from the excavations had the defendant taken prompt and effective measures to support the soil on plot 19.

I now turn to the issue of negligence. The defendant, according to his own admission, began excavating in January or February, 1954. There is no evidence that he took any steps to shore up or support the land on the adjoining plot until a year later, when he submitted plans for the building of a retaining wall. The evidence does not disclose when work on the retaining wall commenced, but on December 17, 1955, Mr. Rickard noticed that the excavations on plot 17 were caving in under the foundations of the factory building. From Mr. Rickard's evidence, which I accept, it is to be inferred that, on December 17, 1955, the retaining wall had not reached the level of the foundations of the factory building, otherwise the caving in would not have been visible.

In my judgment, the failure of the defendant to take prompt and effective steps to support the soil on plot 19 after excavating to a considerable depth was negligent.

I am also of the opinion that the defendant was negligent in erecting a retaining wall of a thickness which was considerably less than that advised by his architect, Mr. Radford, and which was of insufficient bulk to withstand the thrust of earth against it from the adjoining plot.

I am satisfied, on the evidence of Mr. Bicknall, Mr. Farr and Mr. Manwaring, that the excavations on plot 17 would have resulted in a collapse of the soil on plot 19 even had there been no building on plot 19, and that the weight of the building and of the machinery did not materially contribute to the collapse.

An owner of land has as an incident of his ownership the right to prevent such use of the neighbouring land as will withdraw the support which the neighbouring land naturally affords to his land. See Halsbury's Laws of England (2nd Edn.), Vol. 11, p. 364.

There is no natural right to support for buildings, but to quote from Halsbury's Laws of England (2nd Edn.), Vol. 11, p. 364:

"The mere fact, however, that there are buildings upon his land does not preclude an owner from his right against a neighbour or subjacent owner who acts in such a manner as to deprive the land of support, so long as the presence of the building does not materially affect the question, or their additional weight did not cause the subsidence which followed the withdrawal of support."

The plaintiff's case does not, however, depend upon the establishment of a right of lateral support from the defendant's land, since the claim is founded in negligence and breach of statutory duty. In *Bower v. Peate* (1) (1876), 1 Q.B.D. 321, at p. 326, Cockburn, C.J., said:

"The answer to the defendant's contention may, however, as it appears to us, be placed on a broader ground, namely, that a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else . . ."

Having found negligence proved, it is unnecessary for me to deal with the plaintiff's claim in so far as it is founded upon an alleged breach of statutory duty since this cause of action is alternative to the claim for damages for negligence. However, in case it should be held by an appellate court that I have come to a wrong conclusion on the issue of negligence, I will indicate my views, briefly, on the question of liability for alleged breach of statutory duty. In my judgment the evidence establishes a breach by the defendant of r. 152 (4) of the Building Rules (Laws of Uganda (Revised Edn.), Vol. 7, p. 1655). Rule 152 (4) requires a person excavating within six feet of any building or to a lower depth than the bottom of any adjacent or nearby foundation to take such

means of shoring up, securing or otherwise making safe such building so as to ensure that it shall not in any way be prejudicially affected by such excavation.

The decision of the House of Lords in *London Passenger Transport Board v. Upson* (2), [1949] A.C. 155, is authority for the proposition, if authority is needed, that breach of a statutory regulation can give rise to a claim for damages for breach of statutory duty.

The Building Rules are made under s. 72 and s. 73 of the Public Health Ordinance (Cap. 98) and a breach of the Rules is punishable by fine under s. 138 of the Ordinance. In *Monk v. Warbey* (3), [1935] 1 K.B. 75 at p. 84, Maugham, L.J., said:

“I think, however, one may say this that if the Act provides a special remedy for the contravention of its provisions the *prima facie* rule is that that is the only remedy, and the question whether that rule applies in any particular case depends upon the purview of the legislation and the language employed.”

In *Square v. Model Farm Dairy (Bournemouth) Ltd.* (4), [1939] 2 K.B. 365, at p. 380, Slesser, L.J., in a judgment with which the other members of the court agreed, said:

“In those circumstances I find it impossible to think that the purview of this legislation was that a civil remedy should be provided for breach of this Act when this Act itself in substance is imposing a penalty for that for which a civil remedy already in most cases existed.”

As it seems to me, this reasoning is applicable to the instant case. In most cases a breach of r. 152 (4) of the Building Rules would give rise to a cause of action in negligence or nuisance.

With some diffidence, I conclude that a breach of r. 152 (4) does not give rise to a claim for damages independently of negligence, nuisance or the infringement of a natural or acquired right of support.

I now turn to the question of damages. The first plaintiff's claim for damages is founded on injury to its reversionary interest as owner of the building on plot 19.

The cost of building a new retaining wall is estimated in the plaint at Shs. 48,975/30, this figure being based upon a tender received by the first plaintiff's architect. Extensive repairs to the building are also necessary and the cost of these, which included the rebuilding of part of the foundations, was estimated by Mr. Manwaring as in the neighbourhood of £750.

Mr. Aggawal called for tenders for the rebuilding of the retaining wall, on behalf of the defendant, and the highest tender was for Shs. 29,875/-. This latter tender has been impugned on the grounds that tenderers were never likely to be called upon to accept a contract. In all the circumstances, I assess damages under this head at Shs. 40,000/-.

The sum of £750 equals Shs. 15,000/- mentioned by Mr. Manwaring as his estimate of the cost of the repairs to the building has never been challenged by defendant, and I accept this figure. I therefore assess the total of damages due to the first defendant at Shs. 55,000/-.

The second plaintiff claims damages as an occupier of plot 19 whose business has been adversely affected. Mr. Wilkinson, for the defendant, contended that the second plaintiff is not entitled to any damages at all because the carrying on of a tyre retreading business in the building on plot 19 was unlawful on the grounds that no occupation permit had been granted by the Municipal Council. An application for such a permit was made on March 11, 1950, but there is no record of any permit ever having been granted. Mr. Wilkinson contends that under s. 105 of the Evidence Ordinance the burden of proving that it had a permit rests upon the second plaintiff.

Mr. Troughton, for the plaintiffs, relies upon r. 59 (2) of the Public Health (Building) Rules, 1939 (Laws of Uganda, 1939 Vol. at p. 451), which is in the following terms:

“A person shall not occupy or use any new building, or being owner thereof, suffer the same to be occupied or used, unless he shall have procured a written permit of occupation under this rule: Provided always that if within fourteen days, or in the case of the townships of Kampala, Jinja and Entebbe, seven days, of the despatch of a certificate as required by para. (1) of this rule, no reply shall have been received from the local authority, such building may be occupied.”

This rule was amended on May 15, 1950, and has since been revoked, but was in force throughout March, 1950. The reply to the second plaintiff's application for an occupation permit is dated March 25, 1950, which is ten days after the date on which the application had been despatched, namely, March 11, 1950. It is said that the plaintiff was therefore entitled to occupy the building on March 18 without waiting for an occupation permit by virtue of the proviso to r. 59 (2). I accept this contention and am satisfied that the second plaintiff was in lawful occupation of the building.

Mr. Wilkinson contends that the damage claimed in respect of the removal of the factory from one building to another is too remote. I am unable to accept that contention and the decision of the House of Lord in *Liesbosch, Dredger v. Edison S.S.* (5), [1933] A.C. 449, is against it. In that case the owners of a dredger which had been lost due to the negligence of the respondents, were awarded damages based, *inter alia*, upon the cost of purchasing a comparable dredger and the cost of adapting it for the purpose for which it was required.

The second plaintiffs were faced with the alternative of closing down their business altogether or removing it to another building. They did what they could to minimise their own loss by removing the machinery to the twin building and using the damaged building as a store. Had they not done so they would have sustained a very much greater loss for which the defendant might well have found himself liable. It is, however, obvious from a perusal of the bundle of vouchers (ex. P. 2) that certain goods such as screwdrivers, hammers, chisels, hacksaws, handsaws and brooms were purchased for use in connection with the work of removal which have a residual second-hand value for which no allowance has been made. Since no evidence was given as to the second-hand value of these implements, the court can do no more than attempt to arrive at a round figure which should be allowed as a deduction from the plaintiffs' claim under this head. Accordingly, I assess the sum to be deducted at Shs. 200/-.

Mr. Troughton conceded that a sum of Shs. 1,924/28 should be deducted from the amount claimed as the cost of removal, this sum being attributable to the requirements of the chief factories inspector. These requirements were in the nature of improvements to the original factory. I therefore assess damages for the cost of removal at Shs. 17,583/05.

The second plaintiff also claims Shs. 18,570/42 as damages for loss of profits during the period that the factory was closed, namely, April 19 to May 14, 1956.

As to the argument that damages ought to have been claimed on the footing of loss of turnover and not loss of profit, the factory was making a profit during the months immediately preceding its closure and the probability is that it would have made a profit during the period that it was closed but for the closure. Moreover, it cannot be doubted that the second plaintiffs suffered a financial loss whether the loss be described as a loss of profit or a loss of turnover.

I can see no reason to quarrel with the plaintiffs' method of estimating the probable loss to the second plaintiff's business, being satisfied, on the evidence of Mr. Rickard, that there was no saving in overhead expenses during the time that the factory was closed, apart from a saving of about Shs. 800/- in boiler fuel. Part of this Shs. 800/- was probably offset by payment of overtime to employees. I assess damages for loss of profit at Shs. 18,000/-.

There will be judgment for the first plaintiff for Shs. 55,000/-, and for the second plaintiff for Shs. 35,583/05. The defendant will pay the plaintiffs' costs (one set of costs only).

Judgment for the plaintiffs.

For the plaintiffs:

JFG Troughton

Hunter & Greig, Kampala

For the defendant:

PJ Wilkinson

AD Patel, Kampala

Eriezali Mungono v R
[1959] 1 EA 177 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	5 January 1959
Case Number:	213/1958
Before:	Sir Audley McKisack CJ
Sourced by:	LawAfrica

[1] Criminal law – Trial – Submission of no case to answer – Essential element of offence not proved – Witness called by court to give evidence on element of offence not proved – Whether court precluded from taking this course by Criminal Procedure Code (Cap. 24), s. 209 (U.).

Editor's Summary

The appellant had been charged with extortion by a public officer contrary to s. 79 of the Penal Code (U.). The Crown failed to call evidence to show that the appellant was acting in the course of his duty when the alleged extortion took place and counsel for the appellant submitted at the close of the Crown case there was no case to answer on that ground and asked for the dismissal of the case and acquittal of the appellant pursuant to s. 209 of the Criminal Procedure Code. The magistrate, however, relying on s. 148 of the Criminal Procedure Code called the superior officer of the appellant to give evidence as to

what constituted the duty of the appellant and subsequently convicted the appellant.

Held – it is mandatory upon the court to call (or re-call) a witness if his evidence, in the opinion of the court, is essential to the just decision of the case.

Appeal dismissed.

Cases referred to in judgment

(1) *Manyaki and Others v. R.*, [1958] E.A. 495 (C.A.).

(2) *R. v. McKenna* (1956), 40 Cr. App. R. 65.

Judgment

Sir Audley McKisack CJ: The appellant was convicted of extortion by a public officer, contra s. 79 of the Penal Code, and was sentenced to eighteen months' imprisonment. The case against him was that, being an official in the veterinary department of the Uganda Government, he asked for and accepted Shs. 5/- for the issue of a permit for which no fee was payable. He appeals against conviction and sentence, and the memorandum of appeal contains eight grounds on which it is alleged that the learned trial magistrate erred.

The first point is one of law. At the close of the case for the prosecution it was submitted by the defence that there was no case to answer, since it was not proved that it was the appellant's duty to issue the permit in question, which was for the moving of cattle. Section 79 of the Penal Code (Cap. 22) reads as follows:

"79. Any person who, being employed in the public service, takes or accepts from any person for the performance of his duty as such officer any reward beyond his proper pay and emoluments, or any promise of such reward, is guilty of a misdemeanour, and is liable to imprisonment for three years."

It was thus necessary for the purposes of the present case to prove, among other things, that it was the appellant's duty to issue these cattle permits. In reply to the submission by the defence, the prosecutor argued that there had been sufficient evidence for this purpose, but the magistrate then recorded that there was weight in the defence submission that there should have been proper proof of this matter. He went on to record that he would himself call the appellant's superior officer since in his (the magistrate's) opinion this evidence was essential to a just decision of the case. In so doing he was acting under s. 148 of the Criminal Procedure Code (Cap. 24), the relevant part of which is as follows:

"148. Any court may, at any stage of any inquiry, trial or other proceedings under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or call and re-examine any person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:"

Mr. Hunt, who appeared for the appellant, argues that the magistrate was ignoring s. 209 of the Criminal Procedure Code, which is as follows:

"209. If at the close of the evidence in support of the charge it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him."

He argues that, if the magistrate agreed (as he appears to have agreed) with the defence submission that there was no case to answer by reason of a gap in the evidence, he had no choice but to dismiss the case and acquit the appellant. Mr. Hunt contends that s. 148 cannot be invoked in such case, and that the decisions of the East African Court of Appeal about the calling of a witness by the court are not relevant to this issue. He says that, in any event, those decisions relate to the section in the Tanganyika Criminal Procedure Code which differs from the Uganda s. 148 in that it has the following additional sub-section:

"(2) The power created by sub-s. (1) shall be exercised in the same circumstances and subject to the same limitations as the power created by s. 540 of the Indian Code of Criminal Procedure, 1898."

The fact, however, that the Uganda Code does not contain that sub-section in no way favours the appellant's case. On the contrary, it appears to make the limitations imposed by the Indian law inapplicable. The judgment of the East African Court of Appeal in *Manyaki and Others v. R.* (1), [1958] E.A. 495 (C.A.), makes it clear that, even under the provisions of the Tanganyika section, it is mandatory upon the court to call (or recall) a witness if his evidence, in the opinion of the court, is essential to the just decision of the case. And I can see no logic in providing that the court is precluded from doing this if the defence has submitted that there is no case to answer. If the provisions of s. 209 of the Code are mandatory, so are the provisions of s. 148. And the decision of the Court of Criminal Appeal in *R. v. McKenna* (2) (1956), 40 Cr. App. R. 65, is strong support for the view that there is no injustice in the court calling a witness to supplement a gap—or at any rate a technical gap—in the prosecution evidence after a submission of no case to answer. In that case the appellant had been tried in the Central Criminal Court for an offence under Emergency Regulations relating to goods “wholly or mainly of iron or steel”. When the prosecution closed its case the defence argued that there had been no proof that the goods were wholly or mainly of iron or steel and that, consequently, there was no case to go to the jury. The commissioner had then himself recalled a witness to adduce such proof, and the Court of Criminal Appeal held that he had been right to do so.

The first ground of appeal, therefore, fails.

Appeal dismissed.

For the appellant:

R Hunt

PJ Wilkinson, Kampala

For the respondent:

HSS Few (Crown Counsel, Uganda)

The Attorney-General, Uganda

The Attorney-General of Kenya v Block and another [1959] 1 EA 180 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	5 January 1959
Case Number:	85/1958
Before:	Sir Kenneth O'Connor P, Forbes V-P and Gould JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya—Miles, J

[1] *Injunction – Mandatory injunction – Roads in private housing estate in state of disrepair – Whether*

mandatory injunction will be granted at instance of Attorney-General – Whether public interest involved – Court’s discretion whether or not to grant injunction – Town Planning Ordinance (Cap. 134), s. 24(1) (K.) – Nairobi Municipality Building By-laws, 1948, By-law No. 366 – Township Private Streets Ordinance (Cap. 135) (now repealed) (K.) – Municipalities and Townships (Private Streets) Ordinance, 1951, s. 7 and s. 8 (K.) – Municipalities and Townships (Private Streets) (Amendment) Ordinance, 1952 (K.).

Editor’s Summary

The Attorney-General of Kenya appealed against a decision of the Supreme Court dismissing with costs a claim against the respondents for an order “that the defendants do and each of them does forthwith maintain the roads” on certain land in Nairobi to the satisfaction of the Nairobi City Council. At the trial the facts were agreed and no evidence was called by either side. The land in question had been developed as a building estate by the respondents subject to certain conditions imposed by the Commissioner of Lands, the relevant condition being 1 (B) (b), the material portion of which reads as follows:

“(b) The applicant shall construct and maintain to the Council’s specification and satisfaction all the estate roads of 6’ consolidated murram carriageway and to approved gradients and camber and with stone pitched side drains. Thereafter the constructions of these roads to Council’s tarmacadam specification is to be dealt with under the private streets procedure . . .”

At the date of the proceedings the majority of the plots on the estate had been disposed of but the respondents were the owners of the roads. The case for the appellant was that “the respondents not having at the date of suit or up to the present time maintained the roads to the Council’s specification and satisfaction, as required by condition 1 (B) (b)”, there was a breach of that condition which he sought to enforce by mandatory injunction. At the trial counsel for the appellant contended that condition 1 (B) (b) which was made pursuant to s. 24 (1) of the Town Planning Ordinance created a personal obligation on the respondents which would continue for their lives and the life of the survivor of them or until the Council made up the roads under s. 8 of the Municipalities and Townships (Private Streets) Ordinance, 1951; that, *inter alia*, the orderly development of land in Nairobi was a matter of public importance and that the appellant was entitled to seek an injunction and the court ought to grant it. Counsel for the respondents, whilst seeking to put a different construction on condition 1 (B) (b), contended that the appellant had no cause of action as he was not bringing a relator action on behalf of the Council; that no public right was involved since the obligation was to maintain private roads in a privately-owned estate; that the public had no right to use the roads therein; and that it would cost £400,000 to construct the twelve miles of road to the Council’s tarmacadam standard. The trial judge held that condition 1 (B) (b) created a

contractual or other legal liability upon the respondents, that public rights were involved and that the Attorney-General had a cause of action to enforce them, but refused to grant the order or the mandatory injunction asked for on the grounds that the court would not grant a mandatory injunction to repair and maintain a road when a large amount of superintendence would be necessary. On appeal it was argued on behalf of the Attorney-General that the trial judge had misconceived the meaning of the words appearing in para. 12 (1) of the plaint, namely, “the plaintiff claims (1) an order that the defendants do, and each of them does forthwith maintain the roads . . .”; that he thought he was being asked to grant a mandatory injunction binding the respondents to go on maintaining the roads for an indefinite period whereas all that he was being asked to do was to order the respondents to put the roads in repair forthwith. The second argument advanced was that even if what was asked for was a mandatory injunction to maintain the roads for an indefinite time, the trial judge should have granted an injunction in appropriate terms and in exercise of his equitable jurisdiction should have granted an injunction limited to what he considered the justice of the case demanded and the practice of the court allowed which, it was suggested, would have been to put the roads forthwith into a proper state of repair to the satisfaction of the Council. There was, however, no evidence before the trial judge and there was nothing to show whether, if the roads were once more put into a proper state of repair according to the murrum standard required by condition 1 (B) (b), the Council would, thereupon or within any definite time, make them up to “Council’s tarmacadam specification” as provided in the condition. Counsel for the respondents argued, as in the court below, that the Attorney-General had no locus standi and no effective cause of action.

Held –

- (i) the interpretation put upon condition No. 1 (B) (b) by the trial judge was correct.
- (ii) conditions lawfully imposed under s. 24 of the Town Planning Ordinance are *prima facie* imposed in the public interest and breach of them may amount to an infringement of a public right.
- (iii) the court was satisfied that the Attorney-General was seeking to enforce a public right, notwithstanding that the infringement took place on private land, and that the trial judge had jurisdiction to grant an injunction if a proper case for an injunction was shown.
- (iv) the trial judge correctly interpreted the prayer in para. 12 (1) of the plaint and from the allusion by counsel for the Attorney-General to the “time it would take to make up the roads”, it could not be said that all he was asking for was repairs, and that he did not also ask for an order for maintenance for an indefinite period.
- (v) having no information as to the extent of work entailed and the degree of superintendence necessary, nor whether and when the Council contemplated taking over all or some of the roads and raising them to tarmacadam standard, the court was unable to say that it would be proper to make the order asked for.

Per **Sir Kenneth O'Connor P (Forbes V-P and Gould JA** concurring): “The result seems to be that while the court has no right to question the Attorney-General’s decision to sue, or to sue for mandatory injunction in preference to pursuing other remedies . . . it retains its discretion to grant or refuse the injunction asked for and must still have regard to the matters to which it usually has regard in considering whether or not it will grant this type of relief.”

[1] *Practice – Appeal – Meaning of “decision of the court below” in r. 65 (3) of the Eastern African Court of Appeal Rules – Whether notice of appeal should be given when decision required to be affirmed*

on grounds other than those

relied on by trial judge – Eastern African Court of Appeal Rules, 1954 – English Rules of Supreme Court, O. 58, r. 6 (2).

At the hearing of the appeal, counsel for the first respondent proposed, though he had not cross-appealed, to argue that although the trial judge had been right in dismissing the Attorney-General's claim, his findings on certain issues raised had been wrong. In support of this contention he argued that he did not desire to "contend that the decision of the court below" should be varied within the meaning of r. 65 of the Court of Appeal Rules, 1954; he merely wished to re-argue certain grounds which the trial judge had rejected. He further contended that "decision" in the rule meant "the ultimate result" and that Form "G" in the Schedule to the Court of Appeal Rules was not appropriate for a notice of intention to argue that the decision of the court below be affirmed on other grounds. Counsel for the appellant, on the other hand, submitted that under r. 65, as no notice of cross-appeal had been given, the respondents were not at liberty to argue that the judgment of the court below should be varied, unless they obtained leave of the court to do so under r. 65 (3) and argued that "decision" in r. 65 must include the decisions of the court below upon the various issues framed by it in accordance with the Rules of the Supreme Court.

Held – "the decision of the court below" in r. 65 (3) means the decision as embodied in the decree or order appealed against and not grounds of that decision (or the decisions on the issues) and that the respondents were not obliged to give notice of cross-appeal.

Appeal dismissed.

Cases referred to in judgment

- (1) *Waller & Sons, Ltd. v. Thomas*, [1921] 1 K.B. 541.
- (2) *Property Holding Co. v. Clark*, [1948] 1 All E.R. 165; [1948] 1 K.B. 630.
- (3) *Bostel Bros. Ltd. v. Hurlock*, [1948] 2 All E.R. 312; [1949] 1 K.B. 74.
- (4) *A.-G. v. Antrobus*, [1905] 2 Ch. 188.
- (5) *Re Ellenborough Park*, [1955] 3 All E.R. 667; [1956] 1 Ch. 131.
- (6) *A.-G. v. Oxford, Worcester and Wolverhampton Railway Co.* (1854), 2 W.R. 330.
- (7) *A.-G. v. Sharp*, [1930] All E.R. Rep. 741; [1931] 1 Ch. 121.
- (8) *A.-G. (on the relation of Hornchurch U.D.C.) v. Bastow*, [1957] 1 All E.R. 497.
- (9) *A.-G. v. Ashborne Recreation Ground Co.*, [1903] 1 Ch. 101.
- (10) *A.-G. v. Wimbledon House Estate Co. Ltd.*, [1904] 2 Ch. 34.
- (11) *A.-G. v. Cockermouth Local Board* (1874), L.R. 18 Eq. 172.
- (12) *A.-G. (on the relation of Warwickshire County Council) v. London and N.W. Railway Co.*, [1900] 1 Q.B. 78.
- (13) *Kennard v. Cory Bros. & Co. Ltd.*, [1922] 1 Ch. 265; [1922] 2 Ch. 1.
- (14) *Carpenters Estates Ltd. v. Davies*, [1940] 1 All E.R. 13; [1940] Ch. 160.
- (15) *Wolverhampton Corporation v. Emmons*, [1901] 1 Q.B. 515.

- (16) *Molyneux v. Richard*, [1906] 1 Ch. 34.
- (17) *Nairobi City Council v. M. K. Bhandari*, [1957] E.A. 481 (C.A.).
- (18) *Wilson v. Furness Rly. Co.* (1869), L.R. 9 Eq. 28.
- (19) *Storer v. Great Western Rly. Co.* (1841), 2 Y. & C. Ch. Cas. 48; 63 E.R. 21.
- (20) *Moseley v. Virgin* (1796), 3 Ves. 184; 30 E.R. 959.
- (21) *Greene v. West Cheshire Rly. Co.* (1871), L.R. 13 Eq. 44.
- (22) *Ryan v. Mutual Tontine Westminster Chambers Association*, [1893] 1 Ch. 116.
- (23) *Powell Duffryn Steam Coal Co. v. Taff Vale Rly. Co.* (1874), L.R. 9 Ch. 331.

(24) *A.-G. v. Staffordshire County Council*, [1905] 1 Ch. 336.

(25) *A.-G. v. Roe*, [1915] 1 Ch. 235.

(26) *A.-G. v. Colchester Corporation*, [1955] 2 All E.R. 124; (1955) 2 Q.B. 207.

January 5. The following judgments were read:

Judgment

Sir Kenneth O'Connor P: This is an appeal by H.M. Attorney-General for Kenya against a decision of the Supreme Court of Kenya dismissing with costs a claim by the Attorney-General against both respondents for an order “that the defendants do and each of them does forthwith maintain the roads” on land in Nairobi known as sub-plot “A” of Land Reference No. 3734/R to the satisfaction of the City Council. There was also a prayer for an injunction restraining the respondents from transferring plots forming part of sub-plot “A” until the roads had been maintained, but that prayer was abandoned in the course of the proceedings in the court below.

The facts were agreed, no evidence being called on either side. The agreed facts were, so far as material, as follows:

The land in question was bought by the respondents from a religious order referred to in the record as the Holy Ghost Fathers or the White Fathers. The title was the fee simple in possession. Some time after the purchase of the land the respondents applied to the Commissioner of Lands under s. 24 (1) of the Town Planning Ordinance (Cap. 135 of the Laws of Kenya) for permission to subdivide the land into building plots. There is nothing in the record as to what, if any, negotiations took place. Permission to subdivide the land was given by the Commissioner of Lands subject to conditions. The land was subdivided into building plots and almost all the plots have been sold. A copy of the conditions, undated but stated to have been issued in or about July, 1951, is in the record. The relevant parts of this document read:

“CONDITIONS OF APPROVAL FOR SUBDIVISION OF
PART OF L.R. NO. 3734/R (SUBPLOT “A”) FOR MESSRS.
I. MASSADA AND A. L. BLOCK.

Introductory Notes:

- (1) In these conditions, whenever the term “applicant” is used it means Messrs. I. Massada and A. L. Block.
- (2) The approved plan referred to means Plan N.T.P.A. No. 1430 to 2500th scale.
- (3) The letter C. 19/51/8A of February 7, 1951, from the Special Commissioner and Acting Commissioner of Lands to the Trustees the Holy Ghost Fathers sets out the conditions of approval apply to the main subdivisions of L.R. 3734/R. Such conditions are to be complied with before the subdivision of sub-plot A with sub-plots as shown on the approved plan is permitted.
 1. Roads.
 - (A) *Survey:*

The applicant shall reserve land for, and survey and beacon all the roads at his own cost . . .
 - (B) *Construction:*
 - (a) The provisions of By-law 336 (k) are to be strictly complied with regarding the submission of

plans.

- (b) The applicant shall construct and maintain to the Council's specification and satisfaction all the Estate roads of 6' consolidated murram carriageway and to approved gradients and camber and with stone pitched side drains. Thereafter the constructions of these roads to Council's tarmacadam specification is to be dealt with under the private streets procedure.

.....

- (d) The road designs, i.e. apportionment of carriageway, footpaths and other widths, to be prepared or approved by the Council. All necessary culverts and bridges are to be designed constructed and maintained to the satisfaction of the city engineer and to support normal estate road traffic.
- (e) No building development on any plot or plots will be permitted until the complete road serving the plot or plots has been constructed to the satisfaction of the city engineer and a certificate to that effect issued by him.

.....

2. Reserved Plots:

(A) *Land for Government, Municipal and Public Purposes.*

The following plots in the position and extent shown on the plan shall be surveyed and transferred to the under-mentioned authorities free of charge to such authorities and at a time considered favourable by the same.

Government: (a) for public purposes—Plots Nos. 340 to 343 inclusive.

Municipality: (b) for public open space—Plots Nos. 337, 338 and 339.

.....

3. Order of Development.

In order to facilitate the adequate provision of services and avoid scattered development the residential plots are to be placed on the market in the following order unless otherwise permitted by the City Council.

Group 1—Plots Nos. 1 to 101 inclusive.

Group 2—Plots Nos. 102 to 215 inclusive.

Group 3—Plots Nos. 216 to 334 inclusive.

The applicant shall not be permitted to offer for sale residential plots in Group 2 until eighty per cent. of plots in Group 1 have been sold or leased, or under agreement for sale or lease, or in Group 3 until eighty per cent. of plots in Group 2 have been sold or leased, or under agreement for sale or lease . . .

4. General.

.....

- (b) Where land which is reserved for public open space and/or for special purposes, fronts on to a road, then half the cost of constructing the road for the length of such frontage shall be borne by the authority to whom the land is to be transferred except in the case of the road fronting on to Plot 343 the cost of which is to be borne by the applicant."

Prior to the institution of proceedings the first respondent had disposed of all his interest in this estate with the exception of two plots and the second respondent has disposed of all his interest therein. The respondents were, however, at all material times and are still the owners of the roads in question.

The only other fact which it is material to mention is that a receiving order in bankruptcy was made against the second respondent on February 12, 1958.

It was conceded on behalf of the appellant that at some date prior to the filing of this suit the roads were constructed and maintained in a condition which would have satisfied the Council, though they were not in such a condition at the date of filing the plaint. The case for the appellant was that the respondents not having at the date of the suit or up to the present time maintained the roads to the Council's specification and satisfaction, as required by condition 1 (B) (b), there was a breach of that condition and he sought a mandatory injunction to enforce it.

The relevant statutory provisions are:

Sub-s. (1) of s. 24 of the Town Planning Ordinance (Cap. 134 of the Laws of Kenya) reads:

"24. (1) Subject to s. 30 of this Ordinance" [which is not material to this case] "no land within any municipality or township shall, save with the express permission of the Commissioner of Lands, to be obtained in every case, and upon such conditions as he may impose, be divided or subdivided into lots except in accordance with the provisions of a town planning scheme approved under this Ordinance, or where no such town planning scheme has been approved, then in accordance with a scheme of subdivision made so as to satisfy the requirements of the Townships Private Streets Ordinance, wherever applied, and with due regard to the suitability of the land for the purpose intended, and with reference to a town plan, or other plan or scheme (not being a statutory town planning scheme under this Ordinance) for the control of development approved by the Commissioner of Lands; the development, subdivisions or schemes of subdivision of adjacent areas, the provision, preservation and/or enhancement of amenities, the preservation of trees and natural landscape views and beauties and the provision of adequate principal and secondary means of access to subdivisions, of adequate open spaces, public and private, and of facilities for water supply and drainage."

I understand it to be agreed that there is no statutory town planning scheme affecting the land, now known as the Bernhard Estate, but there is a

"scheme of subdivision made so as to satisfy the requirements of the Townships Private Streets Ordinance (Cap. 135) or other plan or scheme for the control of development approved by the Commissioner of Lands".

The Town Planning Ordinance does not contain any penal provisions or specify how its provisions should be enforced.

The By-law referred to in condition 1 (B) (a), *supra*, seems to be By-law No. 366 (not 336) (k) of the Nairobi Municipality Building By-laws, 1948, which reads:

"(k) Where any proposed street is included in a scheme of subdivision the plans submitted shall include the plans, sections, specifications and particulars required to comply with s. 4 of the Private Streets Ordinance, 1924, and the provisions of the said Ordinance regarding the formation or laying out of new private streets shall apply to the scheme."

The Township Private Streets Ordinance, 1924, referred to in this By-law had, at the date of these conditions, been repealed by the Municipalities and Townships (Private Streets) Ordinance, 1951 (which I will call the 1951 Ordinance). The "private streets procedure" mentioned in condition 1 (B) (b) must refer to the relevant parts of the 1951 Ordinance, which appear to be s. 7 and s. 8. The relevant parts of those sections before their amendment in 1952 read as follows:

- “7. Where any private street or part thereof has been levelled, paved or metalled, kerbed, channelled, lighted, sewered and drained, or otherwise made good in a permanent manner to the satisfaction of the local authority, the local authority shall, upon the request of the owner or the owners of the greater part of the frontage of such street or part thereof, declare within three months of the date of such request, the same to be a public street, and thereupon such street or part thereof shall cease to be a private street and shall become a public street.
- “8.(1) If any private street, or any part thereof, is not constructed or maintained to the satisfaction of the local authority, the local authority may from time to time resolve with reference to such street or part thereof to do private street works and the expenses incurred by the local authority in executing such private street works or in renewing or maintaining them, or such part of the expenses as may be deemed reasonable by the local authority, shall be apportioned among the lands fronting, adjoining, abutting or served by such street or part thereof and shall be recoverable by the local authority from the owners of such lands.”

The only material amendments made in 1952 seem to have been the insertion in s. 7 (which then became s. 7 (1)) of the words “by or” after the words “permanent manner”; and the removal of the request of the frontagers as a condition precedent to action by the local authority.

It is admitted that the construction of the estate roads to the Council’s tarmacadam specification has not been carried out, and that the roads are not now being maintained. The respondents say that they are not under a legal liability to maintain them.

One of the main issues agitated in the court below was the construction to be put upon condition 1 (B) (b) set out above. Mr. Sherrin, who was counsel for the Attorney-General in the court below, contended that that condition, made pursuant to s. 24 (1) of the Town Planning Ordinance (Cap. 134), imposed a statutory duty upon the respondents to maintain the roads until such time as the Council made them up under the 1951 Ordinance: this was a personal obligation on the defendants which would continue for their lives and the life of the survivor of them or until the Council made up the roads (wholly or partly at the frontagers’ expense) under s. 8 of the 1951 Ordinance or until the respondents themselves made up the roads to tarmacadam standard and got the Council to take them over under s. 7. Counsel contended that the orderly development of land in Nairobi was a matter of public importance; there was no remedy other than a mandatory injunction by which the public duty of the respondents could be enforced; the Attorney-General was entitled to seek an injunction and the court ought to grant it; there would be no insuperable difficulty in carrying out the injunction, since it would be easy for the Council to say whether the work complied with their specification and was done to their satisfaction and this was the test prescribed by the condition.

Mr. Harris, counsel for the first respondent (first defendant in the court below), submitted that s. 24 of the Town Planning Ordinance was primarily directed not to individual land-owners, but to the registration authorities who would have to register subdivisions and that failure to comply with s. 24 (1) would justify them in refusing registration. Once a transfer was registered, he submitted, the effect of the condition was spent. He contended that the true construction of condition 1 (B) (b) was that the respondents were to construct the roads *seriatim* in the order of development laid down by condition No. 3 and get certificates for each road under condition

1 (B) (e); but that the respondents were only bound to maintain the roads until all had been constructed of murrum to the Council's specification and satisfaction. That, Mr. Harris submitted, was the point of time to which "thereafter" in condition 1 (B) (b) referred: the respondents had admittedly done this and had, therefore, complied with the condition. Counsel contended further that the Attorney-General had no cause of action as he was not bringing a relator action on behalf of the City Council and no public right was involved, since the obligation was to maintain private roads in a privately-owned estate: the freehold title to the roads remained in the respondents and the public had no right to use them. Counsel for the second respondent adopted Mr. Harris's argument and pointed out that it might cost £400,000 to construct twelve miles of roads to the Council's tarmac standard.

The learned judge decided that condition No. 1 (B) (b) created a contractual or other legal liability upon the respondents, that public rights were involved and that the Attorney-General had a cause of action to enforce them. He construed condition 1 (B) (b) as follows:

"In my view the condition merely deals with the two stages of road construction and maintenance, the murrum roads and the tarmac roads, and is assigning the responsibility for the former to the defendants and the latter to the Nairobi City Council. The word 'thereafter' belongs to the second sentence and qualifies that, and means nothing more than 'later'. It must be borne in mind that this was an arrangement between business people. The defendants and the Commissioner of Lands no doubt made an estimate of the time which would elapse before the Council took the roads over. If it be said that the condition imposes an onerous obligation on the defendants the answer is that it would be open to them to cover themselves in the agreements which they make with the purchasers of the various plots. To what extent they have done so, if at all, I do not, of course, know. I have come to the conclusion, therefore, that the construction placed upon condition 1 (B) (b) by Mr. Sherrin is the only possible and reasonable one."

The judge refused, however, to make the order or mandatory injunction asked for on the grounds that, upon the authorities, the court would not grant a mandatory injunction to repair and maintain a road when a large amount of superintendence would be necessary. He said:

"Mr. Sherrin has pointed out that in the present case the work has to be done 'to the Council's specification and satisfaction' so that the court has not to concern itself with the nature of the work which has to be done. He says that no superintendence will be necessary: all that will be required will be a report from the Council's engineer as to whether the work has or has not been properly carried out. That might perhaps be an answer if all that the defendants were required to do was to put the roads in a certain state of repair and leave them, although I am not convinced that it is. The order sought, however, requires them to maintain the roads and the condition 1 (B) (b), as I have held, imposes this obligation until such time as the Council take them over, which is quite indefinite. I can see the necessity possibly arising for frequent applications to the court in the future. It will be noticed that in all the cases referred to above where a mandatory injunction has been granted the work involved has been of a minor character, where the maintenance will be slight. I can find no case, certainly none has been cited to me, where the court has ever ordered anybody to carry out work remotely approaching in magnitude the work in question here, which involves the maintenance for an indefinite period of twelve miles of road."

In this court Mr. Marnan, for the Attorney-General, while supporting the findings of the learned judge which were in favour of the Attorney-General,

attacked his refusal to give the relief claimed. He argued that the judge had misconceived the meaning of the words in para. 12 (1) of the plaint—

“the plaintiff claims (1) an order that the defendants do, and each of them does forthwith maintain the roads . . .”;

that the judge had erroneously thought that the scope of the injunction asked for was co-extensive with the scope of condition 1 (B) (b) and that he was being asked to grant a mandatory injunction binding the respondents to go on maintaining the roads for an indefinite period which might last for the rest of their lives, whereas all that he was being asked to do was to order the respondents to put the roads in repair forthwith. Mr. Marnan’s second point was that even if what was asked for was a mandatory injunction to maintain the roads for an indefinite time, the judge was wrong in dismissing the action: he should have granted an injunction in appropriate terms and, in the exercise of his equitable jurisdiction, should have granted an injunction limited to what he considered the justice of the case demanded and the practice of the court allowed which, counsel suggested, would have been to put the roads forthwith into a proper state of repair to the satisfaction of the City Council. It is to be noted that the learned judge had no evidence before him and there was nothing to show whether, if the roads were once more put into a proper state of repair according to the murram standard required by condition 1 (B) (b), the Council would, thereupon or within any definite time, operate s. 7 or s. 8 of the 1951 Ordinance and make them up to “Council’s tarmacadam specification” as provided in the condition. The following passage appears in the record of proceedings in the court below. In the course of Mr. Sherrin’s argument he said:

“Making up road to murram specification is waste of time if you are immediately going to tarmac. You have to remove surface.

“Court: There is no evidence as to this.

“Harris: Someone did say at a meeting that it would be a waste of money to make a murram road and then immediately tarmac it: I do not admit that you would have to remove any of surface.

“Sherrin: I could call evidence on this and also as to how long it would be before City Council took over.

“Harris: If this evidence is relevant I would not object but I contend it is not relevant. This is a matter of construction.

“Court: I do not think this evidence is relevant.”

I can only say that I regard it as unfortunate that evidence was not called to establish whether or not there was any arrangement that the City Council would be responsible for maintaining the roads under the private streets procedure once they had all been brought up to a good murram standard; if not, the amount of work and superintendence which would be involved in putting the roads, culverts, bridges and drains into a state to comply with the conditions: and whether, if this were done, the Council was prepared to operate the 1951 Ordinance and in what way: whether, for instance, the Council proposed in the near future to tarmacadamise any or all of the estate roads and take them over as public streets, and if so, whether it would not be a waste of time (as stated by Mr. Sherrin) to surface them now with murram; alternatively, if the Council did not propose to take the roads over for years to come, whether there would be much, if any, practical advantage (having regard to the notorious fact that murram roads require fairly extensive maintenance after the long rains) in putting them back into repair “forthwith” unless they were also ordered to be continuously maintained, and, again, what amount of work

and superintendence would be required to put them into repair. Some or all of these considerations would be relevant and highly material in deciding the point, which the learned judge eventually had to decide, whether, if the Attorney-General had a right to ask for an order, it would be proper to make one, in the terms proposed or in what other terms.

It will be convenient to deal with Mr. Marnan's first point at once. I do not think that the learned judge misunderstood the nature of the order he was asked to make or that "forthwith maintain" merely meant "put into a proper state of repair". No doubt, if maintenance had not been carried out for some time, repairs to the roads would first be necessary to bring them up, once more, to the Council's specification and satisfaction; but the prayer did not end there: it asked for an order that the defendants do "forthwith maintain" the roads to the satisfaction of the Council. I read this as a prayer that the defendants be ordered to perform their remaining obligation under condition 1 (B) (b) that is to maintain the roads to the satisfaction of the Council and that they commence the work forthwith. There is nothing in the prayer to show that if the roads were once more put into a proper state of repair, the respondents would not be required to continue to maintain them for an indefinite period or that all that was being asked for was repairs without indefinite maintenance. Our attention was drawn to an allusion by Mr. Sherrin to the "time it would take to make up the roads". But this, in my opinion, did not mean that all he was asking for was repairs and that he did not also ask for an order for maintenance for an indefinite period. I think that the learned judge correctly interpreted the prayer in para. 12 (1) of the plaint.

Mr. Marnan's second point—that the learned judge should, without having been asked to do so, have granted a more limited mandatory injunction, limited for instance to a command to put the roads into proper repair—will be dealt with later.

I must first deal with a preliminary point of procedure. We were informed by Mr. Marnan that, notwithstanding that there was no cross-appeal, Mr. Harris proposed to argue that although the learned judge had been right in dismissing the Attorney-General's claim with costs, his findings on certain of the issues raised had been wrong. Mr. Marnan submitted that under r. 65 of the Rules of this court, as no notice of cross-appeal had been given, the respondents were not at liberty to argue that the judgment of the court below should be varied, unless they obtained leave of this court to do so under r. 65 (3). Mr. Harris, on the other hand, argued that as he did not desire to "contend that the decision of the court below" should be varied, within the wording of r. 65, no leave was necessary: he merely wished to re-argue certain grounds which the learned judge had rejected. He contended that "decision" in the rule, meant "the ultimate result" and he contrasted the wording of the present O. 58, r. 6 (2) of the Rules of the Supreme Court in England (which specifically requires notice to be given by a respondent who contends that the decision of the court below should be affirmed on other grounds) with r. 65 of the Rules of this court. He relied upon *Waller & Sons, Ltd. v. Thomas* (1), [1921] 1 K.B. 541, 547, 548; *Property Holding Co. v. Clark* (2), [1948] 1 K.B. 630, 637; and *Bostel Bros. Ltd. v. Hurlock* (3), [1949] 1 K.B. 74, 84. He also pointed out that Form G in the Schedule to the Rules of this court was not appropriate for a notice of intention to argue that the decision of the court below be affirmed on other grounds. Mr. Marnan contended that "decision" in r. 65 must include the decisions of the court below upon the various issues framed by it in accordance with the Rules of the Supreme Court. We reserved the decision of this question for further consideration and intimated that if Mr. Harris required leave to argue the points which he wished to raise, we would give it under r. 65 (3); but we required him to state forthwith, so that Mr. Marnan should not be taken by surprise, what those points were. We indicated that Mr. Marnan

would be given an opportunity of dealing with them in his reply, and that if, in so doing, he introduced any new law, Mr. Harris would be given an opportunity to deal with that. Mr. Harris then stated that he did not propose to argue that condition 1 (B) (b) did not create a legal liability apart from contract; but he did propose to contend that the judge was wrong in the construction he had put upon that condition, and also to contend that the Attorney-General had no locus standi and no cause of action.

Having now considered the matter, I am of opinion that Mr. Harris is right and that “the decision of the court below” in r. 65 (3) of the Rules of this court means the decision as embodied in the decree or order appealed against and not the grounds of that decision (or the decisions on the issues) and that the respondents were not obliged to give notices of cross-appeal. Since this is obviously inconvenient, the sooner the rule is amended to include a provision similar to the present O. 58, r. 6 (2) of the Rules of the Supreme Court in England, the better.

If Mr. Harris were to succeed on either of the above points, it would be superfluous to consider whether the learned judge’s refusal, in the exercise of his discretion, to make an order was proper or not, since no order could be made. It will, therefore, be desirable to deal with Mr. Harris’s points first.

Mr. Harris proceeded to argue on the construction to be placed upon condition 1 (B) (b). He first outlined the facts (already set out in this judgment) emphasising that the purchase by the respondents of the land from the White Fathers was antecedent to the application for permission to subdivide. He drew attention to the judge’s finding that condition 1 (B) (b) was apparently drafted by some official of the Nairobi City Council. He also drew attention to condition 1 (B) (e) and said that if that condition had been complied with, the city engineer must have given a certificate that the roads serving the plots upon which buildings had been permitted to be erected had been constructed to his satisfaction. He referred to condition No. 3, “Order of Development”, which was mandatory and indicated that, as a necessary consequence, some of the roads would be built long before the others, and he again put forward the interpretation of condition 1 (B) (b) which he had argued in the court below; namely, that the respondents were only under an obligation to maintain the roads until such time as all should have been satisfactorily completed, and that from that point of time there was a mandatory obligation upon the City Council as the local authority to maintain them having regard to the private streets procedure. He stressed that this was a business arrangement, and submitted that an ordinary business arrangement would be that the two developers should invest their money, sell off the plots, take the development profit, and that would be the end of the matter so far as they were concerned: he stated that the developers, while they still owned the roads, had no source of income which could be applied to maintaining them and averred that the arrangement was that when the roads had been completed to a good murram standard, they would be made up to tarmacadam standard by the local authority and the local authority could recover the cost from the frontagers. He stressed that the words “is to be dealt with” were mandatory and imposed an obligation on the local authority (who had been consulted as to the conditions to be imposed and had, in fact, drafted this condition) to take over the roads, maintain them and construct them to the Council’s tarmacadam specification as soon as the developers had completed all of them. Alternatively, s. 7 (1) of the 1951 Ordinance might apply from the start. Whatever might be the strict construction of condition 1 (B) (b), what it was intended to mean was that the liability of the developers for construction and maintenance of the roads would cease at the moment when the last road had been constructed to the required murram standard and a certificate to that effect given: that was the point of time to which “thereafter” referred and if it did not refer to that point of time,

to what point of time did it refer? He emphasised that the City Council was getting, free of charge, twelve miles of roads made up to a good murram standard, that they had been responsible for drafting the condition and that if it was ambiguous, it should not be construed against the respondents. He stressed the hardship which the construction put upon the condition by the judge would inflict upon the first respondent and said it was inconceivable that business men would make such an arrangement. Both Mr. Harris and Mr. Wilcock, for the second respondent, contended that the second sentence of condition 1 (B) (b) was mandatory; if it was merely permissive, it was superfluous. Mr. Wilcock argued that if it was permissive, it left the time at which it would exercise its statutory powers entirely to the discretion of the Council: the Council might not take the roads over till the death of the survivor of the respondents or even later: this could not have been the intention.

Mr. Marnan did not admit that there was any arrangement such as suggested by Mr. Harris or that the intention was as indicated by him. He contended that there was an obligation on the developers to maintain the roads which was indefinite in point of time. He did not agree that this came to an end when the last road was completed to the required murram standard, a contention which would entail inserting words into the condition and reading “thereafter” as if it were “thereupon”. He did not agree that the second sentence of condition 1 (B) (b) was mandatory: it could not bind the City Council who were not parties to it: it was only inserted to show that the developers would have no obligations as regards the tarmacadam stage which was envisaged as a natural consequence or sequel to the murram stage: he discounted the argument based on hardship, since the developers could have taken an indemnity for maintenance expenses from purchasers of plots and it was not shown that they had not done so: and he adopted the construction put upon the condition by the learned judge.

Having carefully considered all the arguments upon this point, I have come to the conclusion that, as a matter of construction, the interpretation put upon condition No. 1 (B) (b) by the learned judge in the passage from his judgment already cited is correct, and I think that the respondents fail on this point.

Mr. Harris next submitted that the Attorney-General had no locus standi and no effective cause of action. He contended that this was not a relator action; it was brought by the Attorney-General in his own name and own right and the basis which he put forward was that it was an action to protect public rights. But, Mr. Harris submitted, no public rights were involved. The roads concerned were private roads or “private streets” within the definition in s. 2 of the 1951 Ordinance. The property in them was in the respondents. The plot-holders were mere licensees; and licences to plot-holders and others to use the roads could not and did not confer rights on the public as such. These were not public highways. He relied on *A.-G. v. Antrobus* (4), [1905] 2 Ch. 188, 206, 207; approved in *Re Ellenborough Park* (5), [1956] 1 Ch. 131, 184.

Mr. Marnan, on this point, submitted that, in order to entitle the Attorney-General to sue, it was not necessary to show that accrued public rights had been infringed: it was sufficient if the public interest was affected. He said that the public interest was affected for three reasons. The first was that when the roads became subject to the private streets procedure, they would become public streets and it was in the public interest that they should be tarmacadamized at the least possible expense. This argument would have been more cogent if there had been evidence to show what, if any, additional expense would be caused by bringing the roads up to tarmacadam standard from their present state as compared with the expense of bringing them up to tarmacadam standard from the murram standard required by the conditions. It will be recalled that counsel for the Attorney-General in the court below stated that making the

roads up to a murram specification was “a waste of time if you are immediately going to tarmac”.

The second reason advanced by Mr. Marnan was that not only plot-holders made use of those roads: members of the public had the right not to be exposed to danger from pot-holes after dark. If licensees or invitees go upon private roads and fall into pot-holes they may, no doubt, have their own remedies. I do not think that this of itself would be a valid reason for making a mandatory injunction to repair twelve miles of private roads at the suit of the Attorney-General.

The third reason advanced has more validity. Mr. Marnan contended that s. 24 of the Town Planning Ordinance is a section enacted in the public interest, that the words “in the public interest” occur in sub-s. (2) and that it is in the public interest to enforce conditions lawfully imposed under sub-s. (1) and that breach of such conditions *prima facie* affects the public and that it is enough if the public is affected. He relied on the statement in para. 844 of Halsbury’s Laws of England (3rd Edn.), Vol. 21 at p. 403–

“Where an illegal act which affects the public is committed or threatened, the court has jurisdiction to grant an injunction at the suit of the Attorney-General”.

The infringement (or threatened infringement) of a public right must be shown or the execution or threatened execution of an illegal act of a public nature which affects the public generally. *A.-G. v. Oxford, Worcester and Wolverhampton Rly. Co.* (6) (1854), 2 W.R. 330, 331; cited in *A.-G. v. Sharp* (7), [1931] 1 Ch. 121, 134. In *A.-G. (on the relation of Hornchurch U.D.C.) v. Bastow* (8), [1957] 1 All E.R. 497 (which appears to be the latest authority), Devlin, J., after considering *A.-G. v. Ashborne Recreation Ground Co.* (9), [1903] 1 Ch. 101; and *A.-G. v. Wimbledon House Estate Co. Ltd.* (10), [1904] 2 Ch. 34, said at p. 500:

“Those cases establish that a remedy by injunction for breach of a statute exists only if a right has been infringed. The mere fact that an illegality has been committed because the provisions of a statute have been broken is not, of itself, enough . . . a public right is sufficient if the suit be by the Attorney-General who is the only authority who has a right to bring a civil suit on the infringement of public rights.”

In my opinion, conditions lawfully imposed under s. 24 of the Town Planning Ordinance are *prima facie* imposed in the public interest and breach of them may amount to an infringement of a public right. I am satisfied that, in the present case, the Attorney-General was seeking to enforce a public right, notwithstanding that, as in *Bastow’s* case (8), the infringement took place on private land, and that the learned judge had jurisdiction to grant an injunction if a proper case for an injunction was shown. Mr Harris attempted to distinguish *Bastow’s* case (8) on the grounds that what was there sought was a negative injunction and that it was a relator action. I agree that a negative injunction may be more freely granted than a mandatory injunction, since it probably involves less supervision; but I do not think that that consideration affects the Attorney-General’s right to sue. As regards the second alleged ground of distinction, Devlin, J., said in *Bastow’s* case (8), at p. 501, quoting *A.-G. v. Cockermouth Local Board* (11) (1874), L.R. 18 Eq. 172 at p. 176:

“Except for the purpose of costs, there is no difference between an ex-officio information and an information at the relation of a private individual. In both cases the Sovereign, as *parens patriae*, sues by the Attorney-General.”

In my opinion, Mr. Harris’s second point fails.

Reliance was placed by counsel for the Attorney-General in the court below upon a passage from para. 844 of Vol. 21 of Halsbury's Laws of England (3rd Edn.) where, after stating that the court has a discretion and that the Attorney-General is not entitled to an injunction as of right on proving his case, the learned author proceeds:

"Where, however, there has been a clear and deliberate breach of a duty imposed by statute, an injunction follows as a matter of course . . ."

This is based upon a dictum of Farwell, J., in *A.-G. v. Wimbledon House Estate Co.* (10) at p. 44, which seems to conflict to some extent with a previous dictum at p. 42 of the report. I think, with great respect, that the later dictum is too widely stated and that the law is correctly stated by Devlin, J., in *Bastow's case* (8) (which was a case of a clear and deliberate breach of a duty imposed by statute) at p. 501:

"It is plain that the fact that the Attorney-General asks for the injunction does not mean that the court has to grant it, even if a clear and deliberate invasion of a public right is proved. The court still has its discretion in the matter and it must have regard to the circumstances to which it usually has regard in considering whether or not it will grant this type of relief."

A.-G. (on the relation of Warwickshire County Council) v. L. & N.W. Railway (12), [1900] 1 Ch. 78, was a case of a negative or restrictive injunction and no question of ordering undefined works to be done or of the ability of the court to exercise superintendence there arose.

The result seems to be that while the court has no right to question the Attorney-General's decision to sue, or to sue for a mandatory injunction in preference to pursuing other remedies; *A.-G. v. Sharp* (7); *A.-G. v. Bastow* (8); it retains its discretion to grant or refuse the injunction asked for and must still have regard to the matters to which it usually has regard in considering whether or not it will grant this type of relief: *A.-G. v. Bastow* (8).

This brings me to the question whether the learned judge was right, in the exercise of his discretion, in refusing to make the order asked for in this case and whether, if so, the less extensive order now asked for should be made.

Mr. Marnan conceded that if the learned judge had been asked to make an order involving maintenance for an indefinite period of twelve miles of murram roads, he would have been right to refuse. I think that this was what the judge was asked to do and that he was right in refusing. Mr Marnan submitted, however, that if the learned judge felt unable to grant the whole of the relief sought, he should have granted such measure of relief as the justice of the case required which, counsel suggested, would have been an order to repair the roads forthwith to the satisfaction of the City Council. Mr. Marnan cited *Kennard v. Cory Bros.* (13), [1922] 1 Ch. 265, 267, as an instance of a case where the extent of the relief originally asked for had been reduced at the hearing by a statement from the bar. I have not, however, found any case in which a mandatory injunction for relief not specifically asked for has been made by a judge of his own motion without any statement from the bar or any evidence or assurance that a less relief than that sought in the pleadings and by counsel at the hearing, would be effective or acceptable. However, what we are now asked to do is to command the respondents to put the roads into repair, and it is submitted by Mr. Marnan that, as the roads have already been constructed, this will involve little or no supervision. This submission is disputed by Mr. Harris and Mr. Wilcock and there is no finding of fact upon it and no evidence or agreed statement of facts upon which a finding could be based.

Mr. Marnan's argument on this part of the case may be summarised as follows: He contended that there were some distinctions between the principles

upon which the court would act in granting or refusing mandatory injunctions as distinct from specific performance of a contract: for instance, a mandatory injunction could be granted to enforce part only of a contract. He submitted that where a mandatory injunction is invoked to enforce rights for the benefit of the public, it would be granted more readily than specific performance of a contract to enforce private rights. He submitted that mandatory injunctions were granted on the same principles as restrictive injunctions. He submitted further that where there are limitations apply equally to the granting of mandatory injunctions. Per contra where there are exceptions to those limitations, the same exceptions apply where the relief sought is a mandatory injunction. To illustrate the nature of the exceptions, he cited the following passage from Halsbury's Laws of England (2nd Edn.), Vol. 31, p. 333, para. 365 (which is a paragraph dealing with specific performance of contracts).

"The court does not enforce the performance of contracts which involve continuous acts and require the watching and supervision of the court.

"In particular, the court does not, as a rule, order the specific performance of a contract to build or repair. This rule, however, is subject to important exceptions, and a decree for specific performance of a contract to build will be made if the following conditions are fulfilled: (1) that the building work is defined by the contract between the parties; (2) that the plaintiff has a substantial interest in the performance of the contract of such a nature that he cannot be adequately compensated in damages; (3) that the defendant has by the contract obtained possession of land on which the work is contracted to be done."

Mr. Marnan pointed out that "has by the contract obtained possession of land" should, since the decision in *Carpenters Estates Ltd. v. Davies* (14), [1940] Ch. 160, be read as "is . . . in possession". He also referred to Fry on Specific Performance (5th Edn.), p. 48, para. 103, and *Wolverhampton Corporation v. Emmons* (15), [1901] 1 Q.B. 515, 525, where the same three conditions are set out. He submitted that the second and third conditions mentioned were complied with in the present case and, as regards the first condition, the work to be done was sufficiently defined here, because under condition 1 (B) (b) supervision is assigned to the City Council. I will assume for the moment that authorities on specific performance are applicable as submitted by Mr. Marnan, though I intend to rest my judgment on cases where a mandatory injunction was the relief sought. I do not think that the fact that the roads are required to be constructed to the Council's specification and satisfaction necessarily implies that the Council is required to supervise the progress of the work, and I do not know how the court could enforce such an obligation upon the Council. But, however that may be, I do not think that the fact that it may be possible to assign the duty of supervision to someone, is in England or in Kenya (where English equitable doctrines apply), though it may be in Scotland, an adequate answer. The learned author of Fry on Specific Performance (5th Edn.) at p. 48 writes:

"It may also be added that in Scotland many contracts to build are specifically performed, in respect of which the courts decline jurisdiction in England, the Scotch courts appointing some properly qualified person, under whose superintendence the work is directed to be executed."

In *Molyneux v. Richard* (16), [1906] 1 Ch. 34, Kekewich, J., said, at p. 41, that the words

"... 'to the satisfaction of the surveyor or agent for the time being of the lessor' ... do not in the slightest degree specify what the buildings are to be."

Mr. Marnan further submitted that the work was sufficiently defined although there was no plan (as there was in *Wolverhampton Corporation v. Emmons* (15)) because the work of construction had been done, the work had moved from paper to the ground, it was there to be seen and “everyone knows what a road should look like when in repair”. There is some force in this argument, though, perhaps, less in Kenya than in most parts of the world. But we have no evidence or agreed facts as to the present state of the roads, except that it seems to be assumed that it is very bad. It is notorious that murram roads have to be repaired and maintained periodically, particularly after the long rains (*Nairobi City Council v. M. K. Bhandari* (17), [1957] E.A. 481 (C.A.)), and it is apparently agreed that no maintenance has been done to these since the last estate road was constructed years ago. We do not know, for instance, whether the culverts and bridges mentioned in condition 1 (B) (d) and the stone pitched drains mentioned in condition 1 (B) (b) are still in existence and, if they are, the extent of any repairs necessary to put them in order. We do not know what the specification was when the roads were made, nor whether it would now meet with the Council’s satisfaction. No plan or specification is produced which might enable the amount of the supervision necessary to be gauged; neither do we know whether murram surfacing would be effective or whether, if the raising of the roads to tarmacadam standard in the near future is contemplated, making the roads up to a murram specification would not, as Mr. Sherrin said, be “a waste of time” because the surfacing would have to be removed. If tarmacadamising is not contemplated for some years, then maintenance in addition to repairs would be essential after each long rain and further applications to the court might be expected. It is true, as Mr. Marnan says, that each of these could be considered on its merits and on the circumstances then obtaining; but I conceive that the question of how long (if at all) the order which the court is asked to make may be expected to be effective is one which the court may take into consideration when deciding, in the exercise of its discretion, whether to make an order or not. What we are now asked to do is to make an order requiring the respondents forthwith to put twelve miles of roads into repair, without having the work defined in the slightest degree or anything but the vaguest guess as to what amount of work and supervision this would entail or how long our order would be effective.

The specific performance cases principally relied upon by Mr. Marnan in support of his contention that we should make the order asked for were *Wolverhampton Corporation v. Emmons* (15); *Carpenters Estates Ltd. v. Davies* (14); and *Molyneux v. Richard* (16).

In the *Wolverhampton* case (15) Romer, L.J., stated at p. 525:

“... the defendant did for valuable consideration undertake to erect houses in accordance with certain plans. When those plans are looked at, it seems to me that the work which the defendant undertook to carry out was perfectly defined by them, or at any rate sufficiently defined for the purpose of the doctrine which I am considering.”

In the *Carpenters Estates* case (14) Farwell, J., said at p. 165:

“Now the nature of the work which the defendant has undertaken to do seems to me in this case to be sufficiently clearly defined. She must completely finish accommodation roads which are clearly defined in the plan attached to the transfer and must construct certain sewers and drains which are also defined in the contract. That has to be done within three months to the requirements and satisfaction of the local or other authority. In my judgment there is nothing whatever in the contract itself which prevents the court from granting specific performance.”

There were sufficient plans and the work was such as could be completed within three months.

In *Molyneux v. Richard* (16) a plan of the required work was produced (in addition to there being similar houses in existence to serve as patterns) and evidence was given upon it by a witness for the plaintiff (see p. 42 of the report).

In my opinion, in all these cases the work to be done was far better defined than in the present case.

In *Wilson v. Furness Rly. Co.* (18) (1869), L.R. 9 Eq. 28; and *Storer v. Great Western Rly. Co.* (19) (1841), 2 Y. & C. Ch. Cas. 48; 63 E.R. 21, the work to be done was defined. In *Moseley v. Virgin* (20) (1796), 3 Ves. 184; 30 E.R. 959, the Lord Chancellor said that if the transaction is loose and undefined and it is not expressed distinctly what the building is, so that the court could describe it as a subject for the report of the Master, the jurisdiction could not apply. *Greene v. West Cheshire Rly. Co.* (21) (1871), L.R. 13 Eq. 44, seems to be in favour of the appellant; but there the work was to build a sufficient railway siding at least one hundred yards in length. As the Vice-Chancellor said, the company had nothing to do but to continue their rails into the land which the plaintiff offered them. He thought that this was not vague or uncertain. Apparently, there was also an order to maintain the siding in perpetuity, and to that extent the case goes further than any of the other cases cited to us. In *Ryan v. Mutual Tontine Westminster Chambers Association* (22), [1893] 1 Ch. 116 at p. 124, Lord Esher, M.R., treated the cases where a railway company had taken land on condition of doing works as exceptional, and so did Kay, L.J., at p. 128.

Of the authorities on mandatory injunctions relied upon by Mr. Marnan in this part of the case, the following are the most important:

Kennard v. Cory Bros. & Co. (13) at first instance is reported in [1922] 1 Ch. 265. At p. 274 Sargent, J., said:

“Lastly, as to the objection to making a mandatory order of this kind at all. There are no doubt objections to ordering a continuous series of operations which the court cannot supervise. But what is sought here does not, in my judgment, answer this description. The work to be done is quite specific and definite, and no real difficulty can be reasonably apprehended in ascertaining whether the defendants have complied with such an order or not. True it is that this order would be a precedent for other orders of the same kind, should occasion arise through the default of the defendants in performing their simple and obvious duty of preventing the artificial ‘wild beast’ they have created from endangering the property and buildings of their neighbours, the plaintiffs. But it will only be a precedent for directing the execution by the defendants of works which can be clearly defined and the execution or non-execution of which can be readily ascertained. Should there arise in the future a situation in which there are greater difficulties in this respect, the matter can be considered de novo in the light of the new facts.”

The relief asked for and granted in that case was an injunction to compel the defendants to restore remedial works, which they had previously erected, by clearing out one manhole and putting into order one drain (both of which works were clearly defined upon a plan). The case may be useful for the principles enunciated, but the relief claimed and its definition bear no relation to the relief claimed and its lack of definition in the present case. *Kennard’s* case (13) on appeal is reported in [1922] 2 Ch. 1. At p. 10 of the report Lord Sterndale, M.R., described the order made by the court below as “an order to do certain specific work of an insignificant character” which had as a matter of fact already been done. At p. 11 the Master of the Rolls said that according to the practice of the Court of Chancery an order involving a mandatory injunction to repair generally would not be granted. On p. 13 he said that difficulty of superintendence or of ordering unspecified and undefined works

to be done did not exist in that case. At p. 16 Warrington, L.J., said that an injunction to do repairs or to do certain works not specified would of course be too indefinite to enforce; whereas in that case (p. 17 of the report):

“The works are defined; there is no question about them; they have in fact been already done.”

The learned Lord Justice then said that the fact that a mandatory order had been granted would not necessarily be a precedent for granting another order which might be asked for: the circumstances might be different and each application should be considered in the light of its own circumstances. On p. 20 and p. 21 there is a valuable exposition of the practice of the court by Scrutton, L.J. He said:

“A wrongdoer who has either broken his contract or committed a tort may be ordered by the court not to pay the damages thereby caused, but to do acts either to fulfil his contract, sometimes known as specific performance, and sometimes by a mandatory injunction to do certain works, or to put right the tortious wrong that he has committed. Some orders the Chancery Court will as a matter of practice make, and others it will not make. As a matter of jurisdiction it seems that the court has the right to make any such order, but in practice it does not make certain orders and does make others. In practice it has never, so far as I can find, drawn the line between what orders it will make and what orders it will not make. It has said that as a general rule it will not make orders to do undefined works which may require continuous supervision in the sense of continuous applications to see whether the undefined works ordered to be done are or are not being carried out, but it has sometimes ordered specific works to be erected and maintained. I mentioned in the argument and I mention again one case which has been followed in other cases, namely, *Greene v. West Cheshire Railway Co.*, where the railway company was ordered to construct and for ever maintain at their own expense a siding of specified length, and as far as I can find, if the works can be exactly specified and are of such character that the maintenance or repair is slight, the court will in some cases make an order which involves future maintenance, though it cannot be foreseen at the time when the order is made exactly what maintenance will be required, and when and though that involves that applications from time to time may have to be made to the court to supervise the carrying out of the order. As far as I can find the court has never defined in one way or the other, and perhaps cannot define, exactly where it will draw the line as to which order it will make and as to which order it will not make . . .

.....

On the other hand the order that has been made is to restore the remedial works by clearing out the manhole at the top of the drain marked ‘B’ to ‘B’ in plan A and to put that drain in working order. Now on the best consideration I can give to the matter that particular order does come within the practice of the court. The original works are specified, the exact thing to be done is specified, the clearing an agreed and specified drain; and in a matter in which the practice is very vague I do not think it right to interfere with the order of the learned judge, who is very familiar with Chancery practice, and who has thought that the proper way of dealing with the wrong undoubtedly committed by the defendants is to order them to maintain in that particular respect at this particular time the specified work which has been done by agreement between the parties. As I say, I doubt whether the peculiar facts of this case will make it a precedent for any other case.”

I most respectfully agree with the principles enunciated in *Kennard's* case (13), but I think that what the appellant is asking us to order in the present case goes far beyond what the court has commanded by mandatory injunction in that or any other of the cases cited to us.

In *Powell Duffryn Steam Coal Co. v. Taff Vale Rly. Co.* (23) (1874), L.R. 9 Ch. 331, the facts were, no doubt, different from the facts of the present case, since what the court was asked to command was the continuous working of signals. James, L.J., however, stated the principle as follows at p. 335:

“Where what is required is not merely to restrain a party from doing an act of wrong, but to oblige him to do some continuous act involving labour and care, the court has never found its way to do this by injunction.”

Although the facts of *A.-G. v. Staffordshire County Council* (24), [1905] 1 Ch. 336, were also very different from those of the present case, the following passage from the judgment of Joyce, J., seems to me to be in point on the question of the necessity for definition of the work to be done:

“Further, in my opinion it is the necessary requisite of every injunction and every mandatory order that it should be certain and definite in its terms, and it must or ought to be quite clear what the person against whom the injunction or order is made is required to do or to refrain from doing. Now a mandatory order, as I understand the practice of the court, will not be made to direct a person to repair. As we all know, the court will not superintend works of building or of repair. Feeling this difficulty, I suppose when the case was opened such part of the claim as asks for a mandatory order was practically dropped, and I am now asked to make a declaration that the Staffordshire County Council is liable to retain and maintain certain walls at points marked on a certain plan, without saying anything about the height and length of the walls, or as to the extent or amount of the repairs to be executed, or as to the time when such repairs ought to be executed—as to all of which matters there may be a considerable difference of opinion.”

A.-G. v. Roe (25), [1915] 1 Ch. 235 was a case where an owner of land adjoining a road repairable by the inhabitants at large had, by quarrying on his land, caused a considerable part of the sub-soil of the road and its surface to fall into the quarry, thus making the road impassable and causing a nuisance. A mandatory order was made on him to abate the nuisance by restoring and fencing the road. Even on those facts, the order was not made until an affidavit had been filed in the court of first instance for the purpose of showing what would be the probable cost of rebuilding the wall and restoring the road. The condition of the roads in the present case may amount to a nuisance, but there is no evidence of this.

A.-G. v. Colchester Corporation (26), [1955] 2 Q.B. 207, was a relator action brought by the Attorney-General on behalf of a resident for a declaration that a municipal corporation was obliged to maintain and operate a ferry and for a mandatory injunction commanding that they should do so. It was held that an injunction ought not to be granted. Lord Goddard, C.J., said at p. 215:

“So I have now to consider whether the court can, in accordance with established principles, grant a mandatory injunction to compel the corporation to work the ferry. There is no case to be found in the books of such an injunction ever having been granted, nor any hint or suggestion of there being such a remedy. As a ferry is a continuation of a road and so part of a highway (see *Letton v. Goodden*) it is not inappropriate to consider whether an injunction has ever been granted to maintain a road. Here again I can find no such instance. Moreover, the common law remedy of mandamus is in many respects closely akin to a mandatory

injunction, and it was expressly held in *Reg. v. Trustees of the Oxford and Witney Turnpike Roads* that the writ will not lie to enforce the repair of a road. This case was followed by Joyce, J., in *Attorney-General v. Staffordshire County Council* when he refused a mandatory injunction ordering the defendants as the highway authorities to do certain work necessary to maintain the road. No doubt cases are to be found where mandatory injunctions have been granted to do work in relation to roads, but these appear to be confined to cases where a nuisance has been created and the injunction is, in effect, to abate the nuisance. *Attorney-General v. Roe*, cited by Mr. Binney may be taken as an example. A landowner made an excavation adjoining a highway which was not only a danger, but caused subsidence of the road. He was ordered to protect the excavation and restore the road, that is, in effect, to abate the nuisance which he had created.

“Now it has been said more than once that it is not easy to be precise as to when equity will or will not grant a mandatory injunction—see, for instance, per Scrutton, L.J., in *Kennard v. Cory Bros. & Co.* Mr. Boreham contends that it is at any rate settled that the court will not grant injunctions requiring a person to perform personal services or to compel a company or an individual to do a continuous act which requires the continuous employment of people. Many cases were cited, but it is enough to refer to the judgment of Lord St. Leonards in *Lumley v. Wagner* for the first proposition, and to *Powell Duffryn Steam Coal Co. v. Taff Vale Railway Co.* for the second. It may be conceded that what are sometimes referred to as the railway cases form an exception. A leading example is *Greene v. West Cheshire Railway Co.*, but these cases turn, in my opinion, on this principle; if a railway company or any other land-acquiring body acquire land for the consideration of a money payment, and a covenant to do certain work for the benefit of the person from whom they acquire it, if they take and keep the land they must do the work. But how can the court compel a person to maintain and work a ferry which would require him either to do the work himself or maintain and pay ferry-men as his servants?”

The facts of that case were, of course, very different from those of the present case. We are not asked to compel anyone to carry on a business, but we are asked to compel the respondents to repair twelve miles of roads, an undefined task which may well require the continuous employment of a considerable and unspecified number of people for a considerable and unspecified length of time. The *Colchester* case (26) is useful for its statement of principle and is interesting in that the railway cases and, in particular *Greene v. West Cheshire Rly. Co.* (21), are again treated as exceptional. It may be that, although the respondents did not acquire the land from the Government, since they did obtain permission to exploit it, i.e. to subdivide it into building plots, upon conditions including condition 1 (B) (b), they could be brought within the principle of the railway cases and that the court should go to great lengths to enforce the condition. But, even if this be so (and I am not convinced of it), I should not feel able to grant the mandatory order asked for in this case. The work to be done is entirely undefined; it must, I think, as already stated, entail the employment of a considerable number of people for a considerable and unspecified time; no particulars are before us of the degree of superintendence necessary; and we do not even know that to repair the roads now to murrum standard would have any but the most transitory effect, having regard to the expected incidence of the long rains in a few months' time. We do not know whether and when the City Council contemplate taking over all or some of the roads and raising them to tarmacadam standard, and, if this is the Council's intention, whether for us to order those parts to be made up

now to a murram standard would not be, as stated by learned counsel for the Attorney-General in the court below, a “waste of time”. Having no information on any of these points, I am unable to say that it would be proper to make the order asked for. I would dismiss the appeal.

As to the costs: the respondents have been successful in the result, but have failed on two of the issues argued by Mr. Harris, namely, the construction of condition 1 (B) (b) and the locus standi and cause of action of the Attorney-General. The argument on these points occupied a considerable portion of the hearing time on the appeal. Under s. 17 of the Crown Proceedings Ordinance, 1956, I would order the appellant to pay two-thirds of the costs of the respondent on the appeal, to be taxed. I am not prepared to interfere with the discretion of the learned judge as to the costs in the court below.

It remains only to repeat what I said at the close of the hearing that the court feels much indebted to counsel who conducted the appeal for their industry in searching for authorities on the various points which fell to be decided and the clear way in which their arguments were presented.

Forbes V-P: I agree and have nothing to add.

Gould JA: I also agree and have nothing to add.

Appeal dismissed.

For the appellant:

JF Marnan QC (Crown Counsel, Kenya)

The Attorney-General, Kenya

For the first respondent:

LGE Harris

Hamilton, Harrison & Mathews, Nairobi

For the second respondent:

RDC Wilcock

Archer & Wilcock, Nairobi

F R Patel v R
[1959] 1 EA 201 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	16 February 1959
Case Number:	67/1958
Before:	Sir Audley McKisack CJ
Sourced by:	LawAfrica

[1] *Coffee industry – Licensed buyer storing wet coffee in kiboko form – Whether permissible to store such coffee whilst having any moisture content – Liability of licence holder for unlawful act of his servant – Whether liability absolute – Meaning of “dry coffee” – Coffee Industry Rules, 1953, r. 4 (b) (U.).*

Editor’s Summary

The petitioner who held a licence to buy coffee was convicted for storing wet coffee in kiboko form contrary to r. 4 (b) of the Coffee Industry Rules. The Rules define dry coffee only in relation to processed coffee and define kiboko as “dried coffee cherry”. There was evidence that the coffee was tested and found to contain over twenty per cent. moisture. The petition for revision against the conviction claimed that the evidence failed to establish that the coffee in his store was not “dry kiboko”, and that the magistrate erred in holding that the petitioner “was vicariously liable for the acts of his servant without any knowledge of such acts”. It was submitted for the petitioner that to store is a physical act, and that liability under the rule attaches only to the person who does the act. The Crown submitted that r. 4 (b) imposes an absolute liability on a licence holder and that it was no defence that contravention was committed by a servant without his knowledge.

Held –

- (i) it is an offence to store kiboko coffee which contains any moisture and the coffee could not be said to be dry in any ordinary sense of the term.
- (ii) there are no words in r. 4 (b) of the Coffee Industry Rules importing any mental element such as “knowingly” or “wilfully” and the rule imposes absolute liability on the licence holder.

Petition dismissed.

Cases referred to in judgment

- (1) *James & Sons Ltd. v. Smee*, [1954] 3 All E.R. 273; [1955] 1 Q.B. 78.
- (2) *Mousell Brother Ltd. v. L. & N.W. Rly. Co.*, [1917] 2 K.B. 836.
- (3) *Reynolds v. Austin (G. H.) & Sons Ltd.*, [1951] 1 All E.R. 606; [1951] 2 K.B. 135.

Judgment

Sir Audley McKisack CJ: This is a petition for revision by one F. R. Patel, a person licensed under the Coffee Industry Ordinance, 1953, to buy coffee, in respect of his conviction for contravening r. 4 (b) of the Coffee Industry Rules, 1953 (L.N. 5 of 1954). The relevant part of r. 4 is as follows:

“No person shall–

.....

- (b) store or permit to be stored in any building in an established coffee market any coffee other than dry kiboko or dry rough hulled coffee which shall in both cases be free from all mustiness.”

The charge on which the petitioner was tried was expressed as follows:

“Storing wet coffee in kiboko form, contra r. 4 (b) of the Coffee Industry Rules, 1953.

“F. R. Patel, on or about the 21st day of May, 1958, at Gyaza, Saza Kyadondo, Buganda Province, did store in Store No. 3, licence No. 5015, wet coffee in kiboko form.”

He was convicted of this offence and fined Shs. 50/-. He petitions against the conviction on two grounds. The first is that the evidence failed to establish that the coffee in his store was not “dry kiboko”. As Mr. Caldwell, who appeared for the petitioner, pointed out, the Coffee Industry Ordinance, 1953, and the rules made there under contain no definition of “dry” which is relevant to the rule under which the petitioner was charged. There is a definition of “dry coffee” to be found in the Seventh Schedule to the Rules (as substituted by L.N. 199 of 1955), but it is a definition inserted for the purposes of r. 17 and r. 18 and is applicable only to “processed coffee”, and not to “kiboko”. The Ordinance defines “kiboko” as “dried coffee cherry”, and “processed coffee” as being coffee that has been pulped and cured, or coffee that has been hulled and cured, but not rough hulled coffee; consequently kiboko coffee and processed coffee are distinct.

Mr. Maloney for the Crown does not dispute that the above definition of “dry coffee” has been inserted in the Rules in relation to processed coffee and not to kiboko, but contends that that definition is a strong indication of the meaning of the word “dry” in relation to coffee before it is processed. That definition is as follows:

“Dry coffee is coffee of a moisture content of not more than 12.5 per centum by weight, or coffee that loses no further weight when left for twenty-four hours in an oven temperature maintained at 100°C.”

It seems strange that the Rules provide a definition of the term “dry” for one form of coffee and yet fail to provide such a definition in respect of another form of coffee, although making it an offence to store the latter kind of coffee if it is not dry. The result seems to be that (although it may not be the practice to prosecute unless there is a substantial proportion of moisture) it is an offence to store kiboko coffee which contains any amount of moisture, however small, and that it is only processed coffee that can be considered to be still “dry” although containing up to 12.5 per centum of moisture. In the instant case the coffee was tested and found to contain 20.3 per centum of moisture. Clearly this coffee could not be said to be dry in any ordinary sense of the term (and in the absence of a statutory meaning I must look to the ordinary meaning), so I am unable to accept Mr. Caldwell’s contention that this coffee was not proved to be other than dry coffee. The first ground on which revision is sought therefore fails.

The second ground is that the magistrate erred in holding that the petitioner

“was vicariously liable for the acts of his servant without any knowledge of such acts”.

The evidence was that the coffee was put into and kept in the petitioner’s store by a person whom the petitioner employed to buy coffee. The petitioner testified that he had instructed the buyer never to buy wet coffee, and that he visited the store from time to time and inspected the coffee; if he found wet coffee on such a visit he gave instructions to the buyer to dry it. He had visited the store ten or fifteen days before the date of the offence. Mr. Caldwell contends that to store is a physical act, and that liability under the rule attaches only to the person who does the act.

The Crown contends that r. 4 (b) of the Coffee Industry Rules, 1953, imposes an absolute liability on the licence holder, and it is no defence for him to say that the contravention was committed by his servant without his knowledge. This question was duly considered by the trial magistrate, and he came to the conclusion that the Crown's contention was right. After citing various passages from the Rules, the judgment says:

"It will be seen therefore that the Rules are so framed as to impose upon the licence holder several obligations, and when reading all the above Rules in conjunction, one cannot but come to the conclusion that these obligations are personal to the holder".

It will be seen that, whereas the rule in question has the words "store or permit to be stored", the petitioner was not charged with "permitting" but simply with "storing". Had it been otherwise, the evidence might have been found insufficient to show that the necessary elements of "permitting" were present; see *James & Son Ltd. v. Smee* (1), [1955] 1 Q.B. 78. But, since the offence charged was storing simpliciter, the question is whether the rule makes it an offence on the part of the employer if his servant, even contrary to the employer's orders, stores wet coffee. In the first place one must look at the wording of the rule, and it will be seen that there are no words importing any mental element such as "knowingly" or "wilfully". Secondly, one must apply the well-known test laid down by Lord Atkin in *Mousell Brothers Ltd. v. London & N.W. Rly. Co.* (2), [1917] 2 K.B. 836 at p. 845:

"I think that the authorities cited by my lord make it plain that while *prima facie* a principal is not to be made criminally responsible for the acts of his servants, yet the legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants. To ascertain whether a particular Act of Parliament has that effect or not regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed."

In the instant case, as the trial magistrate has pointed out, many obligations are imposed upon a licence holder under the Coffee Industry Ordinance, and the function of storing coffee would normally be carried out by the servants of the licensee. The object of the Ordinance, as stated in the long title, includes that of making "better provision for the marketing and processing of coffee". It is, therefore, to be inferred that it is in the interests of the coffee industry that the legislature has imposed the obligations for which the Ordinance provides; and the public interest is very relevant to this question of absolute liability, as was pointed out by Devlin, J., in *Reynolds v. Austin (G. H.) & Sons, Ltd.* (3), [1951] 2 K.B. 135, at p. 149, where he observed:

"It may seem, on the face of it, hard that a man should be fined, and, indeed, made subject to imprisonment, for an offence which he did not know that he was committing. But there is no doubt that the legislature has for certain purposes found that hard measure to be necessary in the public interest. The moral justification behind such laws is admirably expressed in a sentence by Dean Roscoe Pound in his book *The Spirit of the Common Law*, at p. 52: see *The Law Quarterly Review*, Vol. 64, p. 176. 'Such statutes', he says, 'are not meant to punish the vicious will but to put pressure upon the thoughtless and inefficient to do their whole duty in the interest of public health or safety or morals.' Thus a man may be made responsible for the acts of his servants, or even for defects

in his business arrangements, because it can fairly be said that by such sanctions citizens are induced to keep themselves and their organisations up to the mark. Although, in one sense, the citizen is being punished for the sins of others, it can be said that, if he had been more alert to see that the law was observed, the sin might not have been committed.”

Applying the foregoing tests, I am satisfied that the trial magistrate came to a right conclusion on the question of absolute liability, as he also did on the question whether the coffee was “dry”. Consequently I decline to interfere with his decision.

Petition dismissed.

For the petitioner:

R Caldwell

PJ Wilkinson, Kampala

For the respondent:

MT Maloney (Crown Counsel, Uganda)

The Attorney-General, Uganda

Santhumayor v Santhumayor Ferris and another [1959] 1 EA 204 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	4 February 1959
Case Number:	5/1958
Before:	Sir Audley McKisack CJ
Sourced by:	LawAfrica

[1] Divorce – Domicil – Abandonment of domicil of origin – Acquiring fresh domicil – Burden of proof – Evidence – Declaration of intention to reside permanently in Uganda.

Editor’s Summary

The petitioner, a citizen of India, came to Uganda in 1954, on a temporary employment pass. He was employed as a clerk with a bank in Kampala, his contract being for six years expiring in 1962. In 1957 the petitioner married the respondent who had lived all her life in India until she came to Uganda. In 1958 he petitioned for a divorce whereupon the respondent applied to the court to dismiss the petition on the ground that the petitioner was not domiciled in Uganda. The court heard evidence on this issue from which it was established that the petitioner had all his family ties in India and had taken no positive step which would point to an intention to remain in Uganda indefinitely, but he had declared his intention to remain in Uganda permanently to two individuals who gave evidence to that effect.

Held – the burden of proving a change from the domicile of origin to a domicile of choice is not light and taking all the factors into consideration the petitioner had failed to prove that he had acquired a Uganda domicile with that “perfect clearness” which English cases prescribe as necessary before the court can accept that the domicile of origin has been lost.

Petition dismissed.

Cases referred to in judgment

- (1) *Zanelli v. Zanelli* (1948), 64 T.L.R. 556.
- (2) *Boldrini v. Boldrini*, [1931] All E.R. Rep. 708; [1932] P. 9.
- (3) *Cruh v. Cruh*, [1945] 2 All E.R. 545.
- (4) *Will v. Will*, Uganda High Court Divorce Cause No. 3 of 1954 (unreported).

Judgment

Sir Audley McKisack CJ: This is an application to dismiss a petition for divorce on the ground that the petitioner is not domiciled in Uganda. The application came before Sheridan, J., in chambers on September 30, 1958, and was adjourned by him into court for evidence to be taken on this issue. Evidence was heard on January 16, 1959, and was given by the petitioner and two witnesses called by him. There was no evidence called on behalf of the respondent, but Mr. Hunt argues that the petitioner has failed to discharge the onus of proving that he has changed his domicil of origin and acquired a new domicil in Uganda.

The facts are as follows. The petitioner was born in India in 1925, and is a national of the Republic of India. He came to Uganda in 1954, having been allowed to enter the country by virtue of a temporary employment pass which had been issued to him by the Uganda immigration authorities. The employment was as a clerk with a branch of a bank in Kampala, and he has a contract of employment with the bank which is for the duration of six years, expiring in 1962. For the first two years of his residence in Uganda his employment with the bank was on a more temporary basis. His contract contains no provision for renewal, but he has hopes of obtaining another contract with the bank when the present one expires. His contract entitles him to four months' vacation leave at the end of the six years. He also follows another occupation, outside the hours of his employment in the bank, that of doorkeeper at a cinema.

The temporary employment pass which I have mentioned is his authority for remaining in this country, and entitles him to do so for so long as the pass remains valid. Under the Immigration (Control) Ordinance (Cap. 43), and the regulations made there under, a temporary employment pass may be issued in the first instance for a period not exceeding four years, and is thereafter renewable at the discretion of the immigration authorities for a further period, or further periods, but so that the total validity of the pass shall not exceed eight years (see reg. 19 (3) of the Immigration (Control) Regulations, Vol. VII, Laws of Uganda, p. 925, as subsequently amended). The position, therefore, is that, unless in the meantime he obtains some other authority for remaining in Uganda, his temporary employment pass cannot have any validity beyond 1962, and he cannot then lawfully remain in Uganda.

The petitioner married, in 1957, a girl whose home was not in Uganda, and who came from India.

The petitioner's parents were born in India and have never left there. All his brothers and sisters are in India. In Kampala he shares the occupation of a house with an Indian family.

In his evidence the petitioner has stated that he intends to reside permanently in Uganda, and he gives as his reasons for that intention his liking for the country and the fact that he finds economic and other conditions in Uganda preferable to those in his country of origin. Of the two witnesses whom he called, one was a friend who says the petitioner has often told him that he would like to settle in Uganda permanently. The other is the manager of the cinema where the petitioner works in the evenings, and he testifies that the petitioner has sometimes gone to him for advice and when so doing has stated that he wanted to settle in Uganda because he had better prospects here than in India.

I do not find this an easy case to decide. The burden of proving a change from the domicil of origin to a domicil of choice is not a light one. The fact of the petitioner's residence in Uganda is, of course, amply proved, but it is otherwise with the question of his intention. He does not appear to have taken any of the steps which the English cases point to as evidence of intention. He has not, for example, changed

his nationality or bought land here. But it is to be remembered that he is still in his thirties, and his employment is not such that he is as yet likely to be in a position to buy a house or land in this country.

The points in support of the petitioner are, first, that he has stated in the witness box his intention of staying here indefinitely and not returning to India; but the cases show that such statements do not carry very great weight. Secondly, his witnesses have testified that his intention was declared to them or, at any rate, that his wishes as to his future were so declared. Thirdly, there is no proof of his having taken any step inconsistent with the intention to remain here. And fourthly, I accept that he finds his employment and other conditions in this country more congenial than those in his country of origin.

But a man who would like to make a particular country his home does not, of course, necessarily intend to do so. And I think Mr. Hunt is right in saying that the petitioner has taken no positive step which would point to his having an intention to remain in Uganda indefinitely. There is also the fact that he still has all his family ties in India, and that the woman he married lived all her life in India until he brought her to Uganda. The declarations he made to the friend and the employer who gave evidence are somewhat weakened in their effect by the petitioner's own statement in cross-examination that he never discussed with any friends his intention to settle in Uganda.

As to his employment, this is temporary and not permanent, though the petitioner has hopes of obtaining a further contract with the bank. The contract he has at present does not provide for his being employed always in Uganda, but permits of his being sent to branches of the bank elsewhere in East Africa, so that he may at any time cease to reside in Uganda.

His status under the immigration law is also material. The English cases show that an alien whose residence in England is merely permissive—or even precarious—may, nevertheless, have a domicile of choice in England (see *Zanelli v. Zanelli* (1) (1948), 64 T.L.R. 556, *Boldrini v. Boldrini* (2), [1932] P. 9, and *Cruh v. Cruh* (3), [1945] 2 All E.R. 545). But the position is not quite the same in Uganda. As I have said, his temporary employment pass cannot be renewed after the expiration of eight years, and his departure from this country will then become obligatory unless he has meanwhile succeeded in obtaining a different status under the Immigration Ordinance. The petitioner admits that he has so far taken no step to that end, though it would have been open to him to have done so.

Two other points relied on by Mr. Hunt do not lend much support to his case. The Succession Ordinance (Cap. 34) has provision whereby a person who has been resident in Uganda for at least a year

“may acquire a domicile in Uganda by making and depositing in some office in Uganda . . . a declaration in writing under his hand of his desire to acquire such domicile”

(s. 11). Mr. Hunt says that this is another step which the petitioner might have taken, but did not take. I cannot, however, attach importance to this fact, since it was held in *Will v. Will* (4), Uganda High Court Divorce Cause No. 3 of 1954 (unreported), that that provision was relevant only to matters of intestate or testamentary succession. Nor do I consider it counts against the petitioner that, when he gets leave from the bank, he intends to spend it in India.

Taking all the factors into consideration, I come to the conclusion that the petitioner has failed to prove that he has a Uganda domicile with that “perfect clearness” which the English cases prescribe as necessary before the court can accept that the domicile of origin has been lost. Consequently, the petition must be dismissed with costs.

Petition dismissed.

For the petitioner:

ES Mbazira

ES Mbazira, Kampala

For the respondent and co-respondent:

RE Hunt

PJ Wilkinson, Kampala

Yowana Bugembe v Baganda Fishing Co Ltd
[1959] 1 EA 207 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	19 February 1959
Case Number:	KAM. 1/1959
Before:	Sir Audley McKisack CJ
Sourced by:	LawAfrica

[1] *Practice – Appeal – Application for extension of time for filing record – Eastern African Court of Appeal Rules, 1954, r. 58.*

Editor's Summary

The applicant applied to the court for an extension of time for filing the record of an appeal, on the grounds, *inter alia*, that his poor financial position had prevented him from raising the necessary funds required under r. 58 of the Eastern African Court of Appeal Rules, 1954, and that he was endeavouring to raise the required funds for his appeal.

Held – there was nothing in the supporting affidavit to show when or by what means it was expected that the necessary funds would be found and it would be wrong to grant the application in such uncertain circumstances.

Kezekiya Nsimbi and Others v. Sawan Singh & Sons and Another, E.A.C.A. Miscellaneous Civil Application No. KAM. 5 of 1957 (unreported) distinguished.

Application dismissed.

Case referred to in judgment

(1) *Kezekiya Nsimbi and Others v. Sawan Singh & Sons and Another*, E.A.C.A. Miscellaneous Civil Application No. KAM. 5 of 1957 (unreported).

Judgment

Sir Audley McKisack CJ: This is an application for extending the time for filing the record of an appeal. Rule 58 of the Eastern African Court of Appeal Rules, 1954, is as follows:

- “58. Subject to any extension of time and to any order made under r. 82 of these Rules, the appellant shall within sixty days after filing notice of appeal lodge the appeal by filing in the registry of the court four copies of the record of appeal, paying the prescribed fee and lodging in court the sum of fifteen hundred shillings as security for the costs of the appeal.”

Rule 9 of those Rules confers a general power to extend the time for making applications, and for taking any step in connection with an appeal, notwithstanding that the time limit may have expired.

The judgment against which it is sought to bring an appeal was delivered on November 25, 1958, and the notice of appeal required by r. 54 to be filed within fourteen days of the judgment was duly filed. The present application was filed on January 30, 1959, shortly before the sixty-day period provided for in r. 58 had expired. The grounds on which the application is made are contained in paras. 6 to 9 of the supporting affidavit, which are as follows:

- “6. That I am a fisherman at Lake Katwe, Toro.
- 7. That at the present time my business is not paying me as it used to.
- 8. That I am endeavouring to raise the necessary funds for the appeal.
- 9. That owing to the bad state of my business I have been able so far to raise only Shs. 600/-.”

Mr. Binaisa, for the applicant, has referred me to the order made by Lyon, J., sitting as a member of the Court of Appeal for Eastern Africa, in E.A.C.A. Miscellaneous Civil Application No. KAM. 5 of 1957, *Kezekiya Nsimbi and Others v. Sawan Singh & Sons and Another* (1) (unreported). There an application

for extension of time within which to file the record of appeal was granted, the grounds for the application being that the applicant had been unable to find the money required under r. 58 until after the sixty-day period had expired.

There is, however, an important distinction between that case and the present one. In the former, the applicant had found the necessary money before he made his application. In the present case the money has not yet been found. Moreover, there is nothing in the supporting affidavit which sufficiently shows when or by what means it is expected that the necessary money will be found. I consider it would be wrong to grant the application in such uncertain circumstances. There are two other courses which the applicant could have taken, and which, indeed, he may still take. One is to apply under r. 82 for an order reducing the court fees payable, or reducing the amount required as security for costs; the other course would be to make the application for an extension of time after the necessary money has been found, as was done in the other case to which I have referred. I express no opinion, of course, as to the likelihood of the success of any such application if it should be made.

This application is dismissed with costs.

Application dismissed.

For the applicant:

GL Binaisa

GL Binaisa, Kampala

For the respondent:

AL Patel

ML Patel & Sons, Kampala

Prannath Pragji Bhatt v Issa Nassor Mohamed EL Afify
[1959] 1 EA 208 (HCZ)

Division:	HM High Court for Zanzibar at Zanzibar
Date of judgment:	18 February 1959
Case Number:	1/1959
Before:	Horsfall Ag CJ
Sourced by:	LawAfrica

[1] *Jurisdiction – Reference to High Court – Decree obtained ex parte in default of appearance – Decree appealable – Whether High Court has jurisdiction to hear a reference – Civil Procedure Decree, s. 80 (Z.) – Civil Procedure Rules, O. XLVII (Z.).*

Editor's Summary

The resident magistrate, Zanzibar, sought the opinion of the High Court under s. 80 of the Civil Procedure Decree and O. XLVII of the Civil Procedure Rules. The resident magistrate had doubts as to the validity of a decree made by another magistrate relative to a mortgage of a hut. Judgment had been given *ex parte* against the defendant in default of appearance for the amount claimed, with a direction that the defendant should be allowed three months in which to redeem the hut comprised in the mortgage deed. The question argued before the High Court was whether there was jurisdiction to hear the reference. It was submitted that the High Court had no such jurisdiction, since O. XLVII can only be invoked in cases where no appeal lies and in this case the decree was appealable.

Held – although the defendant had not appeared at all before any court, he did have ninety days in which to lodge an appeal against the preliminary decree of the resident magistrate and had not done so. In these circumstances the High Court had no jurisdiction to hear the reference under O. XLVII.

Order accordingly.

Case referred to in judgment

(1) *Chhotubhai Bhimbhai v. Bai Kashi* (1941), A.I.R. Bom. 365.

Judgment

Horsfall Ag CJ: The learned resident magistrate, Zanzibar, referred certain question of law in Civil Case No. 286 of 1958 for the opinion of the High Court under s. 80 of the Civil Procedure Decree and O. XLVII of the Civil Procedure Rules. The questions are as follows: (a) whether a certain mortgage deed in the case is of no force and effect owing to want of the consent of the district commissioner thereto as required by s. 12 (1) of the Ground Rent Restriction Decree, 1940 (as substituted by s. 5 of the Ground Rent Restriction (Amendment) Decree, 1947 (No. 13 of 1947) and (b) whether the judgment of the subordinate court is ultra vires owing to failure to comply with the provision of O. IX, r. 6A of the Civil Procedure Rules.

At no stage of the proceedings, whether in the magistrate's court or in the High Court, did the defendant appear. As important questions of law appeared to be involved this court sought and had the advantage of the services of Mr. Patel as amicus curiae, who after the arguments of Mr. Talati for the plaintiff, stated that he and Mr. Talati had consulted on the questions of law involved and that he associated himself with Mr. Talati's arguments.

Mr. Talati contended that the High Court had no jurisdiction to hear this reference. He referred to the case stated by the magistrate. Para. 9 states:

"On September 17, 1958, judgment was passed against the defendant in default of appearance *ex parte* for the amount claimed by the plaintiff with a direction that the defendant should be allowed three months in which to redeem the hut comprised in the said mortgage deed."

It is clear that the doubts of the magistrate relate to the validity of the preliminary decree passed in this mortgage suit. He began to entertain these doubts when the case came before him, having been previously heard by another magistrate, on application by the plaintiff dated December 31, 1958, for a final decree of sale of the mortgaged hut in default of redemption by the defendant within the three months prescribed in the preliminary decree made on September 17, 1958.

Mr. Talati referred me to the case of *Chhotubhai Bhimbhai v. Bai Kashi* (1) (1941), A.I.R. Bom. 365. This Indian case concerns a rule of court the wording of which is exactly similar to our O. XLVII, r. 1. Broomfield, J., said:

"The idea underlying the rule seems clearly to be to allow difficult points of law to be brought before the High Court in cases where that could not otherwise be done, e.g. where the original decree in a suit is final or where a matter has been decided in first appeal and no second appeal is provided."

See also Mulla's Code of Civil Procedure (11th Edn.) at p. 1224, commenting on the text of the rule:

"This rule does not authorise a reference to the High Court except in a suit or appeal in which the decree is not subject to appeal. Therefore, no reference can be made to the High Court in a matter in which an appeal lies, for in appealable cases a remedy to correct possible error is provided by the appeal. It is only when a decree is not subject to appeal that a reference can be made under this rule."

Reference to the definition of "decree" in s. 2 of the Civil Procedure Decree and to s. 72 indicates that a preliminary decree in a mortgage suit is an appealable decree.

Service of the original summons in the present suit was properly effected by substituted service. Order V, r. 20 (2) states that service substituted by order of the court shall be as effectual as if it had been made on the defendant personally. This being a moneylender's suit, on the defendant not appearing to the summons on the return day, August 6, 1958, the plaintiff under O. IX, r. 6A (see G.N. 234 of 1945), sought and obtained leave to proceed *ex parte* by notice served on the defendant in the form and manner provided in the rule. This notice was in the prescribed form but in actual fact it was served by posting a copy thereof on the front door of the hut in question instead of

“being served personally or by registered post addressed to the defendant at his last known place of address”.

September 17, 1958, was the return day to the notice and on defendant failing to appear the preliminary mortgage decree was made. In my view it is immaterial that the defendant, never having appeared to contest the proceedings, was unlikely to appeal. He had an appealable point in connection with the service of the *ex parte* notice. He had ninety days in which he could have appealed against the preliminary mortgage decree.

Broomfield, J., also stated in the case cited above:

“On the other hand, we take the view that the words ‘not subject to appeal’ must mean that the law provides no appeal in any circumstances. It is quite true that in a case of this kind it is exceedingly unlikely that an appeal to the Privy Council from the decree of this court would have been made or that this court would have certified the case to be a fit one for appeal. At the same time that might have been done; there might have been an appeal, and, if in certain circumstances there might be a further appeal, it cannot be said that the decree is not subject to appeal.”

I accordingly uphold Mr. Talati's first contention that I have no jurisdiction to hear this civil reference. The reference is accordingly sent back with directions that the application for final decree be granted.

Both counsel requested me to indicate my views on the merits. It is not now necessary to do so and I do not think it would be right to do so, since I have heard argument on one side only. Mr. Patel, as *amicus curiae*, as he was in agreement with Mr. Talati's view of the case, was entirely within his duty in associating himself with Mr. Talati's argument, both on the matter of jurisdiction and on the two questions posed by the learned magistrate. I regret that there is no public fund out of which I could award recompense for counsels' pains in arguing this reference. There will be no order as to costs.

Order accordingly.

For the plaintiff:

PS Talati

Wiggins & Stephens, Zanzibar

As *amicus curiae*:

RL Patel

RL Patel, Zanzibar

Division: HM High Court for Uganda at Kampala
Date of judgment: 31 March 1959
Case Number: 24/1959
Before: Bennett J
Sourced by: LawAfrica

[1] Criminal law – Trial – Accused’s right to be represented by counsel – Accused not in custody prior to trial – Application for adjournment at trial since counsel engaged elsewhere – Adjournment refused – Whether accused unfairly deprived of right to representation.

Editor’s Summary

The appellant was convicted of receiving a watch knowing the same to have been stolen contrary to s. 298 (1) of the Penal Code. In his judgment the magistrate found that the evidence proved that the appellant had sold the watch to one Adamu and that from the appellant’s denials he could only infer that the appellant knew the watch was stolen. On December 10, 1958, the accused was brought to the court when the hearing was fixed for January 5, 1959, and the accused was then released from custody. On the day of the trial when the case was called the appellant produced a letter from an advocate requesting an adjournment on the ground that he was engaged in another court on that day. As all the prosecution witnesses were present and the prosecution was ready to proceed the magistrate refused an adjournment and the case proceeded to hearing. On appeal it was argued, *inter alia* (1) that the magistrate erred in relying on inference to prove guilty knowledge and (2) that the refusal to adjourn the hearing so as to enable the appellant to be legally represented constituted a miscarriage of justice.

Held –

- (i) to argue that the court cannot act on inference in receiving cases is tantamount to saying that guilty knowledge cannot be proved by circumstantial evidence, which is manifestly absurd.
- (ii) since the appellant had had ample time to engage an advocate it could not be said that the appellant was by the refusal of an adjournment deprived through no fault of his own of his right to be represented by counsel and he was properly convicted.

Appeal dismissed.

Cases referred to in judgment

- (1) *Edward s/o Msenga v. R.* (1956), 23 E.A.C.A. 553.
- (2) *Galos Hired and Another v. R.*, [1944] 2 All E.R. 50; [1944] A.C. 149.
- (3) *Kingston v. R.*, 32 Cr. App. R. 183.

Judgment

Sheridan J: read the following judgment of **Bennett J:** The appellant was convicted of receiving a

wrist watch knowing the same to have been stolen, contrary to s. 298 (1) of the Penal Code and sentenced to eighteen months' imprisonment with hard labour.

The manager of the Jubilee Watch Company, Jinja, gave evidence that on the night of October 6, 1958, the company's shop was broken into and a number of watches were stolen. He claimed to identify ex. 1 as one of the stolen watches because he had affixed the strap to it. One, Adamu, stated that he bought the watch, ex. 1, from the appellant for Shs. 50/- on December 1, 1958, and his evidence was confirmed by one, Yosefu, who stated that he was

called to witness the sale. The appellant's defence was a denial that he had sold the watch to Adamu. He denied that he had ever seen the watch before. He alleged that Adamu bore him a grudge. He did not allege that Yosefu bore him any grudge. The learned magistrate did not believe the accused's evidence but accepted the evidence of Adamu and Yosefu. He found as a fact that the appellant had sold the watch to Adamu.

The conviction has been attacked on a number of grounds. Firstly, it is said that the prosecution failed to prove guilty knowledge on the part of the appellant. I can find no substance in this contention. The appellant was proved to be in possession of the watch less than two months after the theft and failed to give any explanation at all of his possession. Two further circumstances pointed to guilty knowledge. Firstly, the appellant falsely denied that he was ever in possession of the stolen watch and, secondly, he sold it to Adamu at an under-value. In my judgment there was abundant evidence of guilty knowledge.

Again it is contended that the learned magistrate erred in relying on inference to prove guilty knowledge and that he misdirected himself when he said in his judgment:

"I accept the evidence of Adamu and Yosefu. I am satisfied the accused sold Adamu this watch and that he is deliberately telling lies when he denies doing so. I can only infer that he knew perfectly well that this watch was stolen."

In my judgment this direction was a perfectly proper one. In the great majority of receiving cases guilty knowledge is a matter of inference from proved facts. To argue that a court cannot act on inference in receiving cases is tantamount to saying that guilty knowledge cannot be proved by circumstantial evidence, which is manifestly absurd.

Another point argued on behalf of the appellant is that the record does not disclose that the appellant was given an opportunity to cross-examine Adamu on replies given by him to questions put by the magistrate when Adamu was recalled by the magistrate. It is said that the appellant was denied the right of cross-examination which is given to him by the proviso to s. 148 of the Criminal Procedure Code. This point is not taken in the memorandum of appeal so that Crown counsel was taken by surprise. Moreover, Mr. Mukasa, who appeared for the appellant, has not contended that the appellant wanted to cross-examine Adamu when he was recalled or that he was refused permission to do so. The instant case is therefore distinguishable from *Edward s/o Msenga v. R.* (1) (1956), 23 E.A.C.A. 553, in which it was held that the refusal of permission to an accused to cross-examine a co-accused who had given evidence unfavourable to him was fatal to the conviction. In the instant case the magistrate recalled Adamu to put certain questions to him which should have been put by the appellant in cross-examination. Had the appellant indicated to the magistrate that he wanted to cross-examine Adamu on his additional evidence, I cannot see the slightest reason to suppose that he would have been refused permission to do so.

Finally, it was contended that the refusal of the learned magistrate to adjourn the hearing so as to enable the appellant to be legally represented constituted a miscarriage of justice. The appellant was first brought before the court on December 10, 1958, when the hearing date was fixed for January 5, 1959, and he was released from custody on his own recognizance. On January 5, 1959, when the case was called on for hearing, the appellant produced a letter from an advocate, Mr. Kiwanuka. In the letter Mr. Kiwanuka said that he had been instructed by the appellant and requested an adjournment on the grounds that he was engaged in another court on that particular day. As all the prosecution witnesses were present and the prosecution was ready to proceed,

the magistrate refused an adjournment and the case proceeded to hearing. Every accused has the undoubted right to be defended by counsel. *Galos Hired and Another v. R.* (2), [1944] A.C. 149, and *Kingston v. R.* (3), 32 Cr. App. R. 183, may be regarded as authority for the proposition that if an accused is deprived of that right through no fault of his own and through no fault of his counsel and a conviction follows, the conviction will be quashed on appeal. In the instant case it cannot be said the appellant was deprived of the right to be represented by counsel through no fault of his own. It is apparent from Mr. Kiwanuka's affidavit that when he wrote a letter dated January 5, 1959, asking the magistrate for an adjournment, he had only just been instructed by the appellant. The appellant had, in fact, been at liberty for nearly a month prior to January 5 and so had had ample opportunity to instruct an advocate long before January 5, the date fixed for the hearing of his case. It is plain that the substantial cause of the appellant not being represented by an advocate at his trial was the appellant's failure to instruct an advocate till the eve of the trial. A contributory cause was the failure of the appellant's advocate to do his duty to his client. That duty is aptly described in the following passage from the judgment of the Court of Criminal Appeal in *Kingston v. R.* (3):

"We have had a report in this case from the learned Recorder of Manchester, and it is quite clear from that report that the primary cause of this unfortunate situation was the failure of the counsel who had been briefed to do his duty to his client and the court in attending when the case was in the list for trial. If he was unable for any good reason to attend, his duty, as everybody knows, was to see that some other member of the bar held his brief and was in a position to represent the accused person."

In my judgment the appellant was properly convicted and the appeal is dismissed.

Appeal dismissed.

For the appellant:

AW Mukasa

ES Mbazira, Kampala

For the respondent:

MT Maloney (Crown Counsel, Uganda)

The Attorney-General, Uganda

Barclays Bank DCO v C B Patel and others [1959] 1 EA 214 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	12 March 1959
Case Number:	651/1958
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Practice – Parties – Misjoinder of defendants – Common question of law or fact – Right to relief arising out of same act or transaction or series of acts or transactions – Whether misjoinder of causes of action – Civil Procedure Rules, O. 2, r. 1 and r. 2 and O. 1, r. 3 (U.).

Editor's Summary

The plaintiff sued the eight defendants as guarantors of an overdraft to a company. Judgment was obtained in default against all the defendants except the third and fourth defendants. There were two separate guarantees dated November 26, 1954, and July 20, 1956, respectively. The first, second, third, fourth and fifth defendants were parties to the first guarantee while the first, second, sixth, seventh and eighth defendants were parties to the second guarantee. The third and fourth defendants in their defence took a preliminary objection that the suit was not maintainable as the plaintiff had improperly joined different causes of action against different defendants in one suit. Order 1, r. 3 of the Civil Procedure Rules provides: "All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally, or, in the alternative, where, if separate suits were brought against such persons, any common question of law or fact would arise". On behalf of the plaintiff it was submitted that the overdraft was the fundamental cause of action even if the guarantees were different and that under O. 1, r. 1 and r. 2 the plaintiff was obliged to include them in one suit.

Held – distinct causes of action accrued on different dates and against different defendants and the circumstances in which the liability of different guarantors arose were separate and distinct; accordingly the two causes of action could not be disposed of together.

Preliminary objection upheld.

Case referred to in judgment

(1) *G. K. Kamani v. M. K. Desai and Another*, Uganda High Court Civil Case No. 469 of 1953 (unreported).

Judgment

Sheridan J: The plaintiff bank has sued the eight defendants as guarantors of an overdraft to a company. Judgment by default has been obtained against all the defendants save Nos. 3 and 4. By their written statements of defence they have taken the preliminary objection that the suit is not maintainable as the plaintiff has improperly joined separate causes of action against different defendants.

There were two separate guarantees dated November 26, 1954, and July 20, 1956, respectively (they are annexures A and B to the plaint). Defendants Nos. 1 to 5 were parties to the first guarantee and defendants Nos. 1, 2, 6, 7 and 8 were parties to the second guarantee. Hence defendants Nos. 6, 7 and 8

were not interested in the first guarantee and defendants Nos. 3, 4 and 5 were not interested in the second guarantee. Only defendants Nos. 1 and 2 were parties to both. From this it is argued that different causes of action have been wrongly united against different defendants in one suit. Order 2, r. 2 permits the joinder of different causes of action against the same defendant or the same defendants jointly, but here the defendants are different. If there had been merely a misjoinder of parties the suit would be saved by O. 1, r. 9 which empowers the court to deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. But has there also been a misjoinder of causes of action? This depends on O. 1, r. 3 which provides

“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally, or, in the alternative, where, if separate suits were brought against such persons, any common question of law or fact would arise”.

There must be (1) a right to relief arising out of the same transaction or series of transactions and (2) a common question of law or fact. As regards (2) it might be argued that there is a common question of law, the guarantees being identical in form albeit binding different parties and the circumstances in which they were given might give rise to different questions of fact. But both conditions must be satisfied and it is necessary to consider whether the right to relief arises out of a transaction or series of transactions or merely out of similar transactions. Mr. Troughton, for the plaintiff, submits that the overdraft is the fundamental cause of action even if the guarantees are different and that under O. 2, r. 1 and r. 2 he was obliged to include them both in his whole claim. He relies on the last sentence of this passage from Chitale and Rao, *The Code of Civil Procedure* (16th Edn.), Vol. 2, p. 2067:

“It is a condition precedent to the applicability of the rule that the defendants must be jointly liable in respect of each and every one of the causes of action sought to be joined. It is not, however, necessary, that each of the defendants should be interested in all the reliefs claimed provided that they are interested jointly in the main questions raised in the litigation.”

He invites me to look at the written statements of defence as evidence of this joint interest. I do not consider that I am entitled to do this. I can have regard only to the plaint. Closer to the facts of the present case is this passage:

“A suit against several defendants on causes of action accrued against each of them separately and in respect of which they are not jointly liable is bad for misjoinder.”

Chitale and Rao (ibid), p. 2069. As I see it distinct causes of action would accrue, on different dates maybe, against different defendants on the two guarantees. The plaintiff would have to keep separate accounts. In *G. K. Kamani v. M. K. Desai and Another* (1), Uganda High Court Civil Case No. 469 of 1953 (unreported), Ainley, J., came to a similar conclusion when a landlord claimed in one suit, to eject two tenants from different portions of the same property. He held that no right to relief arose against the tenants until they had separately ignored their notices to quit. Those were separate and distinct acts. Here by analogy the circumstances in which the liability of the different guarantors arose in the two guarantees, would be separate and distinct acts.

In conclusion I would say that I find these rules of misjoinder very technical and not always easy to apply. They may not accord with the balance of convenience in disposing of legal disputes but in this case I find that the two causes

of action cannot, under the rules, be disposed of together. Subject to any submissions by counsel to the contrary, I propose to follow the course adopted by Ainley, J., in *Kamani's* case (1) and order that, upon terms that the plaintiff pays the taxed costs which the defendants have incurred in this suit, the plaintiff shall be at liberty to withdraw the present suit and to institute such fresh suit or suits as he pleases.

Preliminary objection upheld.

For the plaintiff:

JFG Troughton

Hunter & Greig, Kampala

The first, second, fifth, sixth, seventh and eighth defendants did not appear and were not represented.

For the third and fourth defendants:

ML Patel

M Patel & Sons, Kampala

Re Dayalji Laxman, Ex Parte Trustee in Bankruptcy
[1959] 1 EA 216 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	6 February 1959
Case Number:	24/1957
Before:	Bennett J
Sourced by:	LawAfrica

[1] Bankruptcy – Property available for distribution – Application for declaration that property occupied by bankrupt and owned by his wife belongs to bankrupt and is available for creditors – Whether court of bankruptcy can exercise jurisdiction over wife as a stranger – Bankruptcy Ordinance, s. 99 (1) (U.).

Editor's Summary

The trustee of a bankrupt applied to the court for a declaration that certain premises occupied by the bankrupt and certain personal effects were the property of the bankrupt divisible amongst his creditors, and for an order to enforce acquisition of the property from the bankrupt's wife. On behalf of the bankrupt and his wife, who were respondents to this application, objection was taken to the application on the grounds that the bankrupt's wife was a stranger to the bankruptcy proceedings and that the bankruptcy court ought not to exercise jurisdiction over strangers, that s. 99 (1) of the Bankruptcy Ordinance is concerned only with distribution of the property of a bankrupt and matters ancillary thereto,

and that where there is a dispute as to the ownership of property between the trustee in bankruptcy and a stranger to the bankruptcy, the court has no jurisdiction.

Held – it is a matter for judicial discretion whether questions arising between a trustee in bankruptcy and strangers can best be tried in the bankruptcy court or by another tribunal and by virtue of the wide discretion conferred on the court by s. 99 (1) of the Bankruptcy Ordinance, this application would be heard by the court in exercise of its jurisdiction in bankruptcy and all parties would have leave to call evidence on the questions of fact which would have to be determined on the hearing of the application.

Order accordingly.

Cases referred to in judgment

(1) *Re Barnett* (1885), 15 Q.B.D. 169.

(2) *Re Horder*, [1936] 2 All E.R. 1479; [1936] Ch. 744.

Judgment

Bennett J: This is an application by the trustee of a bankrupt for a declaration that certain premises occupied by the bankrupt and certain personal effects are the property of the bankrupt divisible amongst his creditors.

The court is also asked for an order to enforce acquisition of the property from the bankrupt's wife. The application purports to have been made under s. 52 (2) of the Bankruptcy Ordinance, but the section which confers upon the court powers to deal with questions of this kind is s. 99 (1).

Objection has been taken to the application on behalf of the bankrupt and his wife, who are respondents, on the grounds that the bankrupt's wife is a stranger to the bankruptcy proceedings and that a court of bankruptcy ought not to exercise jurisdiction over strangers.

It is contended that s. 99 (1) is concerned only with the distribution of the property of a bankrupt and matters ancillary thereto, and that where, as in the instant case, there is a dispute as to the ownership of property between the trustee in bankruptcy and a stranger to the bankruptcy the court has no jurisdiction.

It is contended that the trustee should be compelled to institute a regular suit against the wife in order to establish his claim to the property in dispute.

It is further argued that, in the absence of pleadings, the respondents would not know what case they had to answer and might thereby be prejudiced in the presentation of their defence.

To deal with the last argument first, I cannot see that the absence of pleadings would cause any prejudice to the respondents since the facts which would be pleaded in a plaint are set out in the affidavit of Mr. Shah, the trustee, in support of this application.

Section 99 (1) of the Bankruptcy Ordinance is modelled on the s. 105 (1) of the Bankruptcy Act, 1914, but the proviso to s. 105 (1) of the English Act is omitted from the Uganda Ordinance, presumably, because it is concerned only with the jurisdiction of the county court. There is ample English authority to the effect that the jurisdiction of the court of bankruptcy extends to the determination of questions affecting persons not parties to the bankruptcy. See *Williams on Bankruptcy* (17th Edn.), p. 470.

The cases seem to establish that it is a matter of judicial discretion whether questions arising between the trustee and strangers to the bankruptcy can best be tried by the bankruptcy court or by another tribunal. See *Re Barnett* (1) (1885), 15 Q.B.D. 169, and *Re Horder* (2), [1936] Ch. 744. In the latter case Clauson, J., said:

"The court has very wide jurisdiction under s. 105 of the Bankruptcy Act, 1914. That jurisdiction, as conferred by the Bankruptcy Act, 1869, has been referred to by Lord Selborne, L.C., in the House of Lords in *Ellis v. Silber*, in certain terms which are very well known to those experienced in bankruptcy practice and to which I will not further allude, and has been referred to also by Sir George Jessel, M.R., in *Ex parte Dickin*. Far be it from me, especially in view of Lord Selborne's observations, to say one single word which could possibly be construed as limiting the court's jurisdiction in any way. I observe, however, that during the last fifty years there has grown up a practice, which I will not attempt to define in words, by which the bankruptcy court has not hesitated to exercise its jurisdiction in cases raising bankruptcy points, while there is another class of case in which the court has left matters to be determined by the ordinary tribunal. I do not propose to go into reasons. As matters stand at present there seems to be a great deal of practical convenience in allowing that practice to continue."

In *Re Barnett* (1) the point was made that there was an advantage in having a dispute tried by a judge and a jury or even by a judge of the High Court

alone as distinct from the county court, since an appeal would then lie to the Court of Appeal and the House of Lords. In Uganda there are no juries and an appeal lies to the Court of Appeal from an order of the High Court in bankruptcy. See s. 102 (2) of the Bankruptcy Ordinance.

Moreover, it would seem that there would be some saving in costs if the court were to adjudicate upon the matter in the exercise of its jurisdiction in bankruptcy.

In these circumstances, and in exercise of the discretion conferred on the court by virtue of s. 99 (1) of the Bankruptcy Ordinance, I direct that the present application be heard by the court in exercise of its jurisdiction in bankruptcy and that all parties should be given leave to call evidence on the questions of fact which fall to be determined on the hearing of the application.

A date for the hearing of evidence is to be fixed by the registrar.

Order accordingly.

For the applicant:

RK Shah

RK Shah, Kampala

For the bankrupt:

AG Mehta

Patel & Mehta, Kampala

Maganlal Manji Dattani v Ahmad
[1959] 1 EA 218 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	2 February 1959
Case Number:	51A/1958
Before:	Sheridan J
Sourced by:	LawAfrica

[1] *Evidence – Document – Tenancy agreement – Tenant claiming damages for wrongful distress – Plaintiff omitting reference to tenancy agreement – Cross-examination of landlord on agreement disallowed – Whether agreement was admissible – Civil Procedure Rules, O. 7, r. 18 (1) and (2) (U.).*

[2] *Judgment – Finding – Magistrate accepting unsupported evidence of one party in preference to supported evidence of other party – Whether magistrate should give reasons for so finding.*

[3] *Estoppel – Rent restriction – Denial by tenant of statutory tenancy – Payments by tenant of increased rent under rent restriction law – Whether tenant estopped from denying statutory tenancy.*

Editor's Summary

The appellant leased certain premises from the respondent under a lease made in 1947 which was sought to be admitted in evidence, although the lease had not been pleaded in the plaint, nor was it produced in court when the plaint was presented. The term was for one year and the rent was Shs. 90/- per month. At the end of the term the tenant held over paying the same rent. In 1954 landlords were permitted by Legal Notice No. 121 of 1954 to increase rents by up to fifteen per cent. The appellant paid Shs. 103/50 per month rent from 1954 until 1957. Legal Notice No. 265 of 1956 permitted landlords to increase rents by up to one hundred per cent. from January, 1957. The appellant refused to pay Shs. 180/-, averring that he was not a statutory tenant. Arrears of rent mounted and after six months distress was levied, when the appellant paid the arrears under protest. The appellant then sued for damages on the ground that the distress had been wrongfully levied. His action was dismissed, whereupon he appealed.

Held –

- (i) the magistrate should have given leave to admit the lease in evidence under O. 7, r. 18 (1) and, in any case, it was admissible under O. 7, r. 18 (2).
- (ii) since the magistrate accepted the unsupported evidence of the respondent in preference to the supported evidence of the appellant, he should have given his reasons for doing so.
- (iii) the appellant was estopped from denying that he was a statutory tenant as he had paid the fifteen per cent. permitted increase in rent from 1954.
- (iv) although the magistrate had erred in finding that no distress had been levied, when in law and in fact it had been, this had no bearing on the outcome of the case, which depended on the legality of the distress; and the distress was, in this case, lawful.

Appeal dismissed.

Cases referred to in judgment

- (1) *Dayalal Kheraj Janna v. Manibhai M. Patel Ltd.*, E.A.C.A. Civil Appeal No. 16 of 1950 (unreported).
- (2) *Morrison v. Jacobs*, [1945] 2 All E.R. 430.
- (3) *Harnam Singh v. Jamal Purbhai* (1955), 22 E.A.C.A. 1.
- (4) *Hutchins v. Scott* (1837), 2 M. & W. 809; 150 E.R. 984.

Judgment

Sheridan J: This is an appeal from a judgment and decree of the learned resident magistrate, Kampala, dismissing the appellant's claim for damages for wrongful levying of distress.

It was agreed that the appellant had leased premises at No. 16, Rashid Khamis Road from the respondent on March 1, 1947, for one year at a monthly rent of Shs. 90/- per month. He held over at the expiration of the year. In July, 1954, the rent was increased to Shs. 103/50. The learned magistrate found that this was the fifteen per cent. Permitted increase in the standard rent allowed by Legal Notice No. 121 of 1954 and was not as a result of a fresh agreement between the parties. Legal Notice No. 265 of 1956 permitted an increase not exceeding one hundred per cent. with effect from January 1, 1957. The appellant refused to pay Shs. 180/- per month rent averring that he was not a statutory tenant. The learned magistrate held that he became a statutory tenant when he held over and that the standard rent was Shs. 90/-. By April, 1957, six months' rent in arrears was due. On May 28, 1957, the respondent levied distress on the premises and the arrears of rent were paid under protest. The learned magistrate held that the distress was lawful and dismissed the suit with costs.

The grounds of appeal are:

- “(a) The learned magistrate erred in law in not allowing the appellant's counsel to put to the respondent in cross-examination the written tenancy agreement signed by both the appellant and the respondent.
- “(b) the learned magistrate erred in holding that the standard rent of the premises occupied by the appellant was Shs. 90/- per month and in so holding misdirected himself in accepting the evidence of the

respondent as to whether the tenancy to Hadi Popat (D. 2) included garage and in failing to accept that of Hadi Popat.

- “(c) The learned magistrate erred in holding that the appellant was a statutory tenant at the material date of the action and in so holding, he further erred in not accepting the appellant’s evidence as to the creation of

a new tenancy when he (the appellant) paid under an agreement made with the respondent an increased rent of Shs. 103/50 as from July, 1954, and in accepting that of the respondent.

- “(d) The learned magistrate erred in believing the respondent as to the demand he made for the permitted increase as soon as he knew of Legal Notice No. 265/56 without considering the appellant’s evidence on that point and without giving due consideration to the respondent’s two letters demanding Shs. 260/- rent per month.
- “(e) The learned magistrate erred in holding that no distress was in fact levied and in so holding failed to give any consideration to the appellant’s evidence on this point and the documents produced in court showing that he paid under protest the alleged rent including the bailiff’s fee and advocates’ costs.
- “(f) The judgement is against weight of evidence in that the learned magistrate viewed the evidence of the appellant and his witness and other documentary evidence from wrong angle.”

On ground (a) at the trial, Mr. Vyas, for the appellant, sought to put to the respondent in cross-examination a written agreement. The learned magistrate refused to allow him to do so relying on the Civil Procedure Rules, O. 7, r. 18. He does not state whether he is relying on r. 18 (1) or r. 18 (2). Rule 18 (1) renders inadmissible, without the leave of the court, any document which ought to be produced in court by the plaintiff when the plaint is presented or to be entered in the list to be added or annexed to the plaint. Rule 18 (2) excludes from the provisions of O. 7 documents produced for cross-examination of the defendant’s witnesses or in answer to any case set up by the defendant or handed to a witness merely to refresh his memory. The plaintiff did not aver a written agreement and if it had done so the appellant would have been under a duty to produce it in court when the plaint was presented (O. 7, r. 14 (1)), nor did he add or annexe to the plaint a list of other documents (O. 7, r. 14 (2)).

“The object of r. 14 and r. 18 is to provide against false documents being set up after the institution of a suit. In those cases, therefore, where there is no doubt of the existence of a document at the date of the suit, the court should, as general rule, admit the document in evidence though it was not produced with the plaint or entered in the list of documents annexed to the plaint as required by r. 14”

(Mulla’s Code of Civil Procedure (10th Edn.), p. 569). I have seen the agreement, which is a printed form with the particulars typed in. It is dated March 3, 1947, and is signed by both the parties and by “H. D. Choudhry, Advocate” in whose presence they signed. It is obviously a genuine document, and if it was not admissible under r. 18 (2), as I find it was, being put to the defendant in cross-examination—he is as much a defence witness as any other witness who is called to support his case—the learned magistrate should have given leave for it to be produced under r. 18 (1). The only effect of the improper rejection of this evidence is to impugn the credibility of the respondent, and it is not a ground of itself for reversing the decision of the learned magistrate if it appears that, if this rejected evidence had been received, it ought not to have varied the decision: s. 165 of the Evidence Ordinance. In evidence the respondent said,

“The agreement *as far as I know* was verbal. I went to my lawyer, Choudhry. He had no written agreement. The tenancy was for one year. We agreed that when there was permitted increase under the law he would have to pay” [my italics].

He was not being dogmatic about it and it must be remembered that he was trying to recall something which happened eleven years ago. The important fact is that both parties agree that there was a tenancy for a fixed period of one year. The result would have been the same if the written agreement had been allowed in evidence. Mr. Vyas criticises the alleged agreement to pay permitted increases on the ground that the first permitted increase was by Legal Notice No. 123 of 1947, which was published in July, 1947, and could not have been anticipated in March, 1947. This alleged agreement may be an after-thought but it would not affect the respondent's right to include the increases in the rent, on notice, as and when they were permitted. Another possibility is that the respondent may have heard bazaar rumours of impending permitted increases.

Ground (b) raises the question whether a garage was included in the premises when they were leased to Hadi Popat (D. 2), who was the tenant in January, 1942, at a monthly rent of Shs. 90/-. The garage was not included in the lease to the appellant. If it was included in the lease to Popat there could be no standard rent as the premises leased to the appellant were not premises which were occupied by a tenant on and prior to January 1, 1942, and the standard rent would not be the rent at which the premises were let on that date: definition of "standard rent" in s. 2 of the Rent Restriction Ordinance (Cap. 115). It is agreed that the rent of the premises let to the appellant has never been fixed by a rent board. Popat gave evidence that the premises included a garage. He admitted that he did not own a car and that the garage was used by one Babu who did not pay him any rent for it. Babu was not called as a witness by either side. In disposing of this issue the learned magistrate stated that he was satisfied that Popat paid Shs. 90/- for the rooms and the rent did not include the garage. He believed the respondent on this issue. Mr. Vyas complains that the learned magistrate did not record in his judgment why he preferred the unsupported evidence of the respondent on this issue to that of the appellant and his witness Popat. He relied on *Dayalal Kheraj Janna v. Manibhai M. Patel Ltd.* (1), E.A.C.A. Civil Appeal No. 16 of 1950 (unreported), where the importance of a trial judge giving his explanation of the reasons why he prefers the evidence of one side in preference to that of the other where there is conflicting evidence was stressed. Here the learned magistrate could have made a note of the credibility or demeanour of the different witnesses or he could have expressed his doubt as to where the truth lay—a common occurrence in cases in this country—but what he seems to have meant was that on the balance of probabilities the garage was not leased to the "carless" Popat and that the same premises were subsequently leased to the respondent.

On ground (c) all that it is really necessary to say is that when the contractual tenancy expired on March 1, 1948, and the defendant held over he became a statutory tenant: *Morrison v. Jacobs* (2), [1945] 2 All E.R. 430. The learned magistrate was fully justified in rejecting the appellant's evidence that there was a fresh agreement in July, 1954, to pay Shs. 103/50—the exact amount of the permitted increase by Legal Notice No. 121 of 1954. By his conduct and by paying this rent for four years without demur he has admitted that he was a statutory tenant and he is estopped from so denying: *Harnam Singh v. Jamal Purbhai* (3) (1955), 22 E.A.C.A. 1.

The answer to ground (d) depends on two undated letters (exhibits 2 and 3) written by the respondent to the appellant. Exhibit 2 informs him that the basic rent in 1942 was Shs. 130/-, and that from January (1957) the rent would be Shs. 260/-, i.e. the full permitted increase allowed by Legal Notice No. 265 of 1956. Exhibit 3 is to the same effect except that it states that the basic rent before 1942 was Shs. 130/-. It contains an expression of opinion that the rent from January 1, 1957, would be Shs. 260/-, and advises the appellant to consult

his own lawyer. This shows that the respondent was not sure of the position. Mr. Vyas submits that these letters show how unreliable the respondent was as the agreed rent was Shs. 90/-. Mr. C. D. Patel states that the respondent gave evidence that the original rent was Shs. 130/-, but was reduced to Shs. 90/- at the special request of the appellant, and that the learned magistrate has failed to record this. Exhibit 3 is not inconsistent with this explanation. However this may be, a misapprehension as to the amount of the permitted increase would not affect the demand as such. The amount should have been Shs. 180/-.

On ground (e), para. (8) of the written statement of defence admits that distress was levied but contends that it was lawful. In *Hutchins v. Scott* (4) (1837), 2 M. & W. 809, which is referred to in Bullen's Law of Distress (2nd Edn.) at p. 226, a broker went to the tenant's house and pressed for payment of rent alleged to be due, and £3 3s. 0d. for expenses of levy, but touched nothing, and made no inventory, whereupon the tenant paid him the rent and expenses under protest, and he withdrew; in which case it was decided that the landlord could not say there had been no distress. The facts in the instant case are similar. In May, 1957, when the rent was over six months in arrears, the respondent issued a warrant of attachment. That warrant was never executed and the learned magistrate held that no distress was in fact levied as the appellant paid the rent when the auctioneer called, armed with the warrant. The learned magistrate erred in holding that there was no levying of distress and he should have accepted the admission contained in the written statement of defence, but this error had no effect on the outcome of the case which depended on the legality of the distress.

I have already covered ground (f) which is in quite general terms. The learned magistrate was entitled to accept the evidence of the respondent in preference to that of the appellant and his witness. In law the appellant was a statutory tenant and the levying of the distress was lawful. The appeal is dismissed with costs.

Appeal dismissed.

For the appellant:

MP Vyas

MP Vyas, Kampala

For the respondent:

CD Patel

CD Patel, Kampala

Yafesi Walusimbi v The Attorney-General of Uganda
[1959] 1 EA 223 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	31 March 1959
Case Number:	109/1958
Before:	Lyon J
Sourced by:	LawAfrica

[1] *Practice – Third party procedure – Third party notice alleging different cause of action and subject matter from those between plaintiff and defendant – Civil Procedure Rules, O. 1, r. 14 (U.).*

Editor’s Summary

The plaintiff sued the Attorney-General claiming damages for negligence. The Attorney-General applied *ex parte* for a third party notice to be issued and served on one, N, pursuant to O. 1, r. 14 of the Civil Procedure Rules. The application was founded on alleged fraud. The third party notice was duly served. Subsequently when N alleged fraud and breach of contract on the part of one, Y, the Attorney-General again applied *ex parte* for another “third party” notice to be issued and served on Y. This application was also granted and the notice was duly served. On a summons for third party directions taken out by N, counsel for Y asked for the third party proceedings to be set aside on the ground that the cause of action and the subject matter of the claim against Y were different from those between the plaintiff and defendant.

Held –

- (i) in order that a third party be lawfully joined, the subject matter between the third party and defendant must be the same as the subject matter between plaintiff and defendant and the original cause of action must be the same.
- (ii) as the plaintiff was suing the defendant for negligence, the third party notices alleging fraud should be set aside.

Order accordingly.

Case referred to in judgment

(1) *Birmingham and District Land Co. v. London and N.W. Ry. Co.* (1887), 34 Ch.D. 261.

Judgment

Lyon J: This is a summons for third party directions. It raises many points of great interest.

The plaintiff in this action claims damages from the Attorney-General. He has alleged that he purchased a plot of land from Nsubuga, that the land was properly surveyed by the senior surveyor, Kampala, who forwarded the relevant agreement, etc. to the registrar of titles, Entebbe, for registration. The plaintiff alleges that, although this was done in 1954, the registration has never been carried out owing to the negligence of some one in the office of the registrar of titles. The plaintiff was filed on February 13, 1958. The Attorney-General entered an appearance and later filed a written statement of defence on March 3, 1958. The defence denied negligence and contained the following paragraphs:

- “6. In the month of January, 1956, prior to the approval of the survey as set forth in para. 4 hereof, the registered proprietor, Hamu Nsubuga, by written agreement dated January 27, 1956, purported to transfer to one

Yobu Saku the entire plot of land comprised in folio 1, Mailo Register Volume 1239.

- “7. By so doing the said Hamu Nsubuga purported to convey to the said Yobu Saku an unascertained portion of the plot of 0.25 acres which had been sold by him to the plaintiff herein the transfer and agreement in respect of which were at that date held at the office of titles pending registration on the conclusion of survey as aforesaid.
- “8. The said transfer to Yobu Saku was the result of fraud or gross negligence on the part of the said Hamu Nsubuga.
- “9. The said agreement between Hamu Nsubuga and Yobu Saku was registered on February 6, 1956, and on the same day the said Yobu Saku entered into a written agreement with one Ezekeri Bunjo whereby the said plot of land comprised in folio 1 of Volume 1239 of the Mailo Register was transferred to the said Ezekeri Bunjo. This latter agreement was passed for registration on February 8, 1956, and the said Ezekeri Bunjo at the present date appears on the said title as registered proprietor thereof.”

So that later observations may be clarified it should be noted that at the hearing of the instant summons, Mrs. Chand appeared for the plaintiff, Mr. Few of Crown counsel for the Attorney-General, Mr. A. D. Patel for the third party (who initiated this summons) and Mr. Pandit for the person who may be conveniently described as the fourth party.

On March 26, 1958, on hearing Mr. McMullen of Crown counsel *ex parte* for the defendant, Sheridan, J., made an order for a third party notice to issue and to be served on Mr. A. D. Patel's client. On August 21, 1958, the learned chief justice gave leave for a third party notice to be served on Mr. Pandit's client—Yobu Saku. This was also done on an application made by Mr. McMullen. Mr. Mehta of Messrs. Chand and Mehta was present and also Mr. A. D. Patel for the third party. As far as I can see, neither Mr. Pandit nor the fourth party was served and therefore, in relation to the fourth party, that application was *ex parte*; and Mr. Pandit rightly asserts that it was only upon the instant summons for directions that he has had an opportunity of making any submission. He now submits with great force that neither his client nor the third party should have been served with a third party notice.

Questions of difficulty now arise because O. 1, r. 14 of the Uganda Civil Procedure Rules (Cap. 6) is not identical with O. 16a, r. 1 of R.S.C. (1959 Annual Practice, p. 381) because the local rule does not include either (b) or (c) of O. 16a, r. 1. The Uganda rule is identical with the rule that was in force when *Birmingham and District Land Co. v. L. and N.W. Ry. Co.* (1) (1887), 34 Ch. D. 261, was decided. O. 1, r. 14 provides:

- “14. Where a defendant claims to be entitled to contribution or indemnity over against any person not a party to the suit he may, by leave of the court, issue a notice (hereinafter called a third party notice) to that effect; such leave shall be applied for by summons in chambers *ex parte* supported by affidavit. A copy of such notice shall be filed and shall be served on such person according to the rules relating to the service of a summons. The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the court, be filed within the time limited for filing his defence. Such notice shall be in or to the effect of the form No. 23 in Appendix A with such variations as circumstances require, and a copy of the plaint shall be served therewith.”

This rule is confined to cases where a defendant “claims to be entitled to contribution or indemnity.”

What are the allegations made in this case? As I have already pointed out, the plaintiff's claim against the Attorney-General is based upon negligence, and the defendant claims that Mr. A. D. Patel's client (third party) fraudulently conveyed a part of the land which, the plaintiff has alleged, he (plaintiff) had already purchased from the third party. The third party alleges that the fourth party has now transferred a plot of land, including part of the land which the third party had agreed to sell to the plaintiff, to another party, also in a fraudulent manner and in a way in which a clerk employed in the Registry of Titles is involved. In my opinion two things are clear in third party procedure: (1) in order that a third party may be legally joined the subject matter of the suit must be the same and (2) the original cause of action must be the same. In the instant case the plaintiff's claim is based on negligence. On the other hand the defendant's claim as against the third party is based on a different tort—fraud—while the third party's claim as against the fourth party is based upon fraud and/or breach of contract.

The subject matter is not the same as between the four parties because the third party sold and transferred to the fourth party only a part of the land which, it is not in dispute, he had already agreed to sell and transfer to the plaintiff. That being so, and as the cause of action is not the same between the four parties, I hold that the two orders giving leave to serve the third and fourth parties with third party notices must be set aside. In the Annual Practice, 1959, p. 391 and 392, in a note headed "Directions General", this passage occurs:

"The powers of the court on the application for directions are now very wide. The master may at any time set aside third party proceedings." (O. 16a, r. 7 (3).)

For these reasons I set aside the two third party notices and order that Mr. A. D. Patel's client pay the costs of this summons in any event, including the costs of the plaintiff and defendant.

In the course of the hearing Mr. Pandit submitted that the word "indemnity" in O. 1, r. 14 cannot include a claim for damages based on a tort. I have already pointed out that when a rule identical with Uganda O. 1, r. 14 was in force in England, the *Birmingham* case (1) was decided. There the Court of Appeal held that:

"in order to bring a case within O. XVI, r. 48, it is not enough that if the plaintiff succeeds the defendant will have a claim for damages against the third party, but the defendant must have against the third party a direct right of indemnity as such, which right must—generally, if not always—arise from a contract expressed or implied, . . ."

I further cite the following passages from the judgment of Bowen, L.J., at p. 274:

"A right to indemnity as such is given by the original bargain between the parties. The right to damages is given in consequence of the breach of the original contract between the parties."

And:

"There is a large class of cases, chiefly arising under the law of principal and agent, where one man employs another to do a thing which the employer apparently has a legal right to direct to be done. The law implies from the request an undertaking on the part of the principal to indemnify the agent if he acts upon the request. It is true that this is not confined only to the cases of principal and agent, there are other cases which it is not necessary to examine now. But they all proceed upon the notion of a

request which one person makes under circumstances from which the law implies that both parties understand that the person who acts upon the request is to be indemnified if he does so.”

And at p. 276 Fry, L.J., observed:

“... in my view the word ‘indemnity’ in the rule which we have now to construe, means to express a direct right either at law or in equity to indemnity as such, and I think that this right has to be contrasted, and not to be for a moment confounded with the right to damages which arises either from a breach of contract or from tort.”

In case this matter may arise hereafter I express the view that the word “indemnity” in O. 1, r. 14 does not include any right to damages arising from either a breach of contract or a tort; and that none of the claims against the third parties in the instant suit can fall within O. 1, r. 14.

I am grateful to Mr. Pandit for a careful and painstaking argument.

Order accordingly.

For the plaintiff:

Mrs Chand

Chand & Mehta, Kampala

For the defendant:

HSS Few (Crown Counsel, Uganda)

The Attorney-General, Uganda

For the third party N:

AD Patel

AD Patel, Kampala

For the third party Y:

SV Pandit

SV Pandit, Kampala

Re an Application by Sumaria Bus Service **[1959] 1 EA 227 (SCK)**

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	9 January 1959
Case Number:	97/1958
Before:	Connell and Miles JJ
Sourced by:	LawAfrica

[1] *Transport licensing – Jurisdiction of Appeal Tribunal – Appeal from Transport Licensing Board to Appeal Tribunal filed within twenty-one days from date of notification of board’s decision in Official Gazette – Oral announcement of board’s decision at hearing – Whether time for appeal runs from oral announcement or date of notification in Gazette – Memorandum of appeal not served on all parties – Whether omission fatal to appeal – Transport Licensing Ordinance (Cap. 237), s. 3 (12) (K.) – Transport Licensing Regulations, 1955, reg. 28 (1), reg. 30 and reg. 33 (K.).*

Editor’s Summary

The applicants moved the court for an order of certiorari to quash an order made by the Transport Licensing Appeal Tribunal. The applicants had, despite the opposition of several objectors, including the respondents, obtained from the Transport Licensing Board licences for a bus and two seven-seater taxis, to ply between Nairobi and Mbale. The two respondents appealed against this decision, when the applicants took a preliminary objection on the ground that the memorandum of appeal was out of time, as it should have been filed within twenty-one days from the date of notification of the decision of the Transport Licensing Board. Before the Appeal Tribunal the present applicants contended that the date of notification of the decision was when the chairman of the board orally announced the board’s decision, namely, November 18, 1957, whilst the appellants before the Appeal Tribunal contended that the decisions of the board are habitually notified by publication in the *Official Gazette*, and that the grant of the licence to the applicants was so notified on December 10, 1957, from which date, therefore, the twenty-one days allowed for filing of an appeal ran. The preliminary point taken by the present applicants was overruled. The applicants also claimed that the Appeal Tribunal had no jurisdiction to entertain an appeal, since the appellants before the Appeal Tribunal had not served copies of the memorandum of appeal upon all the parties to the proceedings before the board. This objection was also overruled, since although it was conceded that the memorandum of appeal had not been served, the parties who had not been served were supporting the appeal. Following the decision of the Appeal Tribunal the applicants now sought to have the order made by the Appeal Tribunal quashed on the same grounds that had been argued before the Tribunal.

Held –

- (i) the practice of the Transport Licensing Board of publishing its decisions in the *Official Gazette* is convenient and proper, and since on many occasions parties concerned in proceedings before the board are not present when the decision is announced, the Appeal Tribunal was right in finding that the date of notification from which time runs for the purposes of an appeal is the date of publication of the decision in the *Gazette*.
- (ii) since all the other parties concerned supported the appeal, it could not be said that the Appeal Tribunal had no jurisdiction to entertain the appeal.

Application dismissed.

Case referred to in judgment

- (1) *The Never Despair* (1884), 9 P.D. 34.

Judgment

Connell J: read the following judgment of the court: This is an application for an order of certiorari to remove into the Supreme Court for the purpose of being quashed an order dated March 26, 1958, made by the Transport Licensing Appeal Tribunal under the Transport Licensing Ordinance (Cap. 237).

The application arises out of two consolidated appeals by Overseas Touring Co. (E.A.) Ltd. (No. 1 of 1958) and O. M. Peugeot Service (No. 19 of 1957), who are the respondents to the present application, against a decision of the Transport Licensing Board on November 18, 1957; the present applicants were respondents to the appeals.

The applicants had applied to the Transport Licensing Board for licences for one large bus and two seven-seater taxis to ply between Nairobi and Mbale via Eldoret. There were several objectors to that application including the present respondents. The Transport Licensing Board granted the application but stipulated that there should be no setting-down or picking-up between Timboroa and Nairobi. Against this decision the present respondents appealed. At the hearing of the appeal of the appeal before the Appeal Tribunal, counsel for the then respondents took a preliminary objection to the hearing of the appeal so far as Appeal No. 1 of 1958 was concerned on the ground that the memorandum of appeal was not presented within the time prescribed by reg. 28 (1) of the Transport Licensing Regulations, 1955. This regulation provides that:

“Every appeal under the provisions of s. 23 of the Ordinance shall be set out in the form of a memorandum signed by the appellant or by his advocate, if any, and shall be presented, together with six copies thereof, to the registrar of the tribunal within twenty-one days from the date of notification of the decision of the licensing authority”.

This objection was overruled by the Appeal Tribunal.

According to an affidavit filed by Mr. A. E. Hunter of the firm of Daly & Figgis, who appeared for the appellants in Appeal No. 1 of 1958, the memorandum of appeal was sent to the Appeal Tribunal by post on December 30, 1957. It is stated in an affidavit by Mr. P. A. Russell, the registrar of the Appeal Tribunal, that he received in this capacity a notice of appeal by the appellants on December 20, 1957, and that a memorandum of appeal by the Overseas Touring Co. (E.A.) Ltd. with six copies was presented to him on January 3, 1958.

In a supplementary affidavit Mr. Russell states that when documents are sent to the office of the registrar of the Transport Licensing Appeal Tribunal with cash attached, as was the case with the memoranda of appeal in case No. 1 of 1958, such documents are not dealt with immediately on receipt but accumulated over a period of three or four days before action is taken upon them as the said office has no accounts clerk. All matters in which payments of money are involved are dealt with by himself, or his secretary, in batches. After accumulation as aforesaid documents are entered in the “Inwards Register” and it is at that stage that they are date stamped.

Mr. Russell also states that he has seen a delivery book kept by Messrs. Cockar & Cockar who were advocates for the appellants in Appeal No. 19 of 1957, which we also have seen, containing an entry to the effect that on December 9, 1957, the memoranda of appeal by O. M. Peugeot Service were delivered to his office and were duly signed for as having been received by his secretary. Mr. Russell says that he sees no reason to doubt the accuracy of the delivery book and he accepts that the memoranda of appeal in Appeal No. 19 of 1957 were filed in his office on December 9, 1957.

So far as Appeal No. 1 of 1958 is concerned Mr. Russell is unable to state when the memoranda of appeal were received in his office but that they may well have been received before January 3, 1958.

It appears further from the affidavit of Mr. Russell, who is also executive officer of the Transport Licensing Board, that if at its advertised meeting the board grants the licence applied for the practice is for the chairman to make a verbal announcement to that effect and thereafter an approval notice is sent to the applicant by ordinary post and notice of the grant of the licence is published in the Official *Gazette*. No written notice of the grant of the licence is sent to persons who have lodged objections to the grant. If at its advertised meeting the board refuses to grant the licence applied for the chairman makes a verbal announcement to that effect and thereafter a refusal notice is sent to the applicant. No written notice of the refusal is sent to the objectors nor, apparently, is any notice published in the official *Gazette*.

In the present case, the chairman made a verbal announcement of the grant of the licence applied for at the meeting of November 18, 1957. Notice of the grant was published in the Official *Gazette* on December 10, 1957.

At the hearing of this application, Mr. Ahamed, for the applicants, made an application for an order for the production of the original memoranda of appeal for the purpose of examining the date stamps thereon, but in view of the statement by Mr. Russell in his supplementary affidavit that the date of stamping was not necessarily the date of receipt in the office we considered that no useful purpose would be served by making such an order.

It is established to our satisfaction that the memoranda of appeal in Appeal No. 1 of 1958 were posted on December 30, 1957, and we consider that the presumption should apply that they were delivered in the ordinary course of post at the office of the registrar of the Appeal Tribunal on December 31, 1957, there being no evidence to the contrary. We are further of opinion that there is a sufficient presentation within the meaning of reg. 28 (1) if the memoranda of appeal are delivered at the office of the registrar of the Appeal Tribunal since it might be impossible for many reasons to effect personal presentation.

We now have to consider what is meant by the phrase in reg. 28 (1):

“Notification of the decision of the licensing authority.”

It is contended on behalf of the applicants that the decision was notified when the decision to grant the licence was announced verbally by the chairman at the meeting of the licensing authority on November 18, 1957, so that the memoranda of appeal in Appeal No. 1 of 1958 were presented out of time. On behalf of the respondents it is contended that the decision was notified by publication of the grant of the licence in the Official *Gazette* on December 10, 1957. If this is so, the memoranda were presented within the time prescribed.

Section 3 (12) of the Transport Licensing Ordinance provides that:

“The business of the licensing authority shall be conducted in such manner as the licensing authority shall determine;”

We consider that the word “business” is not confined to the procedure at the meetings of the licensing authority but is sufficiently wide to cover such ancillary matters as notification of its decisions. We agree with the learned counsel for the applicants that “notification” according to its general usage may be the act of giving official notice or information by words, by writing or by other means but we are of opinion that s. 3 (12) of the Ordinance permits the authority to select whatever method of notification it thinks fit provided that it is reasonable and not contrary to natural justice. We consider that, so far from being

unreasonable or contrary to natural justice, the practice of publishing the decisions in the Official *Gazette* has everything to commend it

since we are informed that on many occasions all the parties concerned are not present at the meeting when the decision is announced. Our finding, therefore, is that December 10, 1957, was rightly held by the Appeal Tribunal to have been the date of notification in the present case. It follows that the memoranda of appeal in Appeal No. 1 of 1958 were duly presented within the time prescribed by reg. 28 (1).

The second ground upon which it is alleged that the Appeal Tribunal had no jurisdiction to entertain the appeal in Appeal No. 1 of 1958 was that the appellants had not served

“upon every other person who was a party to the proceedings before the licensing authority”

a copy of the memorandum of appeal as required by reg. 30. It is conceded by Mr. Hunter that he did not serve copies of the memorandum on the other objectors. Mr. Cockar, however, in Appeal No. 19 of 1957 did serve the other objectors, three of whom instructed him to appear on their behalf.

Taken literally the wording of reg. 30 is sufficiently wide to mean that every person who was party to the proceedings before the licensing authority must be served with a copy of the memorandum of appeal irrespective of whether they opposed or supported the appellant before the licensing authority. In the present case none of the objectors who were not served by Mr. Hunter opposed his objection before the licensing authority, in fact they supported it, nor did they oppose his appeal. In these circumstances, we do not see how it can be said that the Appeal Tribunal had no jurisdiction to entertain the appeal. Had the objectors who were not served opposed Mr. Hunter and his clients before the licensing authority the position would have been very different in view of the provisions of reg. 33.

We would add, although in the light of the decision to which we have come on the two main grounds of this application it is not strictly necessary to consider the point, that there is in our view considerable weight in Mr. Hunter’s preliminary submission. This was that even assuming that the appellants in Appeal No. 1 of 1958 had failed to comply with the requirements of reg. 28 (1) and reg. 30, since there was no question as to the admissibility of Appeal No. 19 of 1957, this court could not hold that the Appeal Tribunal had no jurisdiction to entertain the consolidated appeals. As a general rule when actions are consolidated the carriage of the consolidated action is given to the party who first instituted his suit (see per Sir James Hannen in *The Never Despair* (1) (1884), 9 P.D. 34 at p. 36). In the present instance the first appeal filed was that of Mr. Cockar. The fact that for reasons of convenience at the hearing of the appeal Mr. Cockar adopted the arguments of Mr. Hunter does not appear to us to affect the principle.

The application for an order of certiorari is dismissed with costs. We have considered the question of the costs occasioned by Mr. Hunter’s application on December 22, 1958, for a further affidavit to be filed by Mr. Russell. In our view, the day costs of December 22 should be borne by Mr. Hunter’s clients as we consider that they had ample time to apply for an additional affidavit if they considered one to be necessary.

Application dismissed.

For the applicants:

ZK Ahamed

Shapley, Barret, Allin & Co, Nairobi

For the first respondents:

SR Cockar

Cockar & Cockar, Nairobi

For the second respondents:

AE Hunter

Daly & Figgis, Nairobi

Viram Ranmal Odreda and another v R
[1959] 1 EA 231 (HCU)

Division: HM High Court for Uganda at Kampala
Date of judgment: 9 March 1959
Case Number: 360 and 361/1958
Before: Sir Audley McKisack CJ
Sourced by: LawAfrica

[1] Criminal law – Charge – Contravention of rule made under statutory powers – Rule amended before alleged offence – Accused convicted on own plea – Appeal – Offence alleged in charge sheet not an offence on material date – When appellate court will refuse to substitute conviction for contravention of rule as amended – Employment Ordinance (Cap. 83) (U.) – Employment Rules r. 53 (1), r. 79 (U.) – Criminal Procedure Code, s. 136 (a) (ii) (U.).

Editor's Summary

The appellants were convicted of failing to provide for the medical care of an injured employee contrary to r. 53 (1) of the Employment Rules made under the Employment Ordinance. Prior to the date of the alleged offence, r. 53 (1) was amended, and whereas the former rule required the employer to provide for medical care for his employees, the new rule required the employer to take reasonable steps to provide for medical care. The particulars of the offence set out in the charged sheet were discursive, but showed clearly that the appellants had been charged under the former rule. On appeal against conviction and sentence it was submitted for the appellants that though no appeal against conviction lies where there has been a plea of guilty, the appellants had pleaded to a charge which did not in fact amount to a criminal offence, and accordingly the conviction could not stand. For the Crown it was submitted that the charge should be read as stating a contravention of r. 53 (1) as amended.

Held –

- (i) this was not a case of mere omission to state all the essential elements of the offence; the statement of the offence mis-stated the offence itself, and it was not open to the court to substitute a conviction for an offence against the amended r. 53 (1), since this created a different offence from that to which the appellants had pleaded.
- (ii) the appellants were charged with and convicted of something which was not an offence at all on the material date, and the appeal must be allowed.

Appeal allowed. Conviction set aside.

Case referred to in judgment

(1) *Matu s/o Gichimu v. R.* (1951), 18 E.A.C.A. 311.

Judgment

Sir Audley McKisack CJ: The two appellants pleaded guilty in the district court of Mengo to a charge containing two counts. The first count was failing to notify an accident causing injury to a workman, contra s. 14 (1) of the Workmen's Compensation Ordinance. Both appellants were sentenced to a fine of Shs. 300/- on that count. They do not appeal against that conviction or sentence.

They appeal against the conviction and sentence on the second count, which was for failing to provide for the medical care of an injured employee, contra r. 53 (1) of the Employment Rules (made under the Uganda Employment Ordinance (Cap. 83)). On that count each was sentenced to three months' imprisonment.

Mr. Maloney for the Crown concedes that this last-mentioned sentence is excessive, since the learned trial magistrate appears not to have taken into account certain material facts, but the Crown supports the conviction. At the trial the first appellant (V. R. Odreda) was unrepresented, but the second appellant (N. M. Ranavaya) was represented by an advocate and, as I have said, both pleaded guilty. No appeal against conviction lies where there has been a plea of guilty, but it has been submitted that the charge to which the appellants pleaded did not in fact amount to a criminal offence. The count in question was as follows:

“SECOND CHARGE.

“Failing to provide for the medical care of an injured employee in accordance with r. 53 (1) of the Uganda Employment Rules and contra to r. 79 of the said Rules.

STATEMENT OF OFFENCE.

“On October 2, 1958, when the Gaba Estate was visited, an employee of the estate named Luka Kagwa s/o Pio, a Murundi labourer, was found crawling about and able to move only with the aid of a stick; he could not stand upright nor had he the use of his legs. It was apparent that he had sustained severe burns on his feet, ankles, shins and buttocks following an accident in the factory said to have occurred on July 11, 1958. The injured employee was receiving no medical treatment or care of any sort contra to r. 53 (1) of the Uganda Employment Rules and contra to r. 79 of the said Rules.”

The discursive nature of the particulars (wrongly entitled “statement”) of the offence leave it in doubt what the date of the offence was but, at the earliest, it was July 11, 1958. On that date r. 53 (1) of the Employment Rules read as follows:

“(1) Every employer shall take reasonable steps to provide for the medical care of sick or injured employees and also for their families if such families are resident on the premises of the employer, in accordance with the provisions of this Part. He shall cause steps to be taken to procure the immediate treatment of all cases of sickness and injury.”

That sub-rule had been introduced by amending rules which took effect on March 7, 1957. It replaced the following sub-rule in the original Rules (p. 1341 of Laws of Uganda, Vol. VII):

“(1) Every employer shall provide for the medical care of sick or injured employees and also for their families if such families are resident on the premises of the employer, in accordance with the provisions of this Part.”

It will be seen that the original sub-rule imposed upon an employer obligations different from those of the new sub-rule. Whereas the old sub-rule required him to provide for the medical care of his employees, etc., the new one requires that he “take reasonable steps” to provide for their medical care; and it adds that the additional obligation to

“cause steps to be taken to procure the immediate treatment of all cases of sickness and injury”.

Thus the new sub-rule appears to relax the stringency of the old sub-rule, which apparently imposed an unqualified liability on the employer and left no room for considering whether he had taken reasonable steps. In the charge in the instant case there is no mention of “reasonable steps”, and the offence is merely stated to be failing to provide for the medical care, etc. Nor do the

particulars of the offence make any reference to the matter of reasonable steps as distinct from the mere failure to provide medical care. It is clear, therefore, that the appellants were being charged under the old sub-rule, and the new one. But at the date of the alleged offence the old sub-rule was not in force and a new sub-rule, which was for a different offence, had been in force for over a year.

I agree, therefore, with Mr. James' contention that the appellants were being charged with and pleaded guilty to something which was not an offence at all on the material date. The charge was not amended in the lower court, nor do I consider it would be open to me to substitute a conviction for contravening the new sub-rule since it contains a different offence from that to which the appellants pleaded. The position in the instant case is on all fours with that described by their lordships in *Matu s/o Gichimu v. R.* (1) (1951), 18 E.A.C.A. 311 at p. 316:

"If, in fact, the charge or information discloses no offence in law and cannot be or is not sufficiently amended then either it will be quashed by the court of first instance and an order of acquittal entered or, if a conviction has been recorded, an appellant [sic] court may quash it and substitute an order of acquittal. But it by no means follows that the proceedings had under the defective charge were a nullity and that the prisoner could be tried again upon a fresh charge or information in respect of the same matter."

Mr. Maloney argued that the charge should be read as stating a contravention of the new sub-rule, since the number of the rule and sub-rule remains unaltered despite the amendment of the Rules, and since, by virtue of s. 136 (a) (ii) of the Criminal Procedure Code, it is not necessary for the statement of offence to contain "all the essential elements of the offence". But, in my view, the statement of offence in this case did not omit one of the essential elements; it mis-stated the offence itself. Nor can I agree that this error of law is such that it does not amount to a miscarriage of justice and could therefore be disregarded in considering whether the appeal should be dismissed. Had the appellants been correctly charged under the new sub-rule, the question whether they had taken reasonable steps would have arisen, and it might well be that they would not have pleaded guilty. The facts noted in the record show that the appellants sent the employee to hospital on the day he received his injuries, and that he received treatment in hospital for two months. He was then discharged from hospital, but apparently his injury again gave rise to a septic condition and he was in this condition when found by a labour officer on the appellant's estate on October 2, on which date he was sent back to hospital. I am not to be understood as saying that the appellants did take reasonable steps to comply with the new sub-rule, but they took certain steps, the reasonableness or otherwise of which might have been in issue had the appellants been correctly charged.

The appeal is allowed and both appellants are acquitted on the count for contravening r. 53 (1) of the Employment Rules.

I must observe that these difficulties might never have arisen had the magistrate to whom the complaint was made (and who is not the same as the learned trial magistrate) adhered more strictly to the provisions of s. 85 of the Criminal Procedure Code. That section (as re-enacted with effect from November 7, 1958) prescribes the various methods of instituting criminal proceedings, and provides that a person other than a public prosecutor or a police officer may make a complaint and apply for the issue of a warrant or summons. In such case the duty of the magistrate is as follows (sub-s. (4)):

"(4) The magistrate, upon receiving a complaint under sub-s. (3) of this section, if he is satisfied that *prima facie* the commission of an offence has

been disclosed and that such complaint is not frivolous or vexatious, shall draw up or cause to be drawn up and shall sign a formal charge containing a statement of the offence or offences alleged to have been committed by the accused.”

What happened in the instant case is that a labour officer—and I am informed by Mr. Maloney that labour officers are not public prosecutors within the meaning of the Criminal Procedure Code—laid before the magistrate a written complaint asking for a summons against the appellants and containing the following:

“On October 2, 1958, I visited the Gaba Estate in Kyagwe County in the Mengo District of Buganda Province (Viram Ranmal Odreda and Natha Munja Ranavaya) and found that they had failed to comply with the provisions of the Workmen’s Compensation Ordinance and the Uganda Employment Rules in the manner set out in the charge sheets.”

Attached to this complaint was a paper headed “Charge Sheet” and containing two counts, the second of which I have already set out earlier in this judgment. The magistrate’s signature appears at the foot of this charge sheet and there is a note on the record as follows:

“14.11.58. Mr. Eke, labour officer, before court. Signs complaint. Charge drawn up and signed. Criminal summons to issue for 4.12.58 for hearing.”

It appears to me from the foregoing and, in particular, from the reference in the complaint to “the charge sheets”, that the magistrate adopted the charge annexed to the complaint, and presumably produced by the labour officer, as his own and did not himself “draw up or cause to be drawn up . . . a formal charge” as required by s. 85 (4) of the Criminal Procedure Code. Had the magistrate complied with that sub-section, it is to be expected that he would have noticed the defect in the statement of the offence and would have altered the particulars of the offence from their original form to one which concisely stated the essential particulars. Had he taken the trouble to do so a great deal of time and trouble might have been saved for others, and, what is more, the acts or omissions of the appellants would have been dealt with on the merits and not merely in accordance with a question of law.

Appeal allowed. Conviction set aside.

For the appellants:

AI James

Baerlein & James, Jinja

For the respondents:

MT Maloney (Crown Counsel, Uganda)

The Attorney-General, Uganda

**Standard Vacuum Oil Company (EA) Limited v The Town and Country
Planning Board**
[1959] 1 EA 235 (HCU)

Division: HM High Court for Uganda at Kampala

Date of judgment: 26 March 1959

Case Number: 1/1959
Before: Sir Audley McKisack CJ
Sourced by: LawAfrica

[1] Town and country planning – Refusal of Planning Committee to permit construction of petrol station – Site in area zoned for commercial user – Petrol station permissible only with Planning Committee’s special approval – Application for approval refused – Whether appeal lies – What appellant must show on appeal – Town and Country Planning Ordinance, 1951, s. 27 (U.) – Town and Country Planning Ordinance, 1948 (U.) – Town and Country Planning Regulations, 1952 (Legal Notice No. 245) (U.) – Kampala Outline Scheme, 1951, para. 14 and para. 51 (General Notice No. 267 of 1951 as amended by General Notice No. 583 of 1957) (U.).

Editor’s Summary

The appellant applied to the Planning Committee of the Kampala Municipal Council for permission to erect a petrol filling station on land within an area designated as the “Commercial Zone” in the Kampala Outline Scheme, 1951. Paragraph 14 of this scheme controls the use to which the land within the area can be put. The relevant paragraph under which the application was made to the Planning Committee was para. 8 of the Schedule of Uses for Residential Zone “A” (the scheduled uses for the “Commercial Zone” including those for this zone), which reads: “Petrol filling stations with the special approval of the Planning Committee”. The Planning Committee decided not to approve the application and notified the appellant that it had been resolved to refuse consent for the following reason: “Site not specifically approved as a site for a petrol filling station . . .” The appellant unsuccessfully appealed from the Planning Committee to the Town and Country Planning Board, and from the board’s decision appealed again to the High Court.

Held –

- (i) the appellant had in fact sought to appeal against the refusal of the Planning Committee to grant special approval, whereas there is no provision in s. 27 of the Ordinance for such an appeal.
- (ii) the scheme itself in para. 51 enables a person who has grounds for disagreeing with a decision of the Planning Committee on a planning matter to petition the board and the appellant could, as an alternative to the present appeal, have petitioned as therein provided, but from a decision of the board no appeal lies.
- (iii) the appellant had failed to show that the proposed use was either expressly permitted by the scheme, or one for which the committee had granted approval under s. 27.
- (iv) whilst there might be room for a difference of opinion on the desirability of granting approval for the use in question, neither the committee nor the board had acted upon any wrong principle in reaching a decision.

Appeal dismissed.

No Cases referred to in judgment in judgment

Judgment

Sir Audley McKisack CJ: This is an appeal which purports to be brought under s. 27 (3) of the Town and Country Planning Ordinance, 1951. It is an appeal against a decision by the Town and Country

Planning Board upholding a decision of the Planning Committee of the Kampala Municipal Council. The appellant had applied to that committee under the Town and Country Planning Regulations, 1952 (Legal Notice No. 245) for permission to erect a petrol filling station on plot No. 9, Kampala Road, Kampala. This plot lies within an area designated as the “Commercial Zone” in the Kampala Outline Scheme, 1951 (General Notice No. 267 of 1951, amended by General Notice No. 583 of 1957), which was approved by the Governor under the Town and Country Planning Ordinance, 1948, and continues in force under the Town and Country Planning Ordinance, 1951, by virtue of the saving provision in s. 34 of the last-named Ordinance.

Paragraph 14 of the Kampala Outline Scheme provides that, subject to certain exceptions,

“no land or building situated in any zone shown on the plan (of the scheme) shall be put to any other use than a use set out in the Schedule of Uses in respect of the zone in which it is situated”.

For the Commercial Zone the uses prescribed in that schedule are as follows:

“VII. Commercial Zone:

1. All the uses permitted in Residential Zone ‘E’, provided that no residence or habitation shall be allowed on the ground floor of a house, except with the approval of the Planning Committee.
2. Offices.
3. Commercial premises.”

The term “commercial premises” is defined in the scheme as follows:

“a building or part of a building where goods are displayed for sale (whether by wholesale or retail) and includes an office, workroom or store on the same premises which is necessary for and incidental to the conduct of such sale, but does not include a petroleum filling station, godown, or warehouse.”

From that definition it will be seen that a petrol filling station is expressly excluded from the permissible uses under para. 3 of the scheduled uses for the Commercial Zone. Nor can it come under para. 2, “Offices”. Paragraph 1, however, brings in the uses allowed in Residential Zone “E”. On turning to the scheduled uses for Residential Zone “E” we find that, among other things, it includes the uses allowed for Residential Zone “D”. Similarly Zone “D” refers us back to “C” and so on until we arrive at Residential Zone “A”. The result is that the scheduled uses for the Commercial Zone include those of Residential Zone “A”, and para. 8 of the latter is as follows:

“8. Petrol filling stations with the special approval of the Planning Committee.”

Consequently no petrol filling station can be erected in the Commercial Zone without contravening the town planning scheme unless the special approval of the Planning Committee is first obtained. When, therefore, the appellant submitted his application to the Planning Committee he was placing upon the committee the duty of considering, in the first place, whether or not it would grant approval for that use. The committee decided not to grant approval, and communicated their rejection of the application to the appellant in the following terms:

“Your application dated 30.8.1958 was considered at a meeting of the Planning Authority on 15.9.58 when it was resolved that consent be refused for the following reasons: Site not specifically approved as a site for a

petrol filling station. The committee noted members' views on the undesirability of such development of this important site contiguous to the civic centre and where danger might be caused to traffic on the inside of a bend in the busy main road."

The Town and Country Planning Regulations, 1952 (to which I have already referred), require any person intending to erect a building to obtain prior permission from the Planning Committee. Regulation 4 provides that as soon as the Planning Committee is satisfied that the proposed building does not contravene any provision of a town planning scheme it shall signify its approval of the application and communicate it to the applicant. It is thus mandatory upon the committee to approve a proposed building unless it contravenes a town planning scheme. In the present case, since petrol filling stations are not one of the uses permitted in the Kampala scheme, except with the special approval of the committee, the appellant's proposed building did contravene the scheme, as the committee decided not to approve this particular use. Having taken that decision, the committee had no choice but to reject the appellant's application.

Section 27 of the Town and Country Planning Ordinance, 1951, is as follows:

- "27. (1) Any person aggrieved by a decision of a committee that a building or work contravenes the provisions of either an outline or detailed scheme may, within two months of receipt of the decision apply to the board for the decision of the committee to be set aside or modified:
- "Provided that no appeal shall lie from a decision of a committee not to allow any relaxation from the provisions of a scheme.
- "(2) On receipt of an application under sub-s. (1) of this section the board may, after hearing a representative of the committee and the person aggrieved, confirm, reverse or modify the decision of the committee.
- "(3) Any person aggrieved by a decision of the board made under the provisions of sub-s. (2) of this section may within one month of the receipt of such decision appeal to the High Court who may confirm, reverse or modify the decision of the board.
- "(4) The procedure and practice of the High Court in relation to criminal appeals shall apply to appeals made under the provisions of sub-s. (3) of this section save that any party to the appeal may in any appeal with the permission of the court, call evidence. The attorney-general or his representative may appear on behalf of the board."

It will be seen that an appeal lies only in respect of a decision of a committee

"that a building or work contravenes the provisions of either an outline or detailed scheme",

and not against any other kind of decision. To succeed in the present appeal the appellant would, in my view, have to show that the proposed building does not contravene the town planning scheme, on the ground that it is for a use which is permitted by the scheme, either as coming within the uses specified in para. 2 and para. 3 of item VII in the Schedule of Uses, which it manifestly does not, or as being a use which the planning committee has specially approved under para. 1, which again is clearly not the case. What the appellant has in fact sought to do is to appeal against the refusal of the committee to grant special approval for the proposed use, and there is no provision in s. 27 of the Ordinance, or anywhere else in the Ordinance, for such an appeal. There is, however, provision in the scheme itself (para. 51) whereby any person

"who has grounds for disagreeing with a decision of the Planning Committee on a planning matter may require that his petition be referred

to the board within two months of the date the decision was taken, without prejudice to any other form of an appeal that may be open to him”.

The expression “a decision on a planning matter” is certainly wide enough to cover a refusal to approve a particular use, and an alternative course for the appellant in the instant case would have been to petition the Town Planning Board concerning the committee’s refusal to approve the proposed use. But no appeal would lie from the board’s decision on such petition, since there is no provision for it.

In the result the appeal must be dismissed, since, if it is treated as an appeal under s. 27 of the Ordinance, the appellant has failed to show that the proposed use is either one expressly permitted by the scheme or one for which the committee has granted approval; or, if it is treated as an appeal against the board’s upholding of the committee’s refusal to grant approval for the proposed use, no appeal lies to the High Court. Since, however, the merits of the committee’s and board’s decisions have been argued at some length, I would add that I can see no adequate grounds upon which an appellate court could properly interfere with those decisions. While there may no doubt be room for a difference of opinion on the desirability of granting approval for the use in question, I am satisfied that neither the committee nor the board acted upon any wrong principle in reaching their decision.

Appeal dismissed.

For the appellant:

RE Russell

Russell & Co, Kampala

For the respondent:

MT Maloney (Crown Counsel, Uganda)

The Attorney-General, Uganda

Sullivan v Alimohamed Osman [1959] 1 EA 239 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	24 March 1959
Case Number:	13/1959
Before:	Forbes V-P, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court for Tanganyika–Williams, Ag. J

[1] Trespass – Trespass to goods – No direct interference – Allegation of wrongful order to drive vehicle to police station thereby causing loss – Order obeyed – Whether circumstances establish claim in trespass.

[2] Pleading – Trespass to goods – Interference without physical contact – Duress alleged at trial but circumstances of duress not pleaded – Whether plaint discloses cause of action – Indian Civil Procedure Rules, O. 7, r. 11.

[3] Practice – Pleading – Plaint not disclosing cause of action – Whether mandatory upon court to reject plaint.

Editor's Summary

The respondent had instituted proceedings against the appellant, a forestry officer, claiming a sum of Shs. 16,490/- as special damages. In his plaint the respondent alleged:

“3. On September 5, 1957, the defendant, without the authority or consent of the plaintiff, wrongfully and wilfully interfered with an exercised control over the plaintiff's motor lorry DSA. 985 at or near Songea, Tanganyika, by wrongly ordering the driver employed by the plaintiff, one Hamisi Matola, to drive the said vehicle unlawfully along the main Songea/Lindi Road to the police station, Songea.”

The respondent further alleged that he incurred damage and loss in that he was deprived of the use of the vehicle in his transport business for forty-nine days and that he was charged and convicted on six counts under the Traffic Ordinance and Rules, which convictions were set aside on appeal. The trial judge awarded the respondent Shs. 500/- general damages but rejected his claim for special damages. The appellant appealed on two grounds; firstly, that the plaint disclosed no cause of action in that it failed to state (a) that the respondent's driver complied with the appellant's order to drive the lorry, (b) that, even if this be taken as implied, the order was accompanied by either force or duress, and (c) that the interference with the respondent's use of or control over the lorry, occasioned by that order, was a direct interference; and secondly, that the evidence as accepted failed to establish the claim, which, counsel for the respondent conceded at the hearing of the appeal and in the court below, was one of trespass to goods. The respondent on the other hand cross-appealed against the rejection of his claim for special damages.

Held –

- (i) a literal reading of the plaint was not the correct approach and there was by necessary implication an allegation that the driver had complied with the order of the appellant.
- (ii) unless the driver's compliance with the appellant's order was obtained by duress, the respondent must be taken to have consented, through the driver as his agent, to the driving of the lorry to the police station, and he would then have no cause of action in trespass.
- (iii) as it was not alleged that the appellant's order to the respondent's driver was given in circumstances amounting to duress such as compelled obedience to it, the plaint failed to make an allegation of fact, which, in the light of the other facts alleged, was necessary to success in an action for trespass to goods: *Bruce v. Odham's Press Ltd.*, [1936] 1 All E.R. 287; [1936] 1 K.B. 697, applied

- (iv) under O. 7, r. 11 of the Indian Civil Procedure Rules, it was mandatory upon the court to reject the plaint which did not disclose a cause of action.
- (v) it was not sufficient to allege in the plaint merely that the interference was wrongful, nor did that word import an allegation that it was direct or that it was carried out in circumstances of duress: Observations of Jessel, M.R., in *Day v. Brownrigg* (1878), 10 Ch.D. 294, at p. 302, applied.

Per curiam – “The plaint must allege all facts necessary to establish the cause of action. This fundamental rule of pleading would be nullified if it were to be held that a necessary fact not pleaded must be implied because otherwise another necessary fact that was pleaded could not be true.”

Appeal allowed. Cross-appeal dismissed.

Cases referred to in judgment

- (1) *Powell v. Hoyland* (1851), 6 Exch. 67; 155 E.R. 456.
- (2) *Bruce v. Odham's Press Ltd.*, [1936] 1 All E.R. 287; [1936] 1 K.B. 697.
- (3) *Day v. Brownrigg* (1878), 10 Ch.D. 294.
- (4) *Scott v. Sebright* (1887), 12 P.D. 21.

March 24. The following judgments were read by direction of the court:

Judgment

Windham JA: This appeal raises an interesting question in tort, not well covered by authority, regarding trespass to goods, in particular the extent to which an act on the defendant's part falling short of physical contact with the plaintiff's goods may constitute an interference with his possession of them amounting to a trespass. The appeal is from a judgment of the High Court of Tanganyika, in which the court awarded Shs. 500/- to the plaintiff-respondent as general damages suffered by him through the defendant-appellant's act of wrongful interference with his possession and control of a motor-lorry owned by him. The act complained of was an order by the appellant to the respondent's driver to drive the lorry to the police station, as a result of which the respondent was deprived of its use for forty-nine days and was prosecuted and convicted, his conviction being set aside on appeal, for a number of offences relating to the lighting, braking and general condition of the lorry. The respondent has cross-appealed against the learned trial judge's failure to award him Shs. 16,490/- as special damages in addition to the general damages.

Two alternative grounds of appeal have been raised. First, that the plaint discloses no cause of action and should have been rejected. Secondly, that the evidence as accepted failed to establish the claim, which, learned counsel for the respondent conceded below, and has conceded before us, was trespass to goods.

The portions of the plaint alleging the facts which constitute the cause of action, if indeed they do constitute it, are para. 3 and a part of para. 4. They read as follows:

- “3. On September 5, 1957, the defendant, without the authority or consent of the plaintiff, wrongfully and wilfully interfered with and exercised control over the plaintiff's motor lorry DSA.985 at or near Songea, Tanganyika, by wrongly ordering the driver employed by the plaintiff, one Hamisi Matola, to

drive the said vehicle unlawfully along the main Songea/Lindi Road to the police station, Songea.

- “4. As a result of the said wrongful act of the defendant, the plaintiff incurred damage and loss in that (a) he was deprived of the use of the said vehicle in his transport business for forty-nine days and (b) he was

prosecuted in Songea police court in Songea Criminal Case No. 232 of 1957, and found guilty on six counts under the Traffic Ordinance and Rules. Such convictions were set aside on appeal . . .”

The fatal defects which the appellant alleges in the claim, as above set out, are that it fails to state (*a*) that the respondent’s driver complied with the appellant’s order that he should drive the lorry; (*b*) that, even if this be taken as being implied, the order was accompanied by either force or duress; (*c*) that the interference with the respondent’s use of or control over the lorry, occasioned by that order, was a direct interference.

The first of these three objections is correct in so far as, if the pleading be read literally, there is no allegation that the driver drove the lorry at all, for the allegation is merely that he was ordered to do so, and this is consistent with a refusal by the driver to obey that order. This omission would of course be fatal to the claim if the correct approach to the plaint were the literal one. But it is not. That which is necessarily implied from its context must be read into the plaint. And the statement that the appellant ordered the driver to drive the lorry to the police station, followed by the statement that as a result of that order the respondent was deprived of the use of it for forty-nine days and was prosecuted in the police court, necessarily implies, to my mind, an allegation that the driver complied with that order.

The second omission alleged, namely, the admitted failure of the plaint to state that the appellant’s order to the driver was accompanied by either force or duress, calls for a closer consideration of the nature and scope of the tort of trespass to goods and of its essential ingredients. Now there can be no doubt that any actual physical interference by a defendant or his agent personally, with goods of which the right of possession lies in a plaintiff, constitutes a trespass in respect of those goods, whether the interference be the doing of physical damage to them without moving them or the moving of them without physically damaging them, and will give the plaintiff a cause of action in trespass upon which he may claim damages if such interference caused him damage. Such an interference would be a direct one and would involve the use of force, whether by way of the physical injury to the goods or of the moving of them. But where, as alleged in the present case, the defendant has not directly interfered with the plaintiff’s possession of or control over the goods either by himself or through his own agent, but has done so only by means of giving an order to the plaintiff’s servant having custody of the goods, thereby causing him to move them, then the question arises whether the giving of such an order, even if the defendant had no right to give it, constitutes of itself such an interference with the plaintiff’s possession of or control over the goods as would amount to trespass. Before considering this question further it will be helpful to refer to certain passages from the leading text-books on tort describing the nature of trespass to goods, not as being in themselves authoritative, but as summarising the general effect of decided cases on the point.

Winfield on Tort (6th Edn.), at p. 405, describes trespass to goods in the following terms:

“Trespass to goods is a wrongful interference with the possession of them. It may take innumerable forms, such as scratching the panel of a coach, removing a tyre from a car, injuring or destroying goods, or, in the case of animals, beating or killing them, or infecting them with disease. All that is necessary is that the harm done should be direct, and not consequential (at any rate, as the law understands those terms) for otherwise the action, if any, must be case, not trespass. But physical contact is probably unnecessary; for chasing cattle has been a trespass time out of mind. . . .”

In Salmond on Torts (11th Edn.), the following description appears at p. 358:

“The wrong of trespass to chattels consists in committing without lawful justification any act of direct physical interference with a chattel in the possession of another person—that is to say, it is to say, it is such an act done with respect to a chattel as amounts to a direct forcible injury within the meaning of the distinction drawn in the old practice between the writ of trespass and that of trespass on the case. . . . Physical interference usually consists in some form of physical contact—some application of force by which the chattel is moved from its place or otherwise affected. But this is not essential. It is presumably a trespass wilfully to frighten a horse so that it runs away, or to drive cattle out of a field in which they lawfully are, or to kill a dog by giving it poisoned meat.”

From the foregoing descriptions of the tort of trespass to goods by leading text-books writers, based on established decisions, it would certainly appear that, while the direct application of physical force to the subject-matter of the trespass is not essential, the instances given of cases where it is absent have all been concerned with animals; and this is due no doubt to the fact that an animal does not possess, in any real sense, a will to resist inducement or stimulation or temptation exercised upon or placed before it to the end that it shall act in a certain way; so that the animal’s consequent action may be truly said to be the direct and inevitable result of such inducement, stimulation or temptation. Thus a cow called or chased or frightened out of a field may be said to have been in effect moved from it by direct physical interference in as true a sense as if it had been led or carted from the field. But such is not the case where the inducement or order is given to a human being, as here. For in such case, between it and the resulting action there intervenes a human will capable, save in exceptional circumstances or unless it be overborne by duress, of resisting the inducement or refusing to obey the order. And it seems to me that, in the absence of such circumstances or of duress, damage to a plaintiff’s property resulting from compliance with an order given by a defendant to the plaintiff’s servant who was in charge of that property and who was not under duty to obey the order, will not be damage resulting directly from that order, even if it was the defendant’s intention and expectation that the servant would obey. I can see no difference in this connection between an order given by a defendant to a plaintiff and one given by him to the plaintiff’s servant. In either case it must I think be presumed, unless the contrary is pleaded and shown, that the person ordered was free to refuse to comply with the order, and the order will not be held to constitute an interference by the defendant with the plaintiff’s possession or control of that property. Again, the position in the present case, as disclosed in the plaint, is that before the interference of the defendant the lorry was in the constructive possession of the plaintiff, the driver having been entrusted by him with immediate control and custody of it. Unless, therefore, the driver’s compliance with the defendant’s order was obtained by duress, the plaintiff must be taken to have consented, through the driver as his agent, to the driving of the lorry to the police station, and he would then have no cause of action in trespass.

There seems to be a remarkable scarcity of judicial decisions touching this question whether an order or threat by a defendant to a plaintiff or to the latter’s servant, resulting in detrimental action being taken in respect of the plaintiff’s goods, can give rise to a cause of action in trespass to those goods; perhaps the scarcity indicates that save in exceptional circumstances it cannot. But there is one authority which, while recognising that in such a case an action will in certain circumstances lie, supports the view that I have taken. In *Powell v. Hoyland* (1) (1851), 155 E.R. 456, the action was in trover, and the

facts relevant to the present case were, briefly, as follows. The plaintiff was in lawful possession of certain bills of exchange given him by D. The defendant, acting for creditors who had begun bankruptcy proceedings against D. approached the plaintiff who was ill in bed and demanded the bills. The plaintiff refused to give them up. The defendant then told him that if he did not give them up he would be compelled to do so, and that D's bankruptcy would cost him (the plaintiff) £200 plus the expenses, and that the commissioner would be very severe with him. These threats greatly agitated the plaintiff and caused him reluctantly to give the notes up to the defendant. In deciding the question whether the defendant's action in obtaining the bills in this manner constituted a conversion or even a trespass, and in holding that it did not, Parke, B., delivering the judgment of the court, said at p. 458:

"We are all clearly of opinion that the original taking of the bills did not constitute a conversion; for there was no taking under such duress as would support an action for trespass. In truth, there was no proof of any duress whatever, because a mere statement that the plaintiff would have the expenses of the commission to pay, is not a duress which would vacate a promissory note or bond on the ground of duress; nor is it enough to make the obtaining goods by such a threat itself an illegal act of trespass, so as to render it a conversion."

Clearly the above passage is authority for the proposition that, in order to support an action for trespass to goods, it is not sufficient to show that the plaintiff (and this, as I have said earlier, would extend to his servant) has been induced to agree to an interference with his possession of the goods by the defendant's threats or orders. He must further show that in complying with them he was subjected to duress.

On these grounds I would hold that the plaintiff, by reason of its not having alleged that the defendant's order to the plaintiff's driver was given in circumstances amounting to duress such as compelled obedience to it, failed to make an allegation of fact which, in the light of the other facts alleged, was necessary to success in an action for trespass to goods. The omission of one such material fact makes a claim bad: *Bruce v. Odham's Press Ltd.* (2), [1936] 1 K.B. 697, at p. 712. And under O. 7, r. 11, of the Indian Civil Procedure Rules, it is mandatory upon the court to reject a plaintiff which does not disclose a cause of action. For some reason which does not appear clear, but by consent of the parties, the question whether the plaintiff disclosed a cause of action, though raised in the statement of defence, was not tried in limine but was framed as an issue along with three issues of fact, and the case went to trial. The issue was disposed of by the learned trial judge at the outset of his judgment in the following passage:

"Trespass to goods is essentially wrongful interference with possession of the goods—see Winfield on Tort (3rd Edn.), p. 333. To be wrongful, interference must be direct and forcible but that need not be pleaded. It is alleged that the plaintiff was deprived of the use of his vehicle as from the time of the wrongful order, the alleged act of interference. If the driver drove the vehicle away willingly the plaintiff was not deprived of its use. In my view therefore there is an implied allegation that the circumstances of the giving of the order amounted to a taking by duress. I find on this issue that the plaintiff does disclose a cause of action."

With respect, I consider that in the foregoing passage the learned judge erred on two points. In the first place it was not, in my view, sufficient to allege in the plaintiff merely that the interference was wrongful, nor did that word import an allegation that it was direct or that it was carried out in circumstances of duress. As was said in *Day v. Brownrigg* (3) (1878), 10 Ch.D. 294,

by Jessel, M.R., at p. 302, in a case where the plaintiff had sued the defendant for damages caused by the latter having recently given to his house the same name as that borne for many years by the plaintiff's adjoining house:

"It is not alleged in the statement of claim that the defendant did this either maliciously or with intent to injure the plaintiffs, or for any improper motive whatever. It only states the fact that he did it 'without any justification therefore or right to do so', and that 'he wrongfully, unlawfully, and improperly changed or caused to be changed the name'. Of course those epithets, under the present system of pleading, are useless and redundant. They add nothing whatever to the plaintiff's case. They are merely now epithets of abuse. They were formerly in declarations essential, because under that form of pleading legal rights were stated for facts; but facts alone are stated now."

So in the present case, the plaintiff should have stated briefly the facts or circumstances constituting duress. The allegation that the defendant's act was "wrongful" was insufficient; it was a pleading of law and merely begged the question.

In the second place, to conclude, as the learned trial judge did, that a taking by duress must be implied in the plaintiff because

"if the lorry was driven away willingly the plaintiff would not be deprived of its use"

is, with respect, illogical reasoning. The plaintiff must allege all facts necessary to establish the cause of action. This fundamental rule of pleading would be nullified if it were to be held that a necessary fact not pleaded must be implied because otherwise another necessary fact that was pleaded could not be true.

For these reasons I would hold that the court below erred in finding that the plaintiff disclosed a cause of action. I would therefore allow the appeal and set aside the judgment with costs here and below, on the ground that the plaintiff discloses no cause of action, and I would for the same reason dismiss the cross-appeal with costs.

Although it now becomes unnecessary to consider this appeal on its further merits and to decide whether the evidence as accepted by the learned trial judge would have entitled the plaintiff to succeed, I think it would be satisfactory to consider briefly the question whether on the evidence the judge was justified in finding that the defendant's order to the plaintiff's driver amounted to a "forcible taking" of it, that is to say a taking by duress. The defendant was a forest officer, but it is conceded that he had no power as such to order the plaintiff's driver to drive his lorry to the police station because of its defective lights or for any other reason. That is what he admittedly did, while the lorry was stationary at the side of the road one evening and the driver was in attendance. The driver, in giving evidence, alleged that the defendant assaulted him, but the defendant denied this, and the court found there had been no assault. The defendant also denied having threatened the driver into compliance with his order. The driver at first refused to drive his lorry on to the police station, for the good reason that its lights were not working. According to him he was attempting to repair them. But when the defendant told him that he should drive in front of his (the defendant's) car in the light of the latter's headlights he agreed to go, and did so. The driver admitted that the defendant's "order" consisted of the Swahili word "twenda", meaning "let's go". When asked why he considered this as an order he said,

"He said he had caught me driving a vehicle without lights, and then he caught me as if threatening me. I was a man from the village, I was afraid of the European, and I had to go."

The words “he caught me as if threatening me” refer to his evidence of the alleged assault by the defendant, which the court rejected. In cross-examination, on being asked if he agreed to go, he said, “Yes, I agreed after being oppressed” and that “there were arguments first”. Later he said, “I would not have gone if he had not pushed and threatened me.” The pushing again refers to the rejected evidence of assault.

On this evidence the learned trial judge, after considering the case of *Powell v. Hoyland* (1) to which I have already referred, decided upon the issue of duress in the following passage from his judgment:

“In my view the circumstances of the present case are distinguishable because the threat if there was one was directed not against the ‘possessor’ of the property himself but against his servant, and against a servant who was an unsophisticated African by one of the comparatively few Europeans in his area purporting to exercise authority. In my view the tests to apply here are whether the driver genuinely believed that the defendant had the purported authority and whether he believed that if he disobeyed the order there would be a real danger to his employment and means of living. With regard to the first test he stated that he knew that it would be wrong to drive the vehicle without lights by himself but did not think that it would be wrong to follow the defendant because he was then obeying the defendant’s order. That he also said that he would not have obeyed the order if he had not been pushed or threatened is not in my view really inconsistent. With regard to the second test the fear referred to represents such a common reaction by an African placed in such circumstances that I consider that it can reasonably be assumed. The defendant admitted being annoyed (he said mainly because the vehicle had been moved a short distance since he had passed it on a previous occasion that evening) and it is therefore likely that he was speaking in a high, angry voice, as described by the turnboy. I therefore find that the giving of the order in the circumstances as proved amounted to a threat and that by reason of the threat there was a forcible taking of the vehicle.”

Now although the trial judge was quite right in considering all the surrounding circumstances in deciding on the question of duress, I think with respect that his conclusion was unsupported by the facts as found and by the driver’s own admissions as to why he eventually decided to drive the lorry to the police station. For, his evidence of an assault having been rejected, the only accepted reason given by him for obeying the defendant’s order was the latter’s “threat”. But a careful perusal of the record fails to reveal any threat by the defendant. Moreover, it fails to reveal that the defendant said or did anything that would lead the driver to believe that

“If he disobeyed the order there would be a real danger to his employment and means of living”.

The learned judge held that such a fear represents

“such a common reaction by an African placed in such circumstances that I consider that it can reasonably be assumed”.

Whether or not such a reaction is as common as that, I do not know. But I cannot agree that it is so notorious in Tanganyika today as to allow a court to assume judicial knowledge on the point and to dispense with the necessity of evidence, which is in effect what the court did; for the driver in his evidence never said that he had harboured any such fear. The learned judge, in the passage from his judgment which I have quoted, said,

“In my view the tests to apply here are whether the driver genuinely believed that the defendant had the purported authority and whether he

believed that if he disobeyed the order there would be a real danger to his employment and means of living.”

With great respect I think, while these things were certainly relevant, that in making them the test, in effect, of the defendant’s tortious liability, the learned judge was looking too much to what was in the driver’s mind and too little at what was in the defendant’s. The test was rather whether the defendant intended to make or to allow the driver to believe those things, a question to which all the surrounding circumstances would no doubt be relevant, including the fact that the defendant was a European official and the driver an ignorant African. But, for the reasons which I have given, and in the light of the decision in *Powell v. Hoyland* (1), where there was held to be no trespass in spite of a manifest intention on the defendant’s part to coerce, I think that the accepted evidence, together with the surrounding circumstances and the driver’s admissions, were not such as to justify the learned trial judge’s finding that the defendant’s inducing the driver to drive the plaintiff’s lorry to the police station amounted to a forcible taking of it and thus to a trespass in respect of it. I would on this ground also have allowed the appeal even if the plaint were not materially defective.

Forbes V-P: I agree. The appeal is allowed with costs. The judgment and decree of the High Court are set aside and it is ordered that the suit be dismissed with costs. The cross-appeal is dismissed with costs.

Gould JA: I have had the advantage of reading the judgment of my brother Windham, J.A., and I agree with the conclusions at which he has arrived and that the appeal should be allowed with costs here and in the court below and that the cross-appeal should be dismissed with costs. I would like only to add a few words with relation to the question dealt with in the latter part of the judgment, that is whether the evidence as accepted by the learned trial judge would have entitled the plaintiff to succeed.

It is not necessary to re-state the facts. With relation to the pressure which was put on the driver of the vehicle in question the only facts found by the learned trial judge were that the appellant, being angry and speaking in a high angry voice, ordered the driver to drive to the police station. The giving of that order “in the circumstances as proved” amounted in the learned judge’s view to a threat. The circumstances referred to were that the driver was an unsophisticated African and that the appellant was “one of the few Europeans in his area purporting to exercise authority”. He was in fact a forestry officer.

In my view the type and status of the driver as an “unsophisticated African” with the possibility that he would be thereby the more likely to obey an order from a European holding a position in Government is a factor to be taken into account in deciding whether he acted as the result of duress. The law is stated, in relation to contract, by Butt, J., in *Scott v. Sebright* (4) (1887), 12 P.D. 21 at p. 24 as follows:

“It has sometimes been said that in order to avoid a contract entered into through fear, the fear must be such as would impel a person of ordinary courage and resolution to yield to it. I do not think that is an accurate statement of the law. Whenever from natural weakness of intellect or from fear—whether reasonably entertained or not—either party is actually in a state of mental incompetence to resist pressure improperly brought to bear, there is no more consent than in the case of a person of stronger intellect and more robust courage yielding to a more serious danger. The difficulty consists not in any uncertainty of the law on the subject, but in its application to the facts of each individual case.”

Nevertheless *Scott v. Sebright* (4) was an exceptional case in which the petitioner was reduced by threats to a state of bodily and mental prostration and I think with respect that the learned trial judge in the present case placed rather too much weight on this factor. Though by reason of the driver's position vis-à-vis the appellant he might be more inclined to obey an order, and though he obviously obeyed it in fact with reluctance, it does not necessarily follow that he did so because of duress within the meaning of that word as indicated by the authorities. The plaintiff in *Powell v. Hoyland* (1) (1851), 155 E.R. 456 was at a disadvantage through illness and was no doubt equally reluctant to hand over his promissory notes. The passage from the judgment in that case quoted by the learned Justice of Appeal in his judgment indicates that it is not every threat which will amount to duress. It also indicates that the duress which would render a contract voidable is the type of duress which would be sufficient in a case such as the present one. Earlier in the case, during the argument, Parke, B., had interjected a remark to the same effect. At p. 458—

“Unless there be such duress as would have vacated a contract, trespass could not be maintained, . . .”

No authority which controverts this view of the law has been brought to my attention.

The type of duress sufficient to render a contract voidable is indicated in Halsbury's Laws of England (3rd Edn.), Vol. 8, para 146, p. 84:

“By duress is meant the compulsion under which a person acts through fear of personal suffering, as from injury to the body or from confinement, actual or threatened. A threat of a criminal prosecution for which there is sufficient ground is not such duress as will vitiate a contract made in consequence thereof, provided that there is adequate valuable consideration for the contract, and that there is no agreement to stifle the prosecution. As a general rule, a threat of civil proceedings or bankruptcy proceedings does not amount to duress, whether there is good foundation for the proceedings or not, though it may do so if it is intended and calculated, having regard to the circumstances to cause terror in the particular case. The question whether imprisonment or threatened imprisonment does or does not constitute duress depends upon whether the imprisonment is lawful or unlawful.”

Once the allegations of assault were rejected there was no evidence in the present case of any compulsion of the type described in the foregoing passage. The driver in his evidence made no reference to being in fear. He was undoubtedly reluctant and may have felt he had little option but to obey the order given him though that he was not completely overawed is shown by the fact of his first refusal to comply. On consideration of the proved facts and circumstances, for these reasons as well as for those given in the judgment of the learned Justice of Appeal, I have come to the conclusion that to hold that they amount to duress would be contrary to the authority of *Powell v. Hoyland* (1). I come to that conclusion with some reluctance as it does not appear to me right that where a person attains an end by giving an order which is obeyed, he should be able to avoid consequent liability because the other party need not have obeyed the order.

Appeal allowed. Cross-appeal dismissed.

For the appellant:

D MacDonagh (Crown Counsel, Tanganyika)

The Attorney-General, Tanganyika

For the respondent:

HG Dodd

Plotti v The Acacia Company Limited
[1959] 1 EA 248 (CAD)

Division: Court of Appeal at Dar-Es-Salaam
Date of judgment: 13 March 1959
Case Number: 101/1958
Before: Forbes V-P, Gould and Windham JJA
Sourced by: LawAfrica
Appeal from: H.M. High Court for Tanganyika–Law, J

[1] Negligence – Contributory negligence – Finding of trial judge based on facts and particulars not pleaded – Issue of contributory negligence contested at trial on different basis – Whether judge’s finding valid – Misdirection and non-direction – Costs – Code of Civil Procedure, O. 14, r. 3 (T).

[2] Negligence – Passenger lift – Lift unattended and unlit – Unusual danger – Liability for injuries to passenger.

Editor’s Summary

The appellant who had been injured in a lift in the respondent’s hotel, sustaining injuries to the fingers of his left hand, sued the respondent for Shs. 40,000/- general damages and Shs. 510/- special damages. The trial judge held that the condition of the lift constituted an unusual danger, and that the respondent was in breach of duty in failing to warn the appellant of this unusual danger and was therefore liable. He assessed general damages at Shs. 18,000/- and special damages at Shs. 510/-. He further held that there was a high degree of contributory negligence on the part of the appellant and in consequence awarded only fifty per cent. of the general damages assessed and ordered the respondent to pay three-quarters only of the appellant’s costs. The appellant appealed against the finding on contributory negligence and the order as to costs. For the appellant it was contended that the particulars of the contributory negligence found against him by the trial judge were wholly different from those alleged against the appellant in the written statement of defence: that the contributory negligence found was at no time alleged against the appellant, who consequently had no opportunity of denying the same and that though the fifth issue at the trial “was there contributory negligence?” was framed in general terms, this must be construed with reference to the particulars of negligence pleaded, and was limited to those particulars. It was further contended that in his finding of contributory negligence the trial judge had failed to direct himself as to some of the material evidence given on behalf of the appellant.

Held –

- (i) the paucity of the evidence and absence of cross-examination on material points were a strong indication that the particulars on which the trial judge founded his findings on the issue of contributory negligence were not considered or contemplated by the parties. *Sagarmull v. Galstaun*

(1930), A.I.R. P.C. 205, distinguished.

- (ii) in view of the serious misdirection and non-direction as to the visibility of the chain fastening the two gates of the lift, the trial judge's finding of contributory negligence was difficult to support.
- (iii) even on the trial judge's findings, it seemed doubtful whether the appellant would be precluded from recovering full damages. *Smith v. Austin Lifts Ltd. and Others*, [1959] 1 All E.R. 81, considered.

Appeal allowed. General damages of Shs. 18,000/- awarded and full costs.

Cases referred to in judgment

- (1) *Sagarmull v. Galstaun* (1930), A.I.R. P.C. 205.
- (2) *Esso Petroleum Co. Ltd. v. Southport Corpn.*, [1955] 3 All E.R. 864; [1956] A.C. 218.
- (3) *Wakelin v. London and South Western Railway Co.* (1887), 12 App. Cas. 41.
- (4) *Smith v. Austin Lifts Ltd. and Others*, [1959] 1 All E.R. 81.

March 13. The following judgments were read by direction of the court:

Judgment

Forbes V-P: This is an appeal from the High Court of Tanganyika against that party of the judgment of the court whereby the appellant (the original plaintiff) was found guilty of contributory negligence, and also against an order made as to costs.

The appellant had been injured in a lift in the respondent's hotel, losing the first joint of the index finger and two joints of the second finger of his left hand. He sued the respondent for Shs. 40,000/- general damages, and Shs. 510/- special damages in respect of these injuries. The learned trial judge held that the condition of the lift constituted an unusual danger, and that the respondent was in breach of duty in failing to warn the appellant of the existence of this unusual danger, and was therefore liable in damages to the appellant. He assessed general damages in respect of the injuries suffered by the appellant at £900, and special damages (as to the quantum of which there was no dispute) at Shs. 510/-. The learned judge, however, further held that the appellant was guilty of a high degree of contributory negligence and in consequence awarded only fifty per cent. of the general damages assessed. He also ordered that the respondent should pay three-quarters only of the appellant's costs. It is against the learned judge's decisions on contributory negligence and costs that this appeal has been brought.

The circumstances of the accident, so far as material, appear to have been as follows: the lift in question was standing unattended at the first, or restaurant, floor of the respondent's hotel; it was of a type designed for operation by members of the public, though, normally, it was operated by an attendant; during the absence of the attendant it was customary to secure the lift against use by members of the public by chaining the two gates of the lift together in a half-open position, and they were so chained at the time the appellant entered the lift; there were no lights on in or near the lift, which was lit by daylight only at the material time; the appellant, who had been breakfasting in the restaurant, entered the lift, without difficulty and without noticing the chain on the gates, and closed the gates, again without difficulty and without noticing the chain; on his pressing the button the lift started to descend, causing the chain to ride up on the inner door and crush the handle of the inner door, where it caught and damaged the appellant's hand and caused the injuries which were the subject of the action.

The learned judge held that the presence in an hotel of an unattended lift of the type of this lift constituted an invitation to the public to use the lift, and that the appellant was entitled to use the lift; that

“the system adopted of immobilising the lift by means of a chain was ineffective and . . . highly dangerous”;

and that the respondent ought to have known of the danger, was under a duty to protect the appellant from this unusual danger; and that in failing to warn the appellant of the existence of the unusual danger the respondent was in breach of its duty to him. These findings are not challenged on the appeal.

The learned judge, however, also held:

“As to whether he” [i.e. the plaintiff/appellant] “was negligent in entering the lift at all, that is another matter. I do not think that the absence of a light inside the cage should have put him on his guard, but I do think that if he himself had acted with reasonable care he would have seen the chain and noticed that the gates were in an unnatural position of being half open. Although the light in the cage was not on, the

approaches to the lift are perfectly well illuminated by natural daylight, whether the light in front of the cage is on or not.

“I do not think that light was on, but in my opinion that makes no difference. Mr. Godbye and Mr. Smith, who were not proposing to use the lift, both at once noticed the chain, but the plaintiff did not see it at all, although he actually entered the cage. He should have seen it, and in this respect he was negligent. He should also have been put on his guard by the fact that the landing door, which being spring-loaded normally remains in a closed position, was half-open. He was negligent in not noticing this. He should also have noticed that in closing the inner door, the outer door came with it, and was also negligent in this respect. The plaintiff admits that he was in a hurry, as he had to be at work in ten minutes’ time. His general conduct on this occasion gives me the impression that not only was he in a hurry, but also that he must have been day-dreaming with his thoughts elsewhere. This does not absolve the defendants from liability, because of my finding that the lift in its chained condition was an unusual danger of which they should have been aware and against which they should have protected the plaintiff but failed to do so. At the same time I have no doubt that the plaintiff would not have suffered his injuries had he not himself been negligent in the respects mentioned above. The fact that he was familiar with the lift, and had operated it before, makes his negligence in failing to notice the chain all the more culpable, especially having regard to the fact that the outer door was half open, which it could not have been unless secured in some way. In my opinion the plaintiff was guilty of a high degree of negligence.”

For the appellant it is contended that the particulars of the contributory negligence found against him by the learned trial judge were wholly different from those alleged against the appellant in the written statement of defence, and that the contributory negligence found was at no time alleged against the appellant, who consequently had no opportunity of denying the same. And it was further contended that in finding the appellant guilty of contributory negligence the learned judge failed to direct himself as to some of the material evidence given on behalf of the appellant.

As regards the appellant’s first contention, it is certainly true that the particulars of contributory negligence found by the learned trial judge were not pleaded in the written statement of defence. The written statement was framed on the basis that the appellant was fully aware of the chain on the lift gates and that he had never closed the gates of the lift or set the lift in motion; and it was pleaded in para. 7–

“(c) that the plaintiff injured himself through his own negligence . . .

“(d) that the injuries were caused by the plaintiff’s own violent efforts negligently executed in reckless and insistent attempts to close the gates in spite of the chain threaded through the grilled gates of the lift.”

This theory of the accident was, very properly on the evidence, rejected by the learned trial judge.

Notwithstanding the pleadings, the fifth issue framed at the trial, with the agreement of counsel, was

“5. Was there contributory negligence?”

Counsel for the appellant, however, contends that this issue, though framed in general terms, must be construed with reference to the particulars of negligence pleaded, and is limited to those particulars; that the trial in fact proceeded on that basis, and that he never dealt with, or appreciated that he had to meet,

a case of contributory negligence founded on an entirely different set of particulars.

There is, I think, force in the appellant's contention. It is true that in *Sagarmull v. Galstaun* (1) (1930), A.I.R. P.C. 205, a case in which the variation of an agreement was not pleaded, but was nevertheless put in issue, contested and proved, the Privy Council said,

"Their lordships are satisfied that, notwithstanding the form of the plaint the suit was fought by the parties deliberately upon issues substantially as framed by the trial judge and ought upon that footing to be determined."

In the instant case, however, it does not appear that the issue of contributory negligence was contested on the basis of the particulars which the learned judge held established it. The question whether the chain ought to have been seen was mentioned by counsel for the appellant in his address, but this was apparently in relation to the question whether the chain was a sufficient warning to the public not to use the lift. In view of r. 3 of O. XIV of the Code of Civil Procedure it was not unreasonable that counsel should regard the fifth issue as limited to the particulars of contributory negligence alleged in the statement of defence.

The importance of particulars in pleadings was clearly demonstrated in *Esso Petroleum Co. Ltd. v. Southport Corpn.* (2), [1956] A.C. 218. In that case foreshore owners, who had suffered damage from oil jettisoned from an oil tanker which had stranded in a river estuary, brought against the shipowners an action based on trespass, nuisance and negligence, alleging that the stranding was caused by faulty navigation; the defence denied negligence. At the hearing the shipowners' case was that the stranding was due to the tanker's stern frame being cracked so that the steering gear was faulty, but they called no evidence to show how this condition was caused. The trial judge held that they were not negligent as alleged in the statement of claim and that the foreshore owners were not entitled to succeed either in nuisance, trespass or negligence. The Court of Appeal held that the doctrine of *res ipsa loquitur* applied, and that the onus was on the shipowners to explain why the steering gear went wrong and that, as they had not done so, they were liable in negligence. On appeal the House of Lords allowed the appeal on the ground that the shipowners could not be held responsible because they did not negative a possible case which was not alleged against them in the pleadings. In the course of his judgment (at p. 238) Lord Normand said:

"The respondents' pleadings show (1) that the owners and master of the ship were charged with the same negligent acts or omissions, for which the owners would be liable vicariously and the master directly, if they were proved; (2) that all these acts and omissions were errors in the navigation of the ship; (3) that they began when, and not before, the ship was about to enter the channel of the River Ribble on her way to Preston; (4) that after the respondents had seen the master's report, which disclosed that the stern frame had been fractured, the rudder damaged, and the propeller blades broken, they amended their pleadings by adding an allegation of negligence in navigating the vessel into the channel when the steering was erratic. These were the allegations which the respondents set out to prove. There was no notice in the pleadings of any other cause of action, such as that the appellants negligently sent the vessel to sea in an unseaworthy condition.

"The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them. In fact the evidence in the case was concerned only with

the negligence alleged. The result was that the master of the vessel was acquitted by Devlin, J., of the negligence alleged, and the logical consequence was that the owners were also acquitted by him.

“The majority of the Court of Appeal, however, held that the onus lay on the owners to show that the accident which caused the damage was inevitable, and to do this it would have been necessary to show that no reasonable care which they might have taken would have avoided the damage. As the appellants had made no attempt to lead evidence to discharge this onus, the majority of the Court of Appeal found them liable in damages.

“I do not wish to speculate on what might have been alleged, nor on what evidence might have been adduced by either side on other allegations, nor on how the onus might have shifted in consequence of other allegations and evidence. Confining myself to actual allegations of negligence and to the evidence in the case, I find the conclusion inevitable that, since the master has been acquitted of the faults alleged against him, the owners must also be acquitted.

.....

To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.”

At p. 241 Lord Radcliffe said:

“My Lords, I think that this case ought to be decided in accordance with the pleadings. If it is, I am of opinion, as was the trial judge, that the respondents failed to establish any claim to relief that was valid in law. If it is not, we might do better justice to the respondents—I cannot tell, since the evidence is incomplete—but I am certain that we should do worse justice to the appellants, since in my view they were entitled to conduct the case and confine their evidence in reliance upon the further and better particulars of para. 2 of the statement of claim which had been delivered by the respondents. It seems to me that it is the purpose of such particulars that they should help to define the issues and to indicate to the party who asks for them how much of the range of his possible evidence will be relevant and how much irrelevant to those issues. Proper use of them shortens the hearing and reduces costs. But if an appellate court is to treat reliance upon them as pedantry or mere formalism, I do not see what part they have to play in our trial system.”

And he added at p. 244:

“In my view, where the question is, as here, as to sufficiency of evidence, the state of the pleadings is of more importance than the way in which the case is shaped in argument.”

The question as to the sufficiency of the evidence led on the point in the instant case can, I think, conveniently be combined with consideration of the second ground of appeal, that is, whether the learned judge correctly directed himself on the facts in reaching the conclusion he did on the question of contributory negligence.

The learned judge held that the appellant was negligent (*a*) in that he did not see the chain, (*b*) in that he was not put on his guard by the fact that the doors were half open, and (*c*) in that he did not notice that, in closing the inner door, the outer door came with it.

The relevant evidence is meagre, a fact which tends to support the appellant’s contention that the issue was never contested. The appellant himself in cross-examination

agreed that the chain “is visible if you are looking for it or expecting a trap”. He further said that it did not strike him that the lift was out of use because it was dark. He does not appear to have been cross-examined as to whether the position of the doors did put him on his guard, but he did say

“When entering a lift, one usually shuts the outer gate first, and then the inner. It did not strike me as peculiar that when I pulled one gate, both shut. I just did not think of it . . . When I entered the lift I got hold of the inner gate handle and closed it, it did not strike me as odd that the outer gate followed. I just did not consider it.”

Mr. Godbye, who gave evidence for the appellant, in examination-in-chief said that when the accident happened, he went to the lift. As regards the chain he said,

“I noticed the lock and chain. I had often seen them in use . . . Without lights the area is not well lit. A person wanting to use the lift might well not have seen the chain if he was in a hurry.”

He does not appear to have been cross-examined as to the visibility of the chain, or as to the warning effect of the doors being half open, or their moving together when pulled.

Mr. Smith, who also gave evidence for the appellant said in examination-in-chief,

“Plotti went straight into the lift . . . He shut the gates without difficulty . . . I knew the two gates were chained together from experience . . . I have used the lift myself without the attendant, there is nothing to stop you doing so if the attendant is not there . . . I know the gates are chained through having lived there. A reasonable person might well not appreciate this.”

In cross-examination he was asked about the gates, and said,

“Both gates must be locked for the lift to move. If I pulled one gate and both shut together, I would think something was wrong. I would investigate . . . I know more about lifts than most people, as an engineer.”

Mr. Dadakis, the hotel manager, who gave evidence for the respondent, does not appear to have been directly questioned on these aspects of the matter either in examination-in-chief or in cross-examination. The gist of his evidence was to the effect that he did not think the lift could be moved while the chain was on the gates. Mr. Flack, also, who was called by the defence as an expert witness, was not questioned on these aspects. He did, incidentally, say in cross-examination,

“Locking the gates together is not an effective way of keeping people out, I would consider additional precaution necessary.”

Saidi Hassan, head-waiter of the hotel, who helped to release the appellant, and the lift-boy, Wynokele, also were apparently not questioned on the negligence aspect of the appellant’s version of the accident.

I think it is clear from the passages in the evidence that I have set out that the learned judge’s judgment contains a serious misdirection and non-direction as to the visibility of the chain. He says,

“Mr. Godbye and Mr. Smith, who were not proposing to use the lift, both at once noticed the chain.”

No doubt they did notice the chain immediately after the accident—they could

hardly fail to do so as the appellant's fingers were caught in it and they went to the lift to his assistance—but they both say that they knew the gates were chained because they lived there, and that a reasonable person might well not notice the chain. The learned judge appears to have overlooked this part of their evidence. The learned judge's finding that "the approaches to the lift are perfectly well illuminated by natural daylight" is presumably based on his view of locus in quo though he does not say so, since it is in conflict with Mr. Godbye's evidence. Accepting, however, that the lift is adequately illuminated by natural daylight, it is still difficult to support the learned judge's finding that the appellant should have seen the chain in view of the evidence of Mr. Godbye and Mr. Smith, which was uncontradicted. It is also difficult to see on what evidence he based his finding that the appellant should have been put on his guard by the fact of the gates being half open and by the fact of the gates closing together. There was no evidence that an ordinary member of the public (and there was nothing to indicate that the appellant, though a mechanic, had any special knowledge of lifts) would appreciate that these facts might indicate danger. Mr. Smith, who did say that the gates closing together would have put him on his guard, had special knowledge of lifts which would enable him to appreciate the significance of the fact.

What, I think, emerges is that it is difficult to support the learned judge's finding of contributory negligence in view of the misdirection in the judgment as to the effect of Mr. Godbye's and Mr. Smith's evidence, and also because of the lack of evidence to support the findings. It is to be remembered that the onus of establishing contributory negligence was on the respondent. The paucity of the evidence and absence of cross-examination on the material points are a strong indication that the appellant's contention is correct that the issue of contributory negligence was never contested on the basis of the particulars on which the learned judge founded this part of his judgment. It is true that contributory negligence, if properly pleaded, might have been established by the appellant's witnesses. In *Wakelin v. London and South Western Railway Co.* (3) (1887), 12 App. Cas. 41, at p. 52 Lord Fitzgerald said,

"It has been truly said that the propositions of negligence and contributory negligence are in such cases as that now before your lordships so interwoven as that contributory negligence, if any, is generally brought out and established on the evidence of the plaintiff's witnesses."

It is also true that the facts on which the learned judge ruled were to some extent in issue on the question of whether the condition of the lift constituted an unusual danger. But it seems to me that the case was in fact contested on the basis of the pleadings, and that the issue whether or not the appellant was guilty of contributory negligence on the basis of his own version of the accident was not contemplated or contested by the parties. In the circumstances, I think the appellant must succeed on the first ground of appeal.

In view of my opinion on the first ground of appeal, it is not necessary for me to reach a conclusion on the second ground, but on this ground also I would hold that the appellant is entitled to succeed. While this court is reluctant to interfere with a finding of fact by the trial court, if it is shown that the finding is based on a substantial misdirection or non-direction, then it is the duty of this court to consider the evidence and reach its own conclusion in the matter. There has been a serious non-direction in this case, and, on a review of the material evidence, and bearing in mind the fact that the onus lay on the respondent, I do not think the learned judge's conclusion on the issue of contributory negligence can be supported.

Further, it seems doubtful whether, even on the learned judge's findings, the appellant would be precluded from recovering full damages. In *Smith v.*

Austin Lifts Ltd. and Others (4), [1959] 1 All E.R. 81, the House of Lords was called upon to consider whether the second respondents in that case were liable in damages for injuries suffered by the appellant in trying to enter a lift machine house through a door which was defective and which he knew was defective. It was held that (and I quote from the headnote):

- “(ii) the second respondents (the occupiers) were liable in damages to the appellant as invitee on the ground (a) (per Viscount Simonds, Lord Morton of Henryton and Lord Somervell) that the jamming of the left door created an unusual danger for the appellant the risk of which he did not fully appreciate and that the proper inference in the circumstances was that the jamming of the door was created by the agents or servants of the occupiers and thus was a danger of which they knew, and (b) (per Lord Reid and Lord Denning) that the appellant had not fully appreciated the nature of the risk created by the jamming of the left door and thus was not excluded from recovering damages for the failure of the occupiers to take reasonable care that the premises, the means of access to the machine house, were reasonably safe.”

Lord Reid, in the course of his judgment (at p. 91), said:

“The primary duty of an invitor is to do all that is reasonable to remove unusual danger to the invitee of which he has, or ought to have, knowledge. It would have been reasonable and, indeed, easy to repair this door. But, by reason of *Horton's* case, the invitor is not in breach of duty if, by means of his warning or otherwise, the invitee recognises ‘the full significance of the risk’ (per Lord Porter, *ibid.*, at p. 6) or has ‘full knowledge of the nature and the extent of the danger’ (per Lord Normand, *ibid.*, at p. 10). The test is not whether he agreed or whether he was free to agree to accept the risk; it is whether he had a sufficient appreciation of the danger. In this case, the appellant saw the position and realised that there might be danger because he tested whether the door would hold before putting his weight on it. But, in my view, his appreciation of the danger fell a good deal short of what is required. Another man might have had greater appreciation but, as I read the speeches of the majority in *Horton's* case, the test which they require is subjective.”

Lord Denning (at p. 93) said:

“My Lords, I agree that he knew all about the defect, but I do not think he knew all about the danger arising from it. And *Horton's* case only applies when an invitee has, in Lord Porter's words ([1951] 2 All E.R. at p. 6), ‘full appreciation of the danger’, or, in Lord Normand's words (*ibid.*, at p. 10) ‘full knowledge of the nature and the extent of the danger’, and nevertheless goes on and incurs it. His knowledge is a personal disability on him, which arises from his own individual state of mind, regarded subjectively by reference to his own appreciation of the danger, and not objectively by reference to what a reasonable man would appreciate. It is not enough that he should know of the defective condition of the premises. It is not enough that he should realise there is some risk. He must know and appreciate the full danger. If he was in any way mistaken about the danger, so that the state of affairs was in fact more dangerous than he thought it was, then he can recover.”

And it was held that no case for finding contributory negligence by the appellant had been made out, Lord Morton of Henryton saying (at p. 88):

“I see no ground for holding that the plaintiff was guilty of contributory negligence. He was confronted by a trap, and he fell into it.”

Smith's case (4) is a very recent one which was not before the learned trial judge and was not cited to us on the appeal. Nevertheless, it seems peculiarly applicable to the instant case, and the learned trial judge's decision might well have been different had had the advantage of seeing it.

In the result, I would allow the appeal with costs, set aside the award in the judgment and decree of Shs. 9,000/- in respect of general damages, and substitute an award of Shs. 18,000/-. The total of general and special damages will therefore be Shs. 18,510/-. As regards costs in the High Court, I think that these should now follow the event. I would, accordingly further order that the award of three-quarters of the costs to the plaintiff be set aside, and that the defendant be ordered to pay the whole of the plaintiff's taxed costs in the High Court.

Gould JA: I agree with the reasoning and conclusion in the judgment of the learned Vice-President and have nothing to add. I agree also with the proposed order.

Windham JA: I also agree, and have nothing to add.

Appeal allowed. General damages of Shs. 18,000/- awarded and full costs.

For the appellant:

WD Fraser Murray

Fraser Murray, Thornton & Co, Dar-es-Salaam

For the respondent:

GN Houry QC and L Horn

George N Houry & Co, Dar-es-Salaam

Festo Magambo v R
[1959] 1 EA 257 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	16 February 1959
Case Number:	332/1958
Before:	Bennett J
Sourced by:	LawAfrica

[1] Criminal law – Charge – Evidence proving offence of stealing – Charge against accused naming wrong owner of goods – Whether any miscarriage of justice ensues if conviction altered from offence under s. 257 to offence under s. 258, Penal Code (U.).

Editor's Summary

The appellant was convicted under s. 257 of the Penal Code of stealing seven crocodile skins, the property of Her Majesty, which came into his possession by virtue of his employment as a Gombolola Chief. The evidence showed that the appellant had sold the skins and that the crocodile skins were not the property of Her Majesty but, having been delivered to the Gombolola head-quarters of the Bunyoro Native Government, they became the property of the Bunyoro Native Government, of which the appellant was an employee. On appeal counsel for the appellant contended that the conviction under s. 257 could not be sustained and that the evidence of the person who purchased the crocodile skins from the appellant could not be relied upon, as the purchaser had admitted he had no licence to purchase crocodile skins.

Held –

- (i) as the purchaser could not reasonably have been expected to know the crocodile skins were stolen, he could not be regarded as an accomplice and so his evidence was not tainted.
- (ii) although the appellant had been wrongfully found guilty of an offence contrary to s. 257, there would be no miscarriage of justice by altering the finding to a conviction under s. 258 of the Penal Code.

Appeal dismissed.

Case referred to in judgment

(1) *R. v. Hayward* (1844), 1 Car. and Kir. 518.

Judgment

Bennett J: The appellant, a Gombolola Chief, was convicted of stealing seven crocodile skins, the property of Her Majesty, which came into his possession by virtue of his employment, contrary to s. 257 of the Penal Code. He was sentenced to nine months' imprisonment.

The facts, as found by the learned magistrate, were that the appellant, together with a party of subordinate chiefs, set off on the trail of a party of poachers. When the appellant and his party arrived at the place where the poachers were, the poachers fled leaving behind a canoe and nine crocodile skins. At 7 p.m. on the same day the appellant sold seven of these skins to one Kher Mohamed Sher Mohamed, a Baluchi, for Shs. 542/50. There was no evidence as to whether or not the appellant accounted for the money to the Government, but since the appellant's defence was that only one skin was abandoned by the poachers and that he did not sell any skins to Kher Mohamed, it can properly be inferred that the appellant did not account for the proceeds of sale to Government but used the money for his own purposes.

During the hearing of the appeal I asked learned counsel who appeared for the attorney-general, how it could be established that the skins in question were

the property of the Government, but he was unable to assist me. The learned magistrate appears to have assumed, throughout the trial, that the skins were Government property and did not deal with the question of ownership in his judgment. Nor is it apparent from the judgment why the men who had killed the crocodiles were poachers.

The only part of the Game Ordinance which applies to crocodiles is s. 33. See s. 44 of the Fish and Crocodiles Ordinance. Section 33 of the Game Ordinance forbids the hunting and killing of animals in a game reserve. There is no evidence on the record to show that the place where the poachers were found by the appellant was within a game reserve.

Even assuming, however, that the crocodiles had been killed in a game reserve in contravention of s. 33 of the Game Ordinance, they would not be Government property in the absence of an order of forfeiture by a court, and there is no evidence that any such order was ever made in relation to the seven skins which formed the subject of the charge. Section 12 (1) of the Game Ordinance which gives the Government a title to the trophy of any scheduled animal which has been killed by accident or in self-defence or in contravention of the Ordinance does not apply to crocodile skins because a crocodile is not a scheduled animal.

It does not, therefore, appear from the evidence that these seven skins which the appellant was convicted of stealing were the property of the Government. It may well be asked whose property were they when the appellant converted them to his own use.

It seems to me a fair inference from the facts that when the poachers fled they deliberately abandoned the skins in the hope of escaping apprehension and punishment.

Plainly the appellant took possession of the skins in his capacity as a Chief and employee of the Bunyoro Native Government so that they could be used as court exhibits. There is evidence that after the appellant took possession of the skins he sent them to the Gombolola headquarters by his askari Zerikedi. The Gombolola headquarters belonged to the Bunyoro Native Government, and there was thus delivery of the skins to the premises of the appellant's employer.

The case is not unlike *R. v. Hayward* (1) (1844), 1 Car. and Kir. 518, where it was held that the putting down by a servant of a load of hay which the master had sent him for at the master's stable door, was a sufficient delivery to the master to make the servant guilty of larceny in then appropriating a part of it to his own use.

The charge should have averred that the crocodile skins were the property of the Bunyoro Native Government and the accused should have been charged under s. 258 and not under s. 257 of the Penal Code.

The fact that the appellant has been charged under the wrong section and that the ownership of the stolen property has been wrongly described is no ground for quashing the conviction unless a miscarriage of justice has thereby been occasioned.

Section 331 (1) and s. 347 of the Criminal Procedure Code are in point.

I am satisfied that the errors in the charge have occasioned no miscarriage of justice, since nothing turned on the ownership of the crocodile skins. The appellant himself laid no claim to the ownership of them.

At the hearing of the appeal it was contended, on behalf of the appellant, that the learned magistrate

ought to have accepted the evidence of Kher Mohamed with the greatest caution, for the reason that Kher Mohamed admitted that he was not licensed to purchase crocodile skins.

The learned magistrate held that Kher Mohamed's evidence was untainted and therefore did not give himself any warning with regard to it. In my judgment the learned magistrate was right in the view which he took. Kher

Mohamed was not an accomplice of the appellant since the offence which he committed, namely, buying crocodile skins without a licence, was a different offence to that alleged to have been committed by the appellant.

There was no evidence that Kher Mohamed knew that the skins were stolen when he purchased them. It was never contended in the court below or at the hearing of the appeal, that Kher Mohamed knew or had reason to believe that the skins were stolen. The mere fact that he was committing the minor offence of buying skins without a licence is no ground, in my opinion, for holding that his evidence was tainted.

Taking into account everything that has been said by the appellant's counsel on his behalf, I cannot see the slightest reason for supposing that the learned magistrate came to a wrong conclusion in accepting the evidence of the prosecution witnesses and in rejecting the evidence of the appellant and Zerikedi.

The appeal is accordingly dismissed, but, in exercise of powers conferred by s. 331 (2) of the Criminal Procedure Code, the finding is altered to a conviction under s. 258 of the Penal Code instead of under s. 257.

Appeal dismissed.

For the appellant:

SW Sessanga

SW Sessanga, Kampala

For the respondent:

MT Maloney (Crown Counsel, Uganda)

The Attorney-General, Uganda

Keshavji Jethabhai & Bros Limited v Saleh Abdulla

[1959] 1 EA 260 (HCT)

Division:	HM High Court for Tanganyika at Dar-Es-Salaam
Date of judgment:	20 March 1959
Case Number:	23/1958
Before:	Crawshaw J
Sourced by:	LawAfrica

[1] *Practice – Money decree – Order for payment by instalments – Principles upon which court should grant indulgence – Indian Civil Procedure Rules, O. 20, r. 11.*

Editor's Summary

The appellant obtained judgment against the respondent on September 9, 1958, for Shs. 5,505/-, with interest and costs. When decree was passed the magistrate ordered the respondent to pay Shs. 1,000/- forthwith and the balance by monthly instalments of Shs. 800/-. On December 22, 1958, the appellant filed an appeal against the order for payment by instalments, largely with view to obtaining the High Court's views upon what constitutes a "sufficient reason" within O. 20, r. 11 for ordering that a decretal sum be paid by instalments. On the hearing of the appeal on February 18, 1959, it was conceded that in the instant case all the instalments due at or before that date had been duly paid, and it was not suggested that the instalment due the following month would not be paid.

Held –

- (i) whilst the courts must be zealous of the creditor's rights, they must consider each case on its merits and exercise discretion accordingly.
- (ii) "the mere fact that the debtor is hard pressed or is unable to pay in full at once is not sufficient reason . . .; ordinarily he should be required to show his bona fides by arranging prompt payment of a fair proportion of the debt . . . Each case has to be decided on its own merits, the predominating factor being, of course, the bona fides of debtor". *Sawatram Ramprasad v. Imperial Bank of India* (1933), A.I.R. Nag. 330.
- (iii) hardship to a debtor might in some circumstances be taken into consideration on an application for payment by instalments; it is a question in each case whether some indulgence can fairly be given to the debtor without unreasonably prejudicing the creditor.

Order accordingly.

Cases referred to in judgment

- (1) *Binda Prasad v. Madho Prasad and Others* (1879), 2 All. 129.
- (2) *Jafree Begum v. Ahmed Ameen* (1866), 1 Agra 270.
- (3) *Sawatram Ramprasad v. Imperial Bank of India* (1933), A.I.R. Nag. 330.
- (4) *People's Bank of Northern India Ltd. v. L. Bodh Raj and Others* (1934), A.I.R. Pes. 2

Judgment

Crawshaw J: This appeal, as Mr. Murray for the appellant has said (the respondent was not present or represented), is really of academic interest only, and I gather it has been brought largely with the intention of obtaining the court's views on the principle involved in determining what is a "sufficient reason" for making an order that a decretal sum shall be paid by instalments.

2. The appellant obtained judgment against the respondent for Shs. 5,505/- with interest and costs on September 9, 1958, and the learned magistrate, at the time of passing the decree, ordered that the debtor should pay Shs. 1,000/-

forthwith and Shs. 800/- on October 1 and thereafter monthly instalments of Shs. 800/- on the first day of each succeeding month, with the usual default clause.

3. On December 22, a day or two only before the expiration of the time for appeal, the appellant filed an appeal against the order for payment of instalments and it was set down for hearing on February 18. The court was informed that the instalments had up to then been paid regularly, and it would seem that the instalment due thirteen days later (and there was no suggestion that doubt was held that it would be paid) would have liquidated, or almost entirely liquidated the decretal amount.

4. The order for payment was made under O. 20, r. 11 which reads:

“11. (1) Where and in so far as a decree is for the payment of money, the court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

“(2) After the passing of any such decree the court may, on the application of the judgment-debtor and with the consent of the decree-holder, order that payment of the amount decreed shall be postponed or shall be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor, or the taking of security from him, or otherwise, as it thinks fit.”

5. Mr. Murray said that there has been a general protest in trading circles at the indulgence of the courts in granting instalments, and observed that present trading conditions were such that there were increasing numbers of defaults with a consequent increase in recourse to the courts. Defaults if due to the recession (if such it can be called) might be no fault of the debtors and in some circumstances might, I should have thought, have been properly taken into consideration by the court in favour of the debtor when consideration was given to an application for instalments; hardship is a factor which has been recognised by superior courts, as will be seen from the cases which I shall cite. I say “might in some circumstances” for clearly the creditor cannot be blamed either, and his interests must be paramount. It is a question in each case whether some indulgence can fairly be given to the debtor without unreasonably prejudicing the creditor, who can of course be granted compensation by way of interest on the amount at any time outstanding. Mr. Murray also objected that the contract in the instant case (which related to the supply of goods to the respondent who was described as a merchant and transporters) allowed the debtor forty-five days’ credit only, and the effect of an order for payment by instalments was to alter the nature of the debt; this contingency, however, appears to be contemplated by the wording of r. 11 (1).

6. Whilst the courts must be jealous of the creditor’s rights, they must consider each case on its merits and exercise their discretion accordingly, and I apprehend it would be wrong for this court to interfere with the exercise of that discretion unless the magistrate had acted on some wrong principle or had failed to exercise his discretion judicially. The question in the instant case is, of course, was there “sufficient reason” to justify the order.

7. Mr. Murray has cited a number of cases. In *Binda Prasad v. Madho Prasad and Others* (1) (1879), 2 All. 129, Turner, J., said on appeal at p. 132:

“There are some instances in which debts are contracted without any specific agreement as to the time of payment, and when it is shown that dealings have been conducted on this footing and no injury is done to the

creditor by ordering payment by instalments, the court may be well entrusted with discretion to arrange the payment of a debt by instalments, but when a contract is distinctly made for payment on a date certain for the purpose of enabling the creditor to obtain punctual payment, the circumstances that the payment is secured by an hypothecation of property ought not to deprive him of that right.”

and Oldfield, J., said:

“The reason assigned amounts to nothing more than an inability to pay but that is no sufficient reason why execution should not at once proceed.”

It is to be observed that at the rate of instalments which had been ordered in that case the debt would have taken some ten years to pay off. The appeal court directed the sale of the property hypothecated. The length of time for repayment was a consideration also in the case of *Jafree Begum v. Ahmed Ameen* (2) (1866), 1 Agra 270, where the appeal court reversed an order of the trial court which had allowed payment of a decretal amount by instalments. The appeal court remarked that it would have taken some twenty years to repay the debt and also stated:

“If, as it would seem, the debtor is hopelessly embarrassed in his circumstances, there is little use in attempting to save him from the consequences of his own improvidence or misfortunes; . . .”.

8. In respect of the case of *Sawatram Ramprasad v. Imperial Bank of India* (3) (1933), A.I.R. Nag. 330, Mr. Murray has drawn attention to that part of the judgment of the appeal court which says, in reference to the case of *Mahomed Akbar Khan v. Kasturchand Daga*:

“ . . it is laid down that the mere fact that the debtor is hard pressed or is unable to pay in full at once is not sufficient reason for granting instalments and that ordinarily he should be required to show his bona fides by arranging prompt payment of a fair proportion of the debt. We are in respectful agreement with this interpretation of the law but find great difficulty in construing the last observations in the ruling in the way desired by the counsel for the plaintiff, i.e. that prompt payment of a fair proportion of the debt is a condition precedent for the exercise of the discretion of granting instalments. Each case has to be decided on its own merits, the predominating factor being of course the bona fides of debtor.”

In applying these principles to the *Ramprasad* case (3) the court agreed with the lower court that the circumstances constituted “sufficient reason” for making an order for payment by instalments, although it varied that order to some extent. It is interesting to see what those reasons were; they were as follows:

“This defendant further submits that in view of (1) the extreme and extraordinary depression of trade and financial market; (2) the fact that this defendant has been steadily liquidating his total liability to the plaintiff and has paid off Rs. 1,20,000 and all interest due from time to time during the last ten months; (3) the fact that the plaintiff has in his possession and available to him ample sufficient security for full ultimate payment of his dues; (4) and lastly in view of the fact that this defendant possesses and owns large immovable properties and in case of being required to make immediate payment in cash he will be financially ruined without any fault of his own.”

It will be observed that there was there no question of inability to pay. The court was, however, presumably impressed by the bona fides of the debtor and by the hardship which would result if execution was enforced, and (I have no

doubt this was an important consideration) by the unlikelihood of the creditor losing his money if time was given. Another consideration would be the ability of the debtor to pay substantial instalments so that repayment of the decretal amount would not be unreasonably delayed. This case seems to me to contemplate a rather more liberal use of O. 20, r. 11 than might appear from the *Binda Prasad* case (1) (to which it did not refer), and in this connection it may be stated that in the *Ramprasad* case (3) only limited time for credit had been given, as in the instant case. In *People's Bank of Northern India Ltd. v. L. Bodh Raj and Others* (4) (1934), A.I.R. Pes. 2, an order for payment of instalments was reversed and the decretal amount was made immediately realisable. The appeal court's decision is not really very helpful as it was based on the particular facts of that case, it being said,

"There being no reason proved that the debtor/respondents should be granted an unusual concession, the normal course should be followed".

9. In the commentary to O. 20, r. 11 in Woodroffe And Ameer Ali on the Civil Procedure Code (2nd Edn.), 869, it is said:

"Sufficient reason.— The existence of this will depend upon the facts of the particular case. The court will consider the circumstances under which the debt was contracted, the conduct of the debtor, his financial position, and so forth, and instalments should be directed where the defendant shows his bona fides by offering to pay anything like a fair proportion of his debt at once."

10. In the instant case it appears that there had been substantial business between the parties since 1955, and that during the course of 1958 the respondent had paid to the creditor some Shs. 90,000/-, in relation to which the decretal amount was of course comparatively small. There is nothing to suggest that the respondent had previously defaulted. The respondent on oath said he could not pay the decretal amount at once, but that he owned a house worth Shs. 40,000/- on which there was a mortgage of Shs. 25,000/-, and that he had lorries on hire purchase. I personally would not say that in the circumstances (so far as they are known) it would necessarily have been wrong for the court to have exercised its discretion in the manner it did. The respondent showed his bona fides by paying a substantial sum at once, and the instalments were sufficiently large to enable the debt to be paid off within a reasonable time unless the respondent defaulted, when the whole amount would become immediately payable.

11. I do not, however, think that the learned magistrate went into the matter with sufficient care. The respondent mentioned "stock", but nothing was said by either party as to what stock or other readily attachable goods the respondent had. It is perhaps surprising that the appellant did not question the debtor as to this, but in any event the court should have done so in order to be in a position to ascertain whether an order would be reasonable in the circumstances. The learned magistrate says,

"He [the respondent] has done substantial business with the plaintiff, Shs. 90,000/- in six months. It would mean that he should be able to pay, but I doubt if he would trouble to engage an advocate if his difficulty were not serious."

This contains two non sequiturs. Because a person has been doing big business it does not of course follow that he should be able to pay his debts, which might well be proportionately larger. The inference drawn from the respondent's employment of an advocate was entirely unjustified. I feel that technically the appeal should succeed, but to have set aside the order of the court even on

the day the appeal was heard would have been futile, as by the time execution proceedings could have been instituted the final instalment would have been paid or, if it had gone by default, execution proceedings could have been instituted without any order of this court. I intend to make no order, as it would be of no effect if I did, and on these grounds also I do not think that the respondent should be directed to pay the costs of this appeal (he himself has presumably incurred none).

Order accordingly.

For the appellants:

WD Fraser Murray

Fraser Murray, Thornton & Co, Dar-es-Salaam

The respondent did not appear and was not represented.

Re an Award Filed by the Collector [1959] 1 EA 264 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgement:	17 March 1959
Case Number:	59/1958
Before:	Sir Audley McKisack CJ
Sourced by:	LawAfrica

[1] Compulsory purchase – Compensation – Railway track built on private land – Land subsequently required by Government – Award of collector apportioning compensation between land owner and the Government in respect of railway track – Land owner claiming railway track as fixtures – Whether compensation should be apportioned – Indian Land Acquisition Act, 1894, s. 6, s. 16, s. 18 and s. 19 – Buganda Land Law, 1908, s. 6 (U.) – Uganda Agreement, 1900, Part 15 (U.).

Editor's Summary

A declaration by the Government of Uganda that a certain plot of mailo land was required for a public purpose was made on July 3, 1958, under s. 6 of the Indian Land Acquisition Act, 1894. Possession of the land was taken by the Government on August 15, 1958, under s. 16 of the Act and the land accordingly vested in the Government. The collector under the Act made an inquiry and awarded compensation in the sum of Shs. 69,674/50, of which he apportioned Shs. 23,674/50 to the mailo owner and the balance of Shs. 46,000/- to the Government of Uganda in respect of that part of the land which consisted of a railway track and certain earth works made for the purpose of that track, which had been constructed by the East African Railways and Harbours Administration in September, 1951. The mailo

owner did not accept the award and applied to the collector to refer the matter for determination of the High Court. At the hearing it was contended by the mailo owner that a sum of Shs. 143,735/46 ought to have been awarded and that the whole of that sum should be paid to him and no part apportioned to the Government as the railway line and works on the land were fixtures and became the property of the owner of the land to which they had been affixed. On the other hand, it was contended for the Government that although entry was made on the land long before any steps were taken for compulsory acquisition, it was not in the position of a mere trespasser and that its true position was that of a licensee and that this arose from the landowner's acquiescence in the construction of the railway on his land. It was also argued that a licence was conferred on the Government by s. 6 of the Buganda Land Law, 1908.

Held –

- (i) a railway line built on mailo land in pursuance of s. 6 of the Land Law does not become the property of the mailo owner and the Government is entitled to remove such a railway line if it thinks fit, or otherwise deal with it as owner;
- (ii) the collector was correct in law in apportioning the value of improvements to the Government and in awarding to the mailo owner the compensation applicable to the site value, severance, injurious affection and diminution of profits.

Order accordingly.

Cases referred to in judgment

- (1) *Vallabhdas Naranji v. Development Officer, Bandra* (1929), 53 Bom. 589.
- (2) *Never-Stop Railway (Wembley) Ltd. v. British Empire Exhibition*, [1926] Ch. 877.
- (3) *Secretary of State for Foreign Affairs v. Charlesworth, Pilling & Co.*, [1901] A.C. 373.
- (4) *Mangaldas Girdhardas Parekh v. Assistant Collector of Prant, Ahmedabad* (1920), 45 Bom. 277.

Judgment

Sir Audley McKisack CJ: This is a reference to the High Court under s. 18 of the Land Acquisition Act, 1894, of India, which applies in Uganda by virtue of an order of the Secretary of State (now Cap. 120 of the Laws of Uganda (Revised Edn., 1951)). Proceedings were taken for the compulsory acquisition by the Government of Uganda of a plot of mailo land which is registered in the Mailo Register as Vol. 112, folio 17, final certificate 14153. It is also known as plot 76. A declaration that the land was required for a public purpose was made on July 3, 1958, under s. 6 of the Land Acquisition Act, 1894. Possession of the land was taken by the Government on August 15, 1958, under s. 16 of the Act, and the land has accordingly vested in the Government. The senior valuation officer of the Lands and Surveys department, who was the “collector” for the purposes of the Act, made an inquiry and awarded compensation as required by the Act. The owner of the mailo land, Mr. M. M. Luwalwa, did not accept the award and applied to the collector to refer the matter for the determination of this court, as provided for in s. 18 of the Act.

The history of the case is that, on a date in 1951, which the mailo owner puts at about March 1, his land was entered and surveyed for the purpose of constructing a railway. Later that year entry was made to begin the actual construction. This date has not been precisely determined, but an engineer of the East African Railways and Harbours Administration gave evidence that he was in charge of a section of the railway line in question, known as the Western Uganda extension, running from Kampala to a point 23 miles away. He says that construction began in September, 1951, and would have reached Mr. Luwalwa’s land in September or October of that year. The railway line was duly constructed across Mr. Luwalwa’s land and was put into operation. But, as I have said, steps for the compulsory acquisition of that land were not begun until July 3, 1958. According to the collector, he was negotiating with Mr. Luwalwa on the question of compensation from 1954, but was unable to reach agreement.

The collector has furnished a statement to the court, as required by s. 19 of the Act, in which he sets

out the particulars specified in that section. His total award was for Shs. 69,674/50, of which he apportioned Shs. 23,674/50 to the mailo owner, Mr. Luwalwa, and the balance, Shs. 46,000/-, to the Government

of Uganda. Mr. Luwalwa claims that the amount which ought to have been awarded is Shs. 143,735/46, and that the whole of that sum should be paid to him, and no part apportioned to the Government. At the hearing of the reference one item of this claim, amounting to Shs. 10,400/-, was abandoned, as will appear when I come to deal with the various heads under which compensation is payable.

Before dealing with the amount of the compensation and the method by which it ought to be assessed, I shall deal with the question of the Government's interest, if any, in this land. The collector decided that the mailo owner was not entitled to compensation for that part of the land which consisted of the railway track and the earth works made for the purpose of that track, which appear in his statement as improvements valued at Shs. 40,000/-.

The Government's case as put by Mr. Starforth is that, although entry was made on the land long before any steps were taken for compulsory acquisition, the Government was not in the position of a mere trespasser; if it had been in that position Mr. Starforth concedes that the landowner would be entitled to the benefit of the railway line and works, and to compensation for the acquisition thereof. But the true position of the Government, he argues, is that of a licensee, and this arose from the landowner's acquiescence in the construction of the railway on his land, which is to be deduced from his acceptance of payment offered to him by the Government for damage to his crops in 1951, and from the absence of any action on his part to prevent the construction of the railway or to eject the persons engaged on the construction. From these facts it is said that the landowner must be deemed to have granted the Government a licence to enter his land and construct the railway.

It is further said that a licence is conferred by the provision of local legislation. Mailo land is the subject of a law enacted by the Buganda legislature entitled "The Land Law". This was enacted in 1908, and it is now to be found in Vol. VII of the Laws of Uganda, 1951, at p. 1219. Section 6 of that Law is as follows:

- "6. Every description of land which people of the Protectorate shall have, mailo and official mailo, the Government will be allowed to take them for the works of improvement of the Protectorate as written in Part 15 of the Uganda Agreement, 1900."

The relevant portion of Part 15 of the Uganda Agreement, 1900, which is mentioned in that section, is as follows (see Vol. VI of the Laws of Uganda, 1951, p. 23):

"Her Majesty's Government, however, reserves to itself the right to carry through or construct roads, railways, canals, telegraphs, or other useful public works, or to build military forts or works of defence on any property, public or private, with the condition that not more than 10 per centum of the property in question shall be taken up for these purposes without compensation, and that compensation shall be given for the disturbance of growing crops or of buildings."

Mr. Starforth contends that the effect of s. 6 of the Land Law is to confer upon the Government a licence to enter and construct a railway (and other works) on mailo land. And he relies on *Vallabhdas Naranji v. Development Officer, Bandra* (1) (1929), 53 Bom. 589, the headnote to which is as follows:

"The Government having resolved to acquire under the Land Acquisition Act, 1894, land belonging to the appellant, took possession by arrangement with sutidars, who occupied part of the land, and erected buildings partly on land occupied by the appellant and partly on land occupied by the sutidars. Only after doing so the Government notified a declaration under

s. 6 of the Act that the land was required for a public purpose. The appellant was awarded under the Act the value of the land, and interest thereon from the date when possession had been taken.

“Held, that the appellant was not entitled to the value of the buildings, since by the law of India they did not form part of the soil, and even if the appellant would have been entitled to compensation for them if the Government had acted as mere trespassers and without colour of title, the Government had not so acted.

“It was not necessary to decide whether the appellant could have recovered compensation in respect of a right to have the buildings removed, as he had not so claimed in India.”

Even if the Government was not strictly a licensee, he submits that it at any rate had “a colour of title” which, on the authority of that case, is sufficient to make it a party interested in Mr. Luwalwa’s land for the purposes of the present reference.

The case for Mr. Luwalwa, as put by Mr. Caldwell, is that the railway line and works on this land are fixtures, and have been admitted by Mr. Starforth to be such. As fixtures they have, under the ordinary English law, become the property of the owner of the land to which they have been affixed or on which they have been made. He cites the case of *Never-Stop Railway (Wembley) Ltd. v. British Empire Exhibition* (2), [1926] Ch. 877, in which it was held that the plaintiff, who had been granted a licence to construct a railway on the licensor’s land, was under no obligation to remove the railway on the termination of the licence in the absence of any stipulation to that effect. The Government, he says, even if it is a licensee, does not thereby have an interest in land, and it is only persons who have an interest in land who have any claim to be considered under the Land Acquisition Act (see, for example, s. 9 (1) of that Act).

As to s. 6 of the Land Law, Mr. Caldwell agrees that this confers a general right to acquire land for certain public purposes, but says that it can only be put into operation by taking the proper steps under the Land Acquisition Act, 1894. Further, he argues that the Government of Uganda as such has had nothing to do with the land until it began to take steps for compulsory acquisition in 1958. Before then there is nothing to show that the persons who entered the land and constructed a railway there had any connection with the Government.

This is not the first instance in which a Government has put fixtures upon privately-owned land without first acquiring a title to the land. In *Secretary of State for Foreign Affairs v. Charlesworth, Pilling & Co.* (3), [1901] A.C. 373, Government railway engineers had constructed buildings on private property in Mombasa before taking steps to acquire it under the Land Acquisition Act, 1894. In respect of the claim for compensation under that Act it was held that Mohamedan law applied and that, as under Mohamedan law the houses had not become the landowner’s property, the landowner was not entitled to compensation representing the value of the houses, but was merely entitled to have them removed. This decision cannot assist the Government in the instant case, since Mohamedan law is not applicable, unless the law governing mailo land resembles Mohamedan law in this respect. But, as I have said, reliance is placed on *Vallabhdas Naranji v. Development Officer, Bandra* (1). There again, buildings had been erected by the Government on private property before steps were taken under the Land Acquisition Act, 1894, and it was held that the landowner was not entitled to their value. The basis of the decision was that, by the law of India, buildings do not form part of the soil and the Government was not a mere trespasser without colour of title. On the latter point Lord Carson said, at p. 592:

“It is to be observed that the Government were in a position by law at any moment to regularise their position by such a notification—a fact which becomes material when it has to be considered what the nature of their trespass was under the law as applicable on the question of the right of the appellants to have the buildings which were erected on the lands before November 4 included in the valuation.”

The “notification” here mentioned is a notification under the Land Acquisition Act, 1894. This ability “to regularise their position” also applied to the Uganda Government, and might therefore be said to afford them the same colour of title. But at p. 593 Lord Carson said:

“It was agreed on both sides that the English law as comprised in the maxim *quidquid plantatur solo, solo cedit* has no application.”

It seems to me, therefore, that the decision in that case does not assist the Uganda Government unless the law of Uganda, as applicable to the land the subject of this reference, also excludes that principle. That is the first question to be decided.

By virtue of art. 15 of the Uganda Order-in-Council, 1902, English common law principles apply in Uganda, but they do so subject to any statutory law in force in the Protectorate and so far as the circumstances of the Protectorate permit. In the absence, then, of such statutory law or special local circumstances, this land would be governed by the maxim *quidquid plantatur, etc.* But mailo land—that is to say, land in Buganda which can be held either in private ownership or as an appurtenance of public office as provided in art. 15 of the Uganda Agreement, 1900—has been the subject of local legislation and, in particular, the rights of an owner of mailo land are regulated and restricted by the Land Law (of the Buganda legislature) already referred to. In my view s. 6 of that law, which I have set out at an earlier stage of this award, must be read as modifying the *quidquid plantatur* maxim in relation to mailo land. If it were otherwise, the right conferred by the section could be nullified by the landowner. If a railway which the Government is empowered to construct becomes the property of the landowner as soon as it is affixed to the soil, the mailo owner could, in the absence of any agreement or any other statutory provision to the contrary, dispose of the railway as he wished, or otherwise prevent it being used for the purpose for which it was constructed.

If this view, viz., that a railway line built on mailo land in pursuance of s. 6 of the Land Law does not become the property of the mailo owner, is correct, then I think it follows that the Government is entitled to remove such a railway line if it thinks fit, or otherwise deal with it as owner. In the result, the position of the Uganda Government in the instant case is seen to be even stronger than that of the Indian Government in *Vallabhdas Naranji v. Development Officer, Bandra* (1), since there is more than a mere “colour of title”.

I do not, therefore, consider that the question whether Mr. Luwalwa (the mailo owner) must be taken to have granted the Government a licence to construct the railway line is material. But in any event on his own evidence—and there is nothing to contradict it—he did not do anything which, in my view, could be construed as granting such a licence, and in fact he protested against the Government’s action. Moreover, even if his conduct could be construed as granting such a licence, I doubt if such licence would of itself assist the Government’s case unless it could also be shown that it was a term of the licence that the railway line was not to be treated as becoming Mr. Luwalwa’s property; see the *Never-Stop Railway* case (2).

I have so far dealt with this question of the Government’s interest in the land on the footing that it was the Government (of Uganda) that entered on the land and constructed the railway line. It was in fact done by servants of

the East African Railways and Harbours Administration, as appears from the evidence of Mr. Olszewski, an engineer employed by that administration. That organisation has been administered since 1948 by the East Africa High Commission under the terms of the East Africa (High Commission) Order-in-Council, 1947. The preamble to that order recites that (among other things)

“it is desirable and expedient in the interests of good government to make provision for the control and administration of certain matters and services of common interest”

to the inhabitants of Kenya, Tanganyika and Uganda and for that purpose to establish an East Africa High Commission. The High Commission is comprised of the Governors of those three territories. I think those matters are sufficient to identify the railway administration with “the Government” for the purposes of s. 6 of the Land Law. And whether it is the High Commission or the Government of Uganda which has an interest in the land for the purposes of the Land Acquisition Act, 1894, is not material to Mr. Luwalwa’s claim under that Act. In any event it is the Government of Uganda which is acquiring the land, and the High Commission as such has not made any claim.

In the result I find that the collector was correct in law in apportioning the value of the improvements, i.e., the railway line and earthworks connected therewith, to the Government and in awarding to Mr. Luwalwa the compensation applicable to the site value, severance, injurious affection and diminution of profits. And the method he adopted, viz., that of assessing the aggregate value of the land including the Government’s interest, and then awarding the landowner a sum representing that total less the amount of the Government’s interest, is in accordance with the method approved in *Mangaldas Girdhardas Parekh v. Assistant Collector of Prant, Ahmedabad* (4) (1920), 45 Bom. 277.

Order accordingly.

For the collector:

MJ Starforth (Crown Counsel, Uganda)

The Attorney-General, Uganda

For the claimant:

R Caldwell

PJ Wilkinson, Kampala

**Motibhai Girdharbhai and another v Thomas E King & Co (Overseas)
Limited and another**
[1959] 1 EA 270 (CAA)

Division:	Court of Appeal at Aden
Date of judgment:	12 March 1959
Case Number:	106/1958
Before:	Sir Kenneth O’Connor P, Forbes V-P and Gould JA
Sourced by:	LawAfrica

Appeal from: H.M. Supreme Court of Aden–Campbell, C.J

[1] *Jurisdiction – Parties – Defendants not resident within jurisdiction joined with resident defendant – Whether Court has jurisdiction over non-resident defendants – Rules of Court, r. 4, r. 6, r. 40 (1), r. 48, r. 70 and r. 369 (A.) – Aden Colony Order, 1936, art. 15 (1), (2) and (3) – Aden Colony (Amendment) Order, 1944 – Government of India Act, 1935, s. 299 (1) and (2) – Kenya Colony Order-in-Council, 1921, art. 4 (K.) – Supreme Court Ordinance, s. 8 (A.) – Interpretation and General Clauses Ordinance, s. 41 (A.) – Civil Courts Ordinance, s. 18 and s. 125 (A.) – English Common Law Procedure Act, 1852 – English Rules of Supreme Court, O. XI, r. 1 (g) – Indian Companies Act, 1913, s. 148 – Revised Edition of the Laws Ordinance, 1955, s. 17 (2) (A.) – Indian Code of Civil Procedure, 1908, s. 3 and s. 20 – Indian Aden Courts Act, 1864 – Indian Civil Procedure Rules, O. VII, r. 1.*

[2] *Practice – Parties – Joinder of defendants residing out of jurisdiction with defendant residing within jurisdiction – No leave sought or obtained – Rules of Court, r. 4, r. 6 and r. 48 (A.) – English Rules of Supreme Court, O. XI, r. 1 (g) – Indian Code of Civil Procedure, 1908, s. 20 – Indian Civil Procedure Rules, O. I, r. 3.*

Editor’s Summary

Each of the appellants commenced an action in the Supreme Court against both the respondents to the present appeal and the National Overseas and Grindlays Bank Ltd. The facts and issues in both actions were somewhat similar and the suits were consolidated. The second appellant had purchased from the first respondents a consignment of white crystal sugar which was shipped to Aden by a ship belonging to the second respondents. The second appellant alleged that the goods were not shipped in new bags as had been stipulated and that the second respondents had collaborated with the first respondents, *inter alia*, by shipping goods which were defectively packed and for which the documents were vague and misleading and the bank had been negligent in negotiating a letter of credit against a bill of lading which corresponded neither with the invoice nor the letter of credit. The second appellant accepted the goods under protest and claimed that the transaction had caused him substantial loss. The plaintiff alleged that the cause of action arose in Aden because the goods were contracted for in Aden and sought a decree for Shs. 17,500/- against both the respondents and the bank, costs of the suit and “such other relief as the court consider just and proper”. The body of the plaintiff, contained no particulars of the name, description and place of residence of the two respondents although in the title the first respondents’ address was given as “New Malden, Surrey, England” and the second respondents’ as “29 Rue Galilee, Paris, by agent, L. Savon Ries (Aden C.) Ltd., Aden” but the nature of the agency was not stated. The second respondents filed a defence signed by “Managing Director, Aden Coasters Ltd., agents of defendant No. 2” and denied that the second respondents had any regular place of business in the Colony. The first respondents filed an affidavit which said that they were an English Company and that they had no place of business or agent in Aden. This was not contested by the second appellant. In the case of the

first appellant there was the significant distinction that a copy of the contract with the first respondents was annexed to the plaint in which the following clause appeared “6. Law suit under this contract shall be filed at Aden or at any place under British jurisdiction”. In each action the respondents took the preliminary point that the Supreme Court had no jurisdiction to entertain the suit. The trial judge sustained these objections and held that the court had no jurisdiction to entertain the suits so far as the respondents were concerned.

Held –

- (i) the Supreme Court of Aden can not only exercise the jurisdiction conferred by s. 20 of the Indian Code of Civil Procedure over persons outside Aden, but if and in so far as that jurisdiction falls short of the jurisdiction that would be enjoyed by the court by application of the principles of the common law, the court can exercise jurisdiction in accordance with those principles; the provisions of r. 40 and r. 48 of the Aden Rules of Court relate only to suits which are so justiciable;
- (ii) as regards the first appeal, the first respondents had contracted to acquiesce in the jurisdiction of the Courts of Aden and could not now be heard to deny that jurisdiction;
- (iii) as regards the second appeal,
 - (a) the appellant had failed to show any cause of action justiciable in Aden against the first respondents: there was no suggestion of “acquiescence”; performance had taken place at the port of shipment and the alleged breach also took place there; and the fact that payment was to be made from Aden was immaterial.
 - (b) as regards the second respondents, there was no assertion in the body of the plaint that they were carrying on business in Aden, nor was there evidence to enable the court to find that the nature of the agency held by L. Savon Ries (Aden C.) Ltd. was such as to confer jurisdiction over the second respondent.
 - (c) as to the argument that since the bank was within the jurisdiction it was proper to join the respondents even though they might not be within the jurisdiction, s. 20 (b) of the Indian Code requires either acquiescence or the leave of the court in order to join a defendant residing out of the jurisdiction with a defendant residing within the jurisdiction and since no leave was sought or obtained the court would not interfere with the discretion of the trial judge in refusing to implead the respondents.

Appeal of the first appellant against the first respondents allowed but against the second respondents dismissed. Appeal of the second appellant against both respondents dismissed.

Cases referred to in judgment

- (1) *Riddlesbarger and Another v. Robson and Others*, [1958] E.A. 375 (C.A.).
- (2) *A. Y. Sharif v. S. A. Mansoor*, E.A.C.A. Civil Appeal No. 3 of 1955 (unreported).
- (3) *Lenders v. Anderson* (1883), 12 Q.B.D. 50.
- (4) *Ramprasad v. Hazarimull* (1931), 58 Cal. 418.

March 12. The following judgments were read by direction of the court:

Judgment

Forbes V-P: This is an appeal from two judgments and orders of the Supreme Court of Aden. There were originally two suits filed in the Supreme

Court, one being filed by the first appellant, Motibhai Girdharbhai, against the two respondents and the National Overseas and Grindlays Bank Ltd., and the second being filed by the second appellant, Prataprai Luxmichand, against the same three defendants. The facts and issues in the two suits were substantially similar and the suits were consolidated. The preliminary point was taken in each suit that the Supreme Court in Aden had no jurisdiction to entertain the suit in so far as the respondents were concerned. The learned Chief Justice upheld the objections to jurisdiction and dismissed with costs both suits against the respondents, delivering two judgments, notwithstanding the consolidation of the suits. Against these decisions the appellants now appeal.

Although the facts in the two suits are substantially similar, it appeared on the hearing of the appeal that there were certain material differences between them, and I therefore propose to deal with them separately. I will deal first with the suit instituted by Prataprai Luxmichand.

The facts alleged in the plaint in this case, so far as they are material to this appeal, are as follows: that the plaintiff/appellant had purchased from the first defendants/first respondents a quantity of French white crystal sugar at a stated price, the goods to be packed in new single jute bags of 100 kilos each; that in terms of the contract between the parties the plaintiff opened a letter of credit No. 85/3431 for £3,200 through the third defendants in favour of first defendants; that the letter of credit specified that the packing must be in new single jute bags; that the goods were shipped by s.s. "Picardie" a ship belonging to the second defendants/second respondents, under a bill of lading No. 14; that the third defendants negotiated the relative credit under draft dated July 19, 1957, drawn by the first defendant covering the bill of lading and the invoice; that while the invoice described the packing as new single sound jute bags, the bill of lading mentioned "sacs jute", this description being altered by the addition in ink of the words "sound bags" with a rubber stamp endorsement "alteration approved"; that on arrival in Aden the goods were found to be packed in used old second-hand bags; that under pressure from third defendants the plaintiff accepted the goods under protest; and that by reason of the goods not being packed in new bags the plaintiff suffered a substantial loss. The plaintiff further alleged that the first defendant had described the packing falsely in the invoice; that the second defendant had vaguely described the packing and superimposed the words "sound bags" which were misleading and vague; that the plaintiff had reason to believe that the second defendants received a clean bill of lading though the packing was badly defective against a letter of indemnity, and thereby collaborated with the first defendants in defrauding the plaintiff; and that the third defendants were negligent in negotiating the letter of credit against a bill of lading which did not correspond either with the invoice or the terms of the letter of credit. The paragraphs of the plaint relating to the time the cause of action arose and the jurisdiction of the court are as follows:

- "13. The cause of action has arisen some time in August 28, 1957, when the goods landed at Aden and prior thereto when false documents were made out by the first and second defendants.
- "14. The cause of action has arisen in Aden because the goods were stipulated in Aden and therefore this court has jurisdiction."

And the plaintiff claimed:

- "(a) a decree for Shs. 17,500/- against all the defendants or against such of them as the court find liable.
- "(b) costs of this action.
- "(c) such other relief as the court consider just and proper."

It is not clear from the plaint whether the appellant is suing the first respondents in contract as well as in tort. The learned Chief Justice treated the suit as being in tort only. However, before us counsel for the plaintiff stated that he was suing on the contract as well as on the fraud alleged in the plaint, and the facts pleaded are sufficient to support a suit in contract. It is therefore necessary to consider the question of the jurisdiction of the Supreme Court in contract as well as in tort.

Counsel for the plaintiff argued that for the purposes of the preliminary point the facts pleaded in the plaint must be treated as established. I accept this in so far as no evidence to the contrary was put before and accepted by the court. It is to be noted that it is not pleaded that the contract was made in Aden, or that the respondents reside or carry on business in Aden, or that they have submitted to the jurisdiction of the court in Aden. The sole ground alleged on which it is claimed that the jurisdiction of the court is based is that "the cause of action has arisen in Aden because the goods were stipulated in Aden". At the hearing before us counsel for the plaintiff explained that by "stipulated in Aden" he meant "contracted for in Aden".

Under r. 70 of the Rules of Court of Aden a plaint is required to contain, *inter alia*, particulars of the name, description and place of residence of a defendant, so far as they can be ascertained. The body of the plaint in this case contains no such particulars, though in the title, it is true, the first respondents are described as

"Messrs. Thomas E. King & Co. (Overseas) Ltd., 33, Malden Road, New Malden, Surrey, England";

and the second respondents as

"Societe Navale Delmas-Vieljeux, 29, Rue Galilee, Paris, by agent L. Savon Ries (Aden C.) Ltd., Aden."

The nature of the agency held by "L. Savon Ries (Aden C.) Ltd." for the second respondents is not explained. A written statement of defence filed on behalf of the second respondents purports to be signed by "Managing Director, Aden Coasters Limited, Agents of defendant No. 2." There is no other evidence of the nature of this agency, but in para. 14 of the written statement it is denied that the second respondents have any regular place of business within the Colony. As regards the first respondents, it appears from an affidavit filed on their behalf, and not contested by the appellant, that the first respondents are an English company who have no place of business or agent in Aden.

It may be mentioned here that in the lower court counsel for the plaintiff expressly stated that he did not seek to rely on the fact that the second respondents had filed a written statement of defence as being a submission to the jurisdiction of the court, nor did he seek to do so before us. The principal point taken in the written statement of defence was the objection to the jurisdiction of the court.

The first matter to be considered is the extent of the Supreme Court's jurisdiction over strangers. The court is constituted by art. 15 of the Aden Colony Order, 1936, as amended by the Aden Colony (Amendment) Order, 1944, made under the powers conferred by s. 288 of the Government of India Act, 1935. Sub-s. (1) of s. 288 provides that Aden is to cease to be a part of British India upon a date to be appointed (referred to as "the appointed day"), and sub-s. (2) provides:

- "(2) At any time after the passing of this Act it shall be lawful for His Majesty-in-Council to make such provision as he deems proper for the Government of Aden after the appointed day, and any such Order-in-Council may delegate to any person or persons within Aden power to make

laws for the peace, order and good government of Aden, without prejudice to the power of His Majesty-in-Council, notwithstanding such delegation from time to time to make laws for any of the purposes aforesaid.”

The material part of art. 15 of the Aden Colony Order, 1936, as amended reads:

- “15 (1) There shall be, in and for the Colony, a court of unlimited civil and criminal jurisdiction to be called the Supreme Court.
- “(2) The constitution and powers of the Supreme Court may, subject to the provisions of this Order, be prescribed by laws made by the legislature of the Colony.”

Paragraph (3) of art. 15 confers on the Supreme Court the jurisdiction of the “district and sessions court” as constituted immediately before the appointed day. This is, I think, a material provision, and I will return to it later.

Neither the Act nor the Order in itself provides any clear limitation of the jurisdiction of the court. In a recent case (*Riddlesbarger and Another v. Robson and Others* (1), [1958] E.A. 375 (C.A.) the jurisdiction of the Supreme Court of Kenya conferred by the Kenya Colony Order-in-Council, 1921, was considered. The relevant wording of the Kenya Order-in-Council is more explicit than that employed in the Aden Colony Order, 1936, but I see no reason to read the words “in and for the Colony” in para. (1) of art. 15 of the Aden Colony Order, 1936, as conferring any more restricted jurisdiction than that conferred upon the Supreme Court of Kenya by the Kenya Colony Order-in-Council. It remains to see whether the local legislation made under the Aden Colony Order, 1936, has defined the extent of the jurisdiction of the Supreme Court.

Section 8 of the Supreme Court Ordinance (Cap. 144) is in very wide terms. It reads as follows:

- “8. Subject to the provisions of any other enactment for the time being in force in the Colony, the Supreme Court shall have original civil jurisdiction to hear and determine all cases of whatever nature.”

As was said by the then Vice-President of this court in *A. Y. Sharif v. S.A. Mansoor* (2), E.A.C.A. Civil Appeal No. 3 of 1955 (unreported), the generality of the jurisdiction so conferred must be limited to suits which are justiciable in Aden. The only provision of the laws of Aden which has been brought to my attention or which I have been able to find which purports to limit the jurisdiction of the courts of the Colony is s. 41 of the Interpretation and General Clauses Ordinance (Cap. 83), and I think that s. 8 of the Supreme Court Ordinance is to be read subject to s. 41 of the Interpretation and General Clauses Ordinance. Section 18 of the Civil Courts Ordinance (Cap. 25), which also relates to the jurisdiction of the courts in Aden, is, like s. 8 of the Supreme Court Ordinance, expressed in general terms which carry the matter no further. The material part of s. 41 of the Interpretation and General Clauses Ordinance reads as follows:

- “41. Subject to the provisions of any Statute in force in England which expressly applies in the Colony or has been extended thereto by Order-in-Council and of any enactment for the time being in force in the Colony, and so far as the said Statute or enactment shall not extend or apply, courts in the colony shall exercise their jurisdiction in conformity with usage and, in the absence of usage, in conformity with the substance of the common law, the doctrines of equity and the Statutes of general application in force in England on the first day of April, 1937:”

A proviso follows which provides, *inter alia*, that

- “the said common law, doctrines of equity and Statutes of general

application shall be in force in the Colony so far only as the circumstances of the Colony and its inhabitants permit and subject to such qualifications as local circumstances may render necessary,”

but this proviso has no application in the instant case. The provision of s. 41 that the courts in the Colony “shall exercise their jurisdiction . . . in conformity with the substance of the common law”

corresponds with similar provision contained in the Kenya Colony Order-in-Council, 1921, though it is true that under that Order-in-Council the jurisdiction conferred upon the Kenya Supreme Court is “over all persons and over all matters in the Colony.” However, as I have already said, I do not think that the words of the Aden Colony Order, 1936, which constitute the Supreme Court of Aden, are any more restrictive than the words of the Kenya Order-in-Council. In the *Riddlesbarger* case (1) I expressed the view, with which the other members of the court concurred, that the jurisdiction over persons outside Kenya conferred upon the Supreme Court of Kenya by the Kenya Colony Order-in-Council, 1921, was, subject to any local enactment restricting such jurisdiction, a jurisdiction similar to that enjoyed by the High Court in England under the common law. In my opinion the effect of art. 15 of the Aden Colony Order, 1936, read with s. 41 of the Interpretation and General Clauses Ordinance in relation to the Supreme Court of Aden is the same, subject, however, to the effect of para. (3) of art. 15 of the Aden Colony Order, 1936. It is true that there is a passage in the judgment of the then Vice-President of this court in *Sharif's* case (2) which appears to conflict with this view in one respect which is not material in the instant case. The passage in question (which relates to the jurisdiction of the Supreme Court over persons temporarily within the Colony) was, however, obiter, a final opinion not being expressed on the particular point. With respect, I see no reason to resile from the view I expressed in the *Riddlesbarger* case (1). Section 41 of the Interpretation and General Clauses Ordinance is wider than art. 4 of the Kenya Colony Order-in-Council, 1921, in that it provides that the courts in Aden “shall exercise their jurisdiction in accordance with usage”, but I do not think it necessary to consider the effect of this provision in the instant case. In the instant case the learned Chief Justice sought to apply the principles of the common law in order to ascertain the jurisdiction of the Supreme Court, and, subject to the question of the effect of para. (3) of art. 15 of the Aden Colony Order, 1936, I respectfully agree that this was a correct test to apply.

I also agree with the learned Chief Justice when he says

“care must therefore be taken when ascertaining the common law not to apply English cases whose ratio decidendi is dependent on the wording of O. XI”

(of the English Rules of the Supreme Court). The learned Chief Justice, however, continues

“Certain main principles of the common law followed in Aden in relation to jurisdiction do I think nevertheless emerge from the decided cases which have arisen under O. XI”;

and he then proceeds to examine certain cases with a view to ascertaining such common law principles. With respect, I do not think that the principles which he seeks to extract from those cases are common law principles. Passages were cited to us from Schmitthoff's English Conflict of Laws (3rd Edn.); Cheshire, Private International Law (3rd Edn.); and Dicey, Conflict of Laws (6th Edn.). So far as actions in personam are concerned, it is clear

that at common law jurisdiction in general depended either on the presence of the defendant within the jurisdiction at the commencement of the suit, or, in certain types of cases, on the submission of the defendant to the jurisdiction of the court. The principles are expressed as follows in *Cheshire, Private International Law* (5th Edn.) at p. 107:

“Jurisdiction depends upon physical power, and since the right to exercise power or, what is the same thing in the present connection, the power of issuing process, is exercisable only against persons who are within the territory of the Sovereign whom the court represents, the rule at common law has always been that jurisdiction is confined to persons who are within reach of the process of the court at the time of the service of the writ.”

And at p. 106:

“The principle of submission means that in a limited number of cases a person may voluntarily submit himself to the judgment of a court to whose jurisdiction he would not otherwise be subject. If he does so he cannot afterwards say that the judgment of that court is not binding upon him.”

In *Lenders v. Anderson* (3) (1883), 12 Q.B.D. 50 at p. 56, Huddleston, B., said

“Down to the time of the Common Law Procedure Act, 1852, there was no provision for service of a writ out of the jurisdiction.”

Accordingly, the principles applied by English courts in cases where service out of the jurisdiction is effected under O. XI of the English Rules of the Supreme Court (which now embodies generally the statutory provisions in England relating to service out of the jurisdiction and consequential assumed jurisdiction of the courts) are dependent on the terms of the order and not on any principles of the common law which did not recognise service out of the jurisdiction.

In addition to the statutory provisions I have mentioned, it is necessary to refer to the Aden Rules of Court made under s. 125 of the Civil Courts Ordinance. The relevant rules for the purposes of this appeal are r. 40 (1), r. 48 and r. 369. Rules 40 (1) and r. 48, which appear under the heading of “Service of Summons”, read as follows:

- “40 (1) In a suit relating to any business or work against a person who does not reside within the Colony, service on any manager or agent, who, at the time of service, personally carries on such business or work for such person within the Colony, shall be deemed good service.”
- “48. Where the court is satisfied by affidavit or otherwise that the defendant resides out of the Colony and has no agent in the Colony empowered to accept service the summons shall be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and Aden.”

Rule 369 which is under the heading “Suits by or against Corporations” is as follows:

- “369. Subject to any statutory provision regulating service of process, where the suit is against a corporation, the summons may be served—
- (a) on the secretary, or on any director, or other principal officer of the corporation, or
 - (b) by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office in the Colony then at the place where the corporation carries on business in the Colony.”

This rule amplifies the provisions of s. 148 of the Indian Companies Act, 1913 (which applies in Aden by virtue of s. 17 (2) of the Revised Edition of the Laws Ordinance, 1955), which provides that a document may be served on a company by leaving it at, or sending it by post to, the registered office of the company. It is to be noted that r. 369 provides for service in the Colony. It is perhaps questionable how far r. 48 applies to service on a corporation, but I incline to the view that, if service out of the jurisdiction can be effected under r. 48, such service can be effected on a corporation out of the jurisdiction under the rule.

I have already indicated that at common law service out of the jurisdiction was not recognised. Had the matter depended solely on common law principles, I should have inclined to the view that r. 48 was *ultra vires*. It is necessary, however, to consider the effect of para. (3) of art. 15 of the Aden Colony Order, 1936. That paragraph reads as follows:

- “(3) The District and Sessions Court as constituted immediately before the appointed day shall on that day become the Supreme Court and, subject to the provisions of this section, all the jurisdiction and powers then vested in the District and Sessions Court shall become vested in the Supreme Court.”

In general, the civil jurisdiction of courts in British India was regulated in 1936 by the Indian Code of Civil Procedure, 1908 (hereinafter referred to as the Indian Code), and District Courts were Civil Courts to which the Indian Code applied—see s. 3 of the Code. Accordingly it is necessary to refer to the Indian Code to ascertain the extent of the jurisdiction inherited by the Supreme Court under para. (3) of art. 15 of the Aden Colony Order, 1936.

The material section of the Indian Code for the purposes of this case is s. 20, which (omitting the explanations) reads as follows:

- “20. Subject to the limitations aforesaid every suit shall be instituted in a court within the local limits of whose jurisdiction:
- (a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or
 - (b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or
 - (c) the cause of action, wholly or in part, arises.”

I have not traced the legislative provision constituting and defining the jurisdiction of the “District and Sessions Court” in Aden, but the Indian Aden Courts Act, 1864 (No. 2 of 1864) constituted a “Court of the Resident” in Aden, and no doubt the district and sessions court was subsequently substituted for the court of the resident. The court of the resident under Act No. 2 of 1864 had unlimited pecuniary jurisdiction, and it seems likely that the district and sessions court also had unlimited pecuniary jurisdiction in civil matters. However, even if it did not have unlimited jurisdiction, it could, under s. 20 of the Indian Code and within such pecuniary limits as may have applied, exercise its jurisdiction over persons outside its territory to the extent specified in that section. As it seems to me, the extra-territorial jurisdiction conferred by s. 20 is independent of any other limits which may have existed on a district court’s jurisdiction. Section 20 would, of course, apply to the extent of the pecuniary jurisdiction for the time being vested in the district court, notwithstanding any

variation which might from time to time be made in such pecuniary jurisdiction. Although, therefore, the Supreme Court is now a court of unlimited jurisdiction “in and for the Colony”, and the district court’s jurisdiction may, perhaps, have been subject to pecuniary limits, it appears to me that the district court’s extra-territorial jurisdiction under s. 20 of the Indian Code, as inherited by the Supreme Court under para. (3) of art. 15 of the Aden Colony Order, 1936, now applies to the whole of the Supreme Court’s jurisdiction, using that term in its quantitative sense. If I am right, it follows that under para. (b) and para. (c) of s. 20 of the Indian Code a suit can be instituted against, *inter alia*, a corporation which is not carrying on business in the Colony if the cause of action arose in the Colony, if either the court gives leave or the first-mentioned corporation acquiesces.

Section 41 of the Interpretation and General Clauses Ordinance provides, *inter alia*, that so far as any enactment for the time being in force in the Colony does not extend or apply, the courts in the Colony shall exercise their jurisdiction in conformity with usage and, in the absence of usage, in conformity with the substance of the common law. The term “enactment” is not defined, but in the context in which it is used I have no doubt that it includes the Aden Colony Order, 1936, to which, in any event, the Interpretation and General Clauses Ordinance is subject. It follows, I think, that the Supreme Court can not only exercise the jurisdiction conferred by s. 20 of the Indian Code over persons outside Aden, but if and in so far as that jurisdiction falls short of the jurisdiction that would be enjoyed by the court by application of the principles of the common law, the court can exercise jurisdiction in accordance with those principles. If I am right, it is necessary to ascertain whether the suit is justiciable in Aden either under the provisions of s. 20 of the Indian Code or under the principles of the common law. I am of the opinion that it is only to suits which are so justiciable that the provisions of r. 40 and r. 48 of the Aden Rules of Court relate.

So far as the first respondents are concerned, it appears to me that (subject to the question of joinder to which I will refer later) the plaintiff Prataprai Luxmichand, has failed to show any cause of action justiciable in Aden. There is no suggestion of “acquiescence”. As regards the question whether the cause of action arose in whole or in part in Aden, counsel for the appellants argued that (a) the contract was made in Aden; (b) the goods were to be delivered in Aden; and (c) that payment was to be effected from Aden. There is nothing, however, in the plaint or the evidence that was before the court to indicate that the contract was made in Aden or to lead the court to assume that it was made in Aden. Then it is pleaded that the cause of action arose in Aden because the goods were “stipulated in Aden”. It is true that the goods were to be shipped to Aden, but it appears from an invoice attached to the plaint that the contract was a “C. & F.” contract, i.e. that it was to be performed by shipment of the goods and delivery of the shipping documents. Performance, therefore, took place at the port of shipment, and the alleged breach also took place at the port of shipment. And, as regards payment, the fact that payment “was to be effected from Aden” is, I think, immaterial. What is material is where the payment was to be effected, and this was not Aden. Finally, the fraud alleged, if it took place, took place at the port of shipment. I am unable to find, therefore, on the material before the court, that any part of the cause of action arose in Aden.

So far as the second respondents are concerned, there is no assertion in the body of the plaint that they are carrying on business through agents in Aden. It has been held in India in relation to O. VII, r. 1 of the Indian Civil Procedure Rules, the terms of which are identical with r. 70 of the Aden Rules of Court, that if a plaintiff relies on the defendant’s residence or place of business as

giving jurisdiction, the facts showing this must be stated in the body of the plaint, and that the statement of these facts in the title to the suit is not sufficient since the title to the suit is not covered by the verification clause (Mulla, Code Of Civil Procedure (12th Edn.) p. 606; *Ramprasad v. Hazarimull* (4) (1931), 58 Cal. 418). I doubt very much whether the mere inclusion of particulars of residence or business in the title is sufficient to found jurisdiction, though normally, if the point were taken, it could no doubt be cured by amendment of the plaint. Apart from this, however, there is, as I have said, no indication of the nature of the agency alleged to be held by "L. Savon Ries (Aden C.) Ltd." though it may be presumed to be some form of shipping agency. The fraud alleged to have been committed by the second respondents did not take place in Aden, and the only basis for jurisdiction, therefore, would (apart from the question of joinder) be presence in Aden or the carrying on of business in Aden. The learned authors in Chitale and Rao, Code of Civil Procedure, (5th Edn.) Vol. 1, at p. 376 state, in relation to s. 20 of the Code

"a business may be carried on through an agent . . . But it is essential that the agent must be an agent in the strict sense of the term and must attend exclusively to the business of the principal. A person conducting business at a place through commission agents or brokers or general agents cannot be held to carry on business there."

It is certainly not shown that L. Savon Ries (Aden C.) Ltd. is the agent of the second respondents in this sense.

At common law the principle of presence as the basis of jurisdiction applies in the case of a corporation as in the case of an individual, and a corporation is treated as being present in England when it carries on business in England (Dicey, (6th Edn.) pp. 173, 174).

"The question whether a corporation is carrying on business here is one of fact not always easy to determine. A foreign railway company, for example, may perform part of its business, say the selling of tickets, in London, without necessarily carrying on business there. The answer to the question whether it does or does not carry on business in England depends upon whether or not the agent who sells the tickets makes a contract for the foreign company, or merely sells the tickets as part of his own business. This is substantially a question as to the relation of the agent towards the foreign company." (Dicey, (6th Edn.) p. 174).

But upon this basis, also, it appears to me that there is no sufficient material before the court to enable it to find that the nature of the agency held by L. Savon Ries (Aden C.) Ltd. is such as to confer jurisdiction over the second respondents.

I now come to the question of joinder. It was argued that under r. 4 and r. 6 of the Aden Rules of Court, since the third defendants were within the jurisdiction, it was proper to join the respondents as parties even though they might not be within the jurisdiction. As in the case of r. 48, I do not think that this rule in itself can give jurisdiction (cf. commentary on O. I, r. 3 in Chitale and Rao, Code of Civil Procedure (5th Edn.) Vol. 2 at p. 1469). As I have already indicated, "at common law a writ could never be served on a defendant when out of England" (Dicey, (6th Edn.) p. 180). It is under O. XI, r. 1 (g) of the English Rules of the Supreme Court, that jurisdiction over a person out of England may be assumed where he is a necessary or proper party to an action brought against a person who is within the jurisdiction. So far as Aden is concerned, it is necessary once again to refer to the Indian Code to ascertain the extent of the jurisdiction of the Supreme Court. The relevant provision is s. 20 (b), from which it appears that if the cause of action does not arise wholly or in part within the jurisdiction, the leave of the court must be

obtained to join a defendant residing out of the jurisdiction with one residing within the jurisdiction, unless the defendant out of the jurisdiction has acquiesced in the institution of the suit. In the instant case the learned Chief Justice held that the joinder was not proper as, if separate suits were brought, different questions of law and fact would arise. With respect, I do not think this is correct. Some questions of fact, e.g. whether the consignment was shipped in old or new bags, would certainly be common to each suit. However, no leave to join the respondents was sought or obtained, and the learned Chief Justice indicated that

“on the balance of convenience the court should not use its discretion as regards jurisdiction to implead the first and second defendants.”

On the material before us I see no reason to interfere with the discretion so exercised.

For the reasons I have given I think that in the suit instituted by Prataprai Luxmichand the plaintiff/appellant has failed to show that the court has jurisdiction against either of the respondents, and I would dismiss his appeal with costs.

As regards the suit brought by Motibhai Girdharbhai, nearly all that I have said above applies with equal force. So far as the second respondents are concerned, I can see no distinction between the two cases, and I would accordingly dismiss with costs this appeal also in so far as it relates to the second respondents. In the case of the first respondents, however, there is a significant distinction. In this case a copy of the alleged contract between the plaintiff/appellant and the first respondents was annexed to the plaint as “annexure A”. This document is in terms an order addressed to the first respondents in London for the goods in question and is subject to acceptance by the first respondents, from which it would appear clear that it was not made in Aden (Chitale and Rao, Code of Civil Procedure, (5th Edn.) Vol. 1, p. 383). The document, however, contains the following clause, which presumably was accepted by the first respondents:

“6. Law suit under this contract shall be filed at Aden or at any place under British Jurisdiction.”

It is argued that this is a submission to the jurisdiction of the courts in Aden. I think this clearly must be so. It is by no means clear to me that this provision would give the court jurisdiction at common law in the absence of the respondents. The general principle of submission as the basis of jurisdiction is set out in Dicey, (6th Edn.) at p. 24, and is explained as follows:

“It amounts to this, that a person who voluntarily agrees either by act or word, to be bound by the judgment of a given court or courts, has no right to deny the obligation of the judgment as against himself . . . Submission, it should be noticed, may take place in various ways, e.g. by a party suing as plaintiff, by his voluntarily appearing as defendant, or by his having made it a part of an express or implied contract that he will, if certain questions arise, allow them to be referred for decision to the courts of a given country.”

Nevertheless, at p. 26 the learned author says:

“Where the defendant is not in England. The courts formerly neither claimed nor exercised, at any rate directly, jurisdiction over a defendant who was not in England at the time of service of the writ. The test, therefore, of effectiveness held good in its negative, no less than in its positive, aspect. The courts, however, always exercised jurisdiction over a defendant who appeared to, or a plaintiff who brought, an action or suit. This again is in strict conformity with the principle or test of submission.

“But the High Court now, under statutory powers, exercises jurisdiction in several cases in which the defendant is not in England, and cannot therefore be served with a writ in England.”

I prefer to base my decision upon acquiescence under s. 20 of the Indian Code. I have not found any Indian case which is directly in point and none was cited by counsel. Nevertheless it seems to me that here the first respondents have contracted to acquiesce in the jurisdiction of the courts in Aden and cannot now be heard to deny that jurisdiction. Where there is acquiescence under s. 20, no leave of the court is necessary. I would accordingly allow with costs the appeal by Motibhai Girdharbhai in so far as the first respondents are concerned, set aside that part of the order dated October 16, 1958, in Civil Suit No. 177 of 1958 which relates to the first respondents, and order that the suit continue as against the first respondents, and that the costs of the preliminary objection in the court below be paid by the first respondents in any event.

Sir Kenneth O'Connor P: I agree. The appeal of Prataprai Luxmichand is dismissed with costs, and the appeal of Motibhai Girdharbhai is also dismissed with costs so far as the respondents, Societe Navale Delmas Vieljeux, are concerned. So far as the respondents Thomas E. King & Co. (Overseas) Ltd. are concerned, the appeal of Motibhai Girdharbhai is allowed with costs. The Order dated October 16, 1958, in Civil Suit No. 177 of 1958 is set aside in so far as it relates to the respondents, Thomas E. King & Co. (Overseas) Ltd., and it is ordered that the suit by Motibhai Girdharbhai against Thomas E. King & Co. (Overseas) Ltd., do continue. The costs incurred in the court below in respect of the preliminary objection taken in suit No. 177 of 1958 by Thomas E. King & Co. (Overseas) Ltd. will be paid by Thomas E. King & Co. (Overseas) Ltd. in any event.

Gould JA: I also agree.

Appeal of the first appellant against the first respondents allowed, but against the second respondents dismissed. Appeal of the second appellant against both respondents dismissed.

For the appellant:

PK Sanghani

PK Sanghani, Aden

For the first respondent:

EW Nunn

EW Nunn, Aden

For the second respondent:

VK Joshi

VK Joshi, Aden

Erisa Lukwago v Bawa Singh and another
[1959] 1 EA 282 (HCU)

Division: HM High Court for Uganda at Kampala

Date of judgment 8 January 1959

Case Number: 37/1954
Before: Bennett J
Sourced by: LawAfrica

[1] Native law and custom – Kibanja – Trespass – House on kibanja demolished by mailo owner – No eviction order – Lease by mailo owner of land to third person – Permission of Gombolola Chief for grant of lease not obtained – Whether holder of kibanja entitled to damages for trespass – Busulu and Envujo Law, s. 2, s. 8, s. 11, s. 12, s. 14 (U.).

Editor's Summary

In 1948, when he died, the plaintiff's father held a kibanja on land of the second defendant. There was then a house on the plot. The plaintiff, as heir of his father, succeeded to the kibanja, but since he was a minor the rent was paid for him by his uncle and guardian. By 1952 the guardian's sister was, by permission of her brother, occupying the house. On June 17, 1952, the second defendant sent a circular to all his tenants, including the guardian, informing them that as from January 1, 1953, their rents would be Shs. 400/- per annum, and asking them to state whether they agreed to this rent and a new tenancy agreement. The guardian did not agree. On June 10, 1952, the second defendant leased the kibanja of the plaintiff to the first defendant. Towards the end of 1952 the second defendant gave the guardian's sister notice to vacate the house. She replied, claiming compensation. The second defendant offered the guardian Shs. 400/-, which he refused. On November 19, 1953, the second defendant's agent entered on the plot, with a gang and demolished the house, assisted by the first defendant and his labourers. No permission had been obtained from the gombolola chief to the land being leased to the first defendant or anyone else. The plaintiff sued the two defendants for damages for trespass. The first defendant admitted the demolition of the house. The second defendant denied that the plaintiff was in possession of the land and both defendants denied that the plaintiff had any rights over the land. The second defendant did not give evidence, but claimed that the court should infer from certain admissions in the evidence of the plaintiff's guardian and next friend that there was a contractual tenancy, and that the plaintiff was not a mukopi.

Held –

- (i) it is of the essence of the relationship between a mailo owner and the holder of a kibanja that the latter's right of occupation inures for an indeterminate period and is heritable by his heir and successor.
- (ii) there was no evidence of a lease for a fixed term or any sufficient evidence of a tenancy agreement; accordingly the plaintiff was, when the house was demolished, a mukopi within the Busulu and Envujo Law, and his rights could only be terminated under that law.
- (iii) the plaintiff's rights had never been extinguished when the house was demolished and he was in lawful possession thereof.
- (iv) whilst the first defendant had a valid lease over the plot, this title was, under the Registration of Titles Ordinance (Cap. 123), s. 61, subject to the plaintiff's interest in the land.
- (v) the plaintiff was entitled to damages for demolition of the house and the loss of his rights as a

kibanja holder.

Judgment for the plaintiff.

No Cases referred to in judgment in judgment

Judgment

Bennett J: In this suit the plaintiff, a minor, claims from the defendants Shs. 31,470/50 as special damages for trespass. He also claims general and exemplary damages.

The plaintiff sues by his next friend, Erisa Lukwago, who in fact conducted the case on his behalf.

The first defendant while admitting that he demolished a certain house, which was situated on land over which he had obtained a lease from the second defendant, denies that the plaintiff had any rights over the land in question. He also denies having removed any personal property from the house at the time of demolition.

The second defendant denies that the plaintiff was in possession or occupation of the land in suit, or that the plaintiff had any rights whatsoever over the land.

The following facts have been admitted or proved to my satisfaction.

The father of the plaintiff, Yosia Lukwago was, at the time of his death in 1948, the holder of a kibanja on the land belonging to the second defendant and as such entitled to the protection of Busulu and Envujo Law (Vol. 7, Laws of Uganda (Revised Edn., 1951) p. 1238).

At the time of Yosia's death there was a house on the plot.

The plaintiff is Yosia's heir and successor by native law and custom, and as such succeeded to the kibanja by virtue of s. 8 of the Busulu and Envujo Law. Under s. 14 of that law the plaintiff was entitled to remain in quiet possession of the kibanja in accordance with native custom.

The plaintiff being a minor, the annual rent (Busulu) was paid on his behalf by his uncle and lawful guardian, Erisa Lukwago. Originally rent appears to have been paid at the rate of Shs. 8/50 per annum. In 1950 Erisa Lukwago began to pay rent at the rate of Shs. 60/- per annum.

Between 1949 and 1952 the house standing on the plot was occupied by Monika, the sister of Erisa, by permission of Erisa.

On June 17, 1952, the second defendant sent out a circular letter to all his tenants (exhibit P. 1.), informing them that their rents would be Shs. 400/- a year, payable as from January 1, 1953. The tenants were requested to inform the second defendant's treasurer before the end of June whether or not they agreed to the proposed rent and desired a new tenancy agreement. This circular letter was sent to Erisa Lukwago among others.

Erisa Lukwago did not agree to pay the increased rent and no tenancy agreement was made between him and the second defendant.

On June 10, 1952, the second defendant leased the land in occupation of the plaintiff to the first defendant for a term of thirty-three years, and a certificate of title was issued to the first defendant.

Towards the end of 1952 Monika, who was residing on the plot, was given a notice by the second defendant to vacate it. To this notice she replied on January 5, 1953, by letter (exhibit D. 2.) in which she asked the plaintiff for compensation. No compensation was, in fact, paid although the second defendant

offered to pay Erisa Lukwago Shs. 400/- as compensation, which Erisa refused to accept.

On November 19, 1953, one Ernesti Kapagosa, the second defendant's treasurer and rent collector, entered upon the plot with a gang of convicts from the Kabaka's prison at Mengo. He proceeded to demolish the house standing on the plot, and in this he was assisted by the first defendant, whose labourers cleared away the debris. I am satisfied that at the time of the demolition the house had been vacated by Monika and that there were no goods or chattels in it.

The main issue in this case is whether or not at the time the house was demolished the plaintiff was in lawful possession of the plot. If he was, then both defendants, by their servants or agents, committed an act of trespass in entering upon the plot and demolishing the house.

Conflicting evidence has been given as to who built the house which was standing on the plot at the time of demolition. According to one witness it was built by the grandfather of the plaintiff, Alexi. According to another witness the house built by Alexi had fallen down and the house standing on the plot in November, 1953, was built by Yosia. According to other witnesses the house standing on the plot in November, 1953, had been built by Monika.

It seems to me immaterial to determine by whom the house was built since no one but the plaintiff has claimed any rights under Busulu and Envujo Law over the plot.

On behalf of the defendant, it is contended that the fact that during the years 1950, 1951 and 1952 rent was being paid by Erisa Lukwago at the rate of Shs. 60/- per annum and not at the rate of Shs. 10/- as provided for in s. 2 of the Busulu and Envujo Law, leads to an inference that there was a contractual tenancy between the plaintiff and the second defendant, and that the plaintiff was not a "mukopi" within the meaning of the Busulu and Envujo Law. It is not clear to me why it should have been necessary for the second defendant to have relied upon inference, when he could very well have gone into the witness box and given evidence of the terms of the alleged contractual tenancy. The second defendant did not elect to go into the witness box and give evidence on the matter. Ernesti, his treasurer and rent collector, did not give evidence of any contractual tenancy. His explanation as to how Erisa Lukwago came to pay a rent of Shs. 60/- per annum was that the rent was increased when the estate of second defendant was carved up into plots. He ventured the opinion that a mailo owner can circumvent the provisions of Busulu and Envujo Law by carving his land up into plots, a doctrine which is, no doubt, very convenient to landlords but disastrous to tenants.

Erisa Lukwago denied, when giving evidence, that there was any tenancy agreement between himself and the second defendant. He alleged that he had agreed to pay rent at the rate of Shs. 60/- per annum because he had sub-let part of the plot. Erisa's evidence denying the existence of any special tenancy agreement is quite uncontradicted by any other evidence, and I accept it.

It is of the essence of the relationship between a mailo owner and the holder of a kibanja that the latter's right of occupation inures for an indeterminate period and is heritable by his successor. It may well be that Africans in Buganda can enter into a relationship of landlord and tenant which is not governed by the Busulu and Envujo law, as for instance where land is demised by one African to another for a fixed term of years. In the instant case, however, there is no evidence that the land in suit was leased to the plaintiff for any fixed term, nor is there any sufficient evidence of a tenancy agreement.

I accordingly, find that the plaintiff was at the time when the house was demolished a "mukopi" within the meaning of Busulu and Envujo law, and as such his rights over the land could only be terminated in accordance with the provisions of that law.

Under s. 11 of the Busulu and Envujo law a mukopi can be evicted from his kibanja by the mailo owner in pursuance of the order of a court of competent jurisdiction. Under s. 12 of the same law a mukopi who has left his kibanja derelict for more than four months may lose his rights over the kibanja, but only if the local gombolola chief so orders.

The second defendant's treasurer and rent collector, Ernesti, conceded that he had no knowledge of any eviction order. He also conceded that no permission had been obtained from the local gombolola chief for the plaintiff's kibanja to be given to another on the ground that it had been left derelict.

In these circumstances I find that the plaintiff's rights over the plot had never been extinguished at the time when the house was demolished, and that he was in lawful possession thereof.

It is true that the first defendant had a valid lease over the plot, but under

the proviso to s. 61 of the Registration of Titles Ordinance (Cap. 123) his title was subject to the interest of any tenant on the land, and in my judgment, the plaintiff was a “tenant” within the meaning of the proviso.

If follows that both defendants committed an act of trespass when they, by their servants or agents, entered upon the plaintiff’s land and demolished the house standing thereon.

I now turn to the question of damages. In regard to special damages, it is common ground that the house was made of mud and wattle with a roof of tin and corrugated iron sheets. The evidence as to the size of the house is conflicting. Yisiya Kyaggwe, who was called as a witness by the second defendant, and, who gave me the impression of being a disinterested witness, said that the house was a large one and that its value was between Shs. 700/- and Shs. 800/-. The first defendant’s witness, Pritam Singh, said that the house was a very small one and his valuation of it was between Shs. 500/- and Shs. 600/-. In the plaint the house is valued at Shs. 10,000/-. Taking into account the high rates of wages prevailing in the Kampala district and the high cost of materials, I find that the replacement value of the house was Shs. 700/-.

In the plaint a sum of Shs. 21,470/50 is claimed in respect of the value of personal property which is alleged to have been destroyed when the house was demolished. In his evidence Erisa Lukwago puts the value of the personal property at only Shs. 1,470/50. Both the first defendant’s witness, Pritam Singh, and the second defendant’s witness, Ernesti, say that there was no personal property in the house at the time of demolition, and that the house was unoccupied. If anyone was living in the house at the time of its demolition it was Monika, and Monika has not been called as a witness.

I find that there was no one residing in the house at the time of its demolition and that there were no personal effects therein.

I therefore award the plaintiff no damages for loss or destruction of personal property.

I find that the trespass was not accompanied by circumstances of aggravation as alleged in the plaint since no one was residing in the house at the time when it was demolished. It follows that exemplary damages would not be justified. It is, however, plain that the plaintiff has not only lost the value of the house standing upon the land, but his rights as a kibanja holder have been extinguished by the second defendant. This is a matter to be taken into consideration in assessing general damages against the second defendant.

The plot appears to have been a small one, and there is no sufficient evidence that there were any trees of value or growing crops on the land, and, if there were, Erisa Lukwago could give no estimate of their value. On the other hand the eviction of a mukopi is a serious matter, depriving him and his successors of a right which the Busulu and Envujo law envisages is not to be extinguished without payment of compensation. I assess general damages against the second defendant at Shs. 1,000/-. I award no general damages against the first defendant.

There will be judgment for the plaintiff against both defendants jointly and severally for Shs. 700/-, and against the second defendant only for Shs. 1,000/-.

The defendants will pay the costs of this suit.

Judgment for the plaintiff.

The plaintiff appeared by his guardian and next friend in person.

For the first defendant:

YV Phadke

Parekhji & Co, Kampala

For the second defendant:

HD Choudry

HD Choudry, Kampala

Gurdev Singh v Pala
[1959] 1 EA 286 (HCT)

Division:	HM High Court for Tanganyika at Dar-Es-Salaam
Date of judgment:	17 April 1959
Case Number:	4/1959
Before:	Simmons J
Sourced by:	LawAfrica

[1] Rent restriction – Verbal notice to quit – Validity of notice – Premises duly vacated but keys temporarily retained by tenant beyond expiration of term – Whether tenant still in occupation – Rent Restriction Ordinance (Cap. 301), s. 26 (1) (T.).

Editor's Summary

The appellant applied to the Rent Restriction Board claiming rent and mesne profits for alleged holding over by his tenant after expiry of a notice to quit given by the latter. The respondent had notified the appellant verbally at the end of February that he would be leaving at the end of March. The appellant agreed and the respondent vacated the premises on March 29. A few days later the respondent met the appellant who told the respondent to bring the keys to his office. When the respondent did so the appellant refused to accept them. The respondent sent the keys to the appellant by registered post some-time in April. The board found that verbal notice to quit expiring at the end of March was given and accepted; that the premises were vacated before the due date; that the appellant acquiesced in the retention of the keys by the respondent and later refused to accept them. On appeal it was argued on behalf of the appellant *inter alia* that the respondent's notice to quit was invalid because he had not proved that the notice contained a statement that he was not merely leaving but was also giving up possession at the material date; that as the keys were not handed over on or before the end of March possession was not given up in accordance with the notice and that as the keys were not given up until April the tenancy was not terminated until the end of May.

Held –

- (i) none of the ingredients of a notice to quit were missing and on the evidence the board was entitled to find that the respondent meant and was understood to mean that he would quit and deliver up

possession at the proper time.

- (ii) there was ample evidence that the respondent did not retain possession after the end of March, even though he retained the keys and the keeping of keys was not evidence of occupation. *Gray v. Bompas* (1862), 11 C.B. (N.S.) 520, followed.

Appeal dismissed.

Case referred to in judgment

- (1) *Gray v. Bompas* (1862), 11 C.B. (N.S.) 520.

Judgment

Simmons J: This is an appeal from an order made on October 8, 1958, by the Rent Restriction Board for Dar-es-Salaam. The claim was for Shs. 640/- rent and mesne profits. At the hearing the claim was reduced to Shs. 490/-, the rent for February having been paid. The appellant admitted that he had received a letter from the respondent on April 25, 1958, enclosing the keys and saying that he had already given a month's notice. The respondent testified that he had given oral notice to quit at the end of February for the end of March, and this testimony was accepted by the board.

The facts found by the board are set out thus in their "order" dated November 5, 1958:

“The main item of dispute, however, consists of the claim for the rent of April and May, 1958. Briefly the contention of the landlord is that the first he knew of the tenant’s intended departure was a letter received by him on April 25, 1958, and enclosing the keys; he therefore claims rent for April and also, in lieu of notice, for the month of May. The tenant’s contention is that he notified the landlord verbally at the end of February that he would be leaving at the end of March and that the landlord agreed and that he vacated the property on March 29, 1958, and that a few days later he met the landlord and was told to bring the keys to the landlord’s office. When he did this he claims the landlord refused to accept them and he therefore sent them by registered post.

“The board members once more prefer the evidence of the tenant to that of the landlord and the board finds as facts that verbal notice expiring at the end of March was given and accepted; that the property was vacated before the due date; that the landlord acquiesced in the retention of the keys for a short period by his former tenant and then refused to accept their return.”

This appeal was heard *ex parte* pursuant to r. 10 of the Rent Restriction (Appeals) (Rules of Court) Rules (Cap. 301) and O. 41, r. 17(2) of the Civil Procedure Code. The argument of the learned advocate for the appellant was that the respondent’s notice was invalid because he had not proved—the onus being on him—that the notice contained a statement that the tenant was not merely leaving but was also giving up possession at the material date. He referred to the evidence of the respondent, before the board, saying—

“Notice was given about February 27 or 28. I did not send the keys because we were quite friendly; I did forget for a few days”.

This means that the keys were still in the respondent’s possession when the month of April had begun. The respondent says in chief—

“After I left the flat a few days later I met him. I told him I still had the keys. He said to bring it to his office when I had a chance”.

Appeals from the Rent Restriction Board are governed by s. 11 (1) of the Rent Restriction Ordinance (Cap. 301); appeals lie only on points of law or of mixed fact and law. The memorandum of appeal contains the following four grounds:

- (a) That the learned board erred in considering verbal notice to quit while not knowing its contents.
- (b) That the board should have held that the respondent has not discharged the onus on him of the serving notice to quit.
- (c) That the board should have held that on evidence laid before it there is no valid or proper notice to quit.
- (d) That the board should have laid more stress on the documentary evidence placed before it.

The substance of the appeal is contained in para. “c”. Paragraph “d” must, I think, be treated as surplusage; in any case it was not argued. I cannot accept the implication of para. “a”, that the board had no sufficient evidence of the contents of the oral notice. The respondent said, and his testimony was throughout believed by the board (whose findings I am bound to accept),

“I gave him notice I would leave at the end of March. I did this at the end of February . . . He agreed”.

I cannot see that any of the ingredients of a notice to quit are missing. It is not disputed that a clear calendar month is sufficient nor that the notice may

be oral. The notice was certain; the board were entitled to find that the respondent meant and was understood to mean that he would quit and deliver up possession at the proper time, which was clearly stated (the date need not actually be named); the end of the next clear calendar month. The appeal must fail on ground “a”.

I do not doubt that the onus was upon the respondent to prove that he had given due notice but I can find no more to say about para. “b” of the memorandum of appeal than this: whether that onus was or was not discharged was a question of fact for the board, provided there was evidence upon which they could base their finding.

Most of the learned advocate’s argument was founded on ground “c”. He argued that because the keys were not handed over on or before the end of March possession was not given up in accordance with the notice, and that as the keys were not given up until April the tenancy was not terminated until the end of May. He referred to s. 26(1) of the Ordinance:

“A tenant who, under the provisions of this Ordinance, retains possession . . . shall be entitled to give up possession . . . only on giving such notice as would have been required under the original contract of tenancy . . .”.

But the board found as a fact, upon evidence, that the respondent did not “retain possession”, either under the provisions of the Ordinance or at all. They found that he forgot to return the keys and that the appellant acquiesced in this but refused to accept them when they were later tendered. On the analogous question of what are the circumstances in which a tenant is liable for holding over after the tenancy I would quote Woodfall on Landlord and Tenant (25th Edn.), page 1111:

“Where a tenancy . . . has been determined by a regular notice to quit, the mere accidental detention of the key by the tenant (who has quitted the premises and removed his goods) for two days beyond the expiration of the term, does not amount to any evidence of use and occupation, so as to make him liable for another quarter (*Gray v. Bompas* (1862), 11 C.B. (N.S.) 520).”

That case was remarkably similar to this on its facts, and the Court of Common Pleas reversed the judgment of the country court judge, holding that the keeping of the key was not “evidence of an occupation”. I regard the case as an authority which I propose to follow.

I cannot find fault with the board; there was ample evidence that the respondent did not retain possession after the end of March, even though he retained the keys. It is not necessary to answer a second question, whether even if the respondent had “retained possession” he had done so “under the provisions of this Ordinance”. In my opinion the board’s findings as to notice to quite were supported by evidence and the board properly applied the law.

The appeal is therefore dismissed.

Appeal dismissed.

For the appellant:

MS Chaddah

MS Chaddah, Dar-es-Salaam

The respondent did not appear and was not represented.

Venturis v The Attorney-General of Tanganyika
[1959] 1 EA 289 (CAD)

Division: Court of Appeal at Dar-Es-Salaam
Date of judgment: 23 April 1959
Case Number: 17/1958
Before: Forbes V-P, Gould and Windham JJA
Sourced by: LawAfrica
Appeal from: H.M. High Court of Tanganyika–Mahon, J

[1] Shipping – Carriage by sea – Negligence – Bill of lading for goods issued by company – Identity of ship owners not explicitly stated on bill of lading – Bill signed by ship’s captain – Captain a part owner – Goods lost at sea – Whether captain as part owner liable for negligence – Carriage of Goods by Sea Ordinance (Cap. 164), Schedule, art. IV, r. 2 (a) (T.).

Editor’s Summary

The respondent sued the appellant for the value of government stores which, whilst being carried by the M.S. “Vera”, were lost through the negligent navigation of the vessel by the appellant as master. The trial judge held that the appellant had been negligent and that although he was part owner of the vessel, he was not entitled to the immunity conferred by r. 2 (a) of art. IV of the Schedule to the Carriage of Goods by Sea Ordinance. On appeal it was conceded that the appellant was negligent and the only point for decision was whether the appellant was, as part owner, a party to the bill of lading which had been issued by a company in its own name.

Held –

- (i) the appellant having signed the bill of lading simply as “captain” had signed as an agent.
- (ii) where there is a charter of which the shipper is ignorant, the shipper is entitled to regard the owners as the persons contracting to carry the goods.
- (iii) the terms of the bill of lading which distinguished between “the company” and “the owners” were consistent with the company being managers or agents and, taken in conjunction with the uncontroverted evidence that there were three owners, of whom the company was one and the appellant another, and the signature on the bill by the appellant as “captain”, without more, led to a *prima facie* inference that the appellant was signing for the owners.
- (iv) in the circumstances the appellant as part owner was a party to the contract of carriage and entitled to the protection of rule 2 (a) of art. IV of the Schedule to the Carriage of Goods by Sea Ordinance.

Appeal allowed.

Cases referred to in judgment

- (1) *Humble v. Hunter* (1848), 17 L.J. Q.B. 350.
- (2) *Venkatasubbiah Chetty v. Govindarajulu Naidu* (1908), 31 Mad. 45.
- (3) *Collins v. Associated Greyhound Racecourses*, [1930] 1 Ch. 1.
- (4) *Associated Portland Cement Manufacturers (1910) Ltd. v. Ashton*, [1915] 2 K.B. 1.
- (5) *Sandeman v. Scurr* (1866), L.R. 2 Q.B. 86.
- (6) *Paterson, Zochonis v. Elder Dempster*, [1924] A.C. 522.
- (7) *Wilson v. Darling Island Stevedoring and Lighterage Co. Ltd.*, 95 C.L.R. 43.
- (8) *Westport Coal Co. v. McPhail* (1898), 67 L.J. Q.B. 674.

(9) *Adler v. Dickson*, [1954] 3 All E.R. 21; [1954] 3 All E.R. 397; [1955] 1 Q.B. 158.

(10) *Gosse Millard v. Canadian Government Merchant Marine Ltd.*, [1928] 1 K.B. 717.

April 23. The following judgments were read:

Judgment

Gould JA: This is an appeal from a judgment of the High Court of Tanganyika in an action brought by the Attorney-General of Tanganyika on behalf of the Government against the defendant, master of the motor schooner “Vera”. The plaintiff (respondent) claimed in the action and was by the judgment awarded the sum of Shs. 19,029/37 as the value of Government stores which were being carried on the said vessel and which were found to have been lost as the result of the negligence of the defendant (appellant) in the navigation thereof. In the appeal before this court no objection has been taken to the finding of the learned judge in the court below that the appellant was guilty of negligence as a result of which the stores were lost, and the only question for our decision is whether the judge was right in holding that the appellant, who, as well as being the master of the said vessel was a part owner, was not entitled to the benefit of the immunity provided by r. 2 (a) of art. IV in the Schedule to the Carriage of Goods by Sea Ordinance (Cap. 164) to which I will revert later.

Apart from the question of negligence, to which it is unnecessary to refer again, the relevant facts are few, but, unfortunately, they are not all perfectly clear. There is no challenge to the fact that the appellant was master and part owner of the m.s. “Vera”, and a shipping broker called by him as a witness said that a company called the Coastal Freights Co. Ltd. owned 51 per cent., one John Sartis 24½ per cent. and the appellant 24½ per cent. of that and other vessels. He described the Coastal Freights Co. Ltd. as the “managing agents” giving as his reason that they employed him as a broker to find cargo. He was in the habit of supervising the loading and off-loading of cargo in Dar-es-Salaam and of collecting the charges, which he paid into the bank account of the Coastal Freights Co. Ltd. after deducting his own expenses and commission. It is not stated whether the broker acted in the case of the particular goods which were the subject matter of the action but it does not appear to be material; the Government Stores Officer concerned said that he arranged for the stores to be shipped in the m.s. “Vera” and was not aware that there was any other owner besides the Coastal Freights Co. Ltd. He received from that company a document (it was not disputed by counsel that it was a bill of lading) which it is necessary to set out in full:

“OUTWARD

Coastal Freights Co. Ltd.

Coastal Freights Carriers

Motor Schooner “Vera” D.133.

CASH

Received from *Chief Storekeeper i/o P.W.D. Wharf* for Carriage from *D’Salaam to Lindi*

Subject to the terms and conditions of the Carriage by Sea Ord. No. 6 of 1927.

<i>Marks</i>	<i>No. of Packages</i>	<i>Description</i>	<i>C ft.</i>	<i>Weight</i>	<i>Per</i>	<i>Shs. Cts.</i>	<i>Remarks Serial No.</i>
	7	Pkgs. Sports & Acms	33' 7?		96/- ton	50.60	214/54
	11	" Merchandise	27' 11?		118/- "	33.50	253/54
				Ibs.			P. 1
	56	"		11681	60/- "	512.85	" P. 1
	6	"	32' 4?	Ibs.	48/- "	38.80	" P. 2
	3	"		628	60/- "	16.82	" P. 2
	14	"	34' 1?	Ibs.	48/- "	40.40	" P. 3
	7	"		1624	60/- "	43.63	" P. 3
	62	"	157' 7?		48/- "	186.70	" P. 4
	166					753.80	

Notes:

- (a) The packages described in this receipt are accepted for transport entirely at shippers risk.
- (b) The owners accept no liability whatsoever for loss or damage and/or as to contents, value or weight thereof.
- (c) Delivery shall always be construed to have been made ex-ship at port of destination and responsibility thereon shall be at shippers risk.
- (d) No claim for any short landed goods will be entertained unless made in writing within seven days of discharge, supported with custom certificate and the owners expressly limit their liability in respect of any short landed package to Shs. 200/- (two hundred shillings).
- (e) The company reserves the right to ship the above goods in any of the company's vessels and subject to space being available.

Total Agreed Freights Due Shs. 753/80

Less 37/69

716/11

9.7.54 Sgd.

? Captain"

The signature appearing in the original of this document over the word “Captain” is admitted to be that of the appellant.

In para. 3 of the plaint it was alleged that the stores were being carried on board the m.s. “Vera”,
“under the terms of the contract of carriage between the Government and Coastal Freights Limited”,

and the written statement of defence in its original form admitted the whole of para. 3. Before evidence was heard however the court gave leave (without objection from counsel for the respondent) to amend the written statement of defence but ordered that costs to that date should be paid by the appellant in any event. In its amended form para. 3 of the written statement of defence reads:

“3. With reference to para. 3 of the plaint the defendant admits that on or about July 13, 1954, the vessel ‘m.v. Vera’ was travelling from Mikindani to Lindi in the southern province carrying *inter alia*, certain

stores, the property of the Government; but denies that the contract of carriage was between the Government and Coastal Freights Co. Limited and states that the said contract of carriage was between the Government and Coastal Freights Co. Limited as agents of the owners of the m.v. 'Vera' of which the defendant was at the relevant time captain and part owner."

This of course put in issue whether the appellant was a party to the contract of carriage, and therefore, as such, entitled to the benefit of any exceptions; it was also in issue on the pleadings whether as part owner he was in any event liable. At the hearing formal issues were framed by agreement as follows:

- "(i) Was the defendant negligent as alleged.
- (ii) If yes, is defendant liable to the plaintiff.
- (iii) If yes, to what damages, if any, is the plaintiff entitled."

The second issue is obviously framed in very wide terms and covers all matters put in issue by the pleadings except the question of negligence. Before proceeding to discuss the learned judge's finding of fact upon the one real factual issue (whether the appellant was a party to the contract of carriage or not) it is expedient to set out the legislation relied upon as conferring exemption from liability for the consequences of negligence.

Section 2 and s. 4 of the Carriage of Goods by Sea Ordinance are in the following terms:

- "2. Subject to the provisions of this Ordinance, the rules set out in the Schedule hereto shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in the territory to any other port whether in or outside the territory.
- "4. Every bill of lading, or similar document of title, issued in the territory which contains or is evidence of any contract to which the rules apply shall contain an express statement that it is to have effect subject to the provisions of the said rules as applied by this Ordinance."

Article 1 of the rules assigns the following meaning to the word "carrier":

" 'Carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper."

It is sufficient to quote only the first portion of the meaning assigned to the phrase "contract of carriage" by the same article:

" 'Contract of carriage' applies only to contracts of carriage covered by a bill of lading or any similar document of title . . ."

The second article is as follows:

"Article II.

Risks.

"Subject to the provisions of art. VI, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care, and discharge, of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth."

Rule 2 (a) of art. IV is as follows:

- "2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:
 - (a) Act, neglect, or default of the master, mariner, pilot, or the

servants of the carrier in the navigation or in the management of the ship”;

As the immunity conferred by this rule flows through art. II which refers to “every contract of carriage of goods by sea . . .” and as by art. I the term “contract of carriage” is limited to those covered by a bill of lading or any similar document of title, it is necessary to mention that it was not disputed before us that the document evidencing the contract of carriage in this case was in conformity with that description. Neither was it in dispute that the negligence of the appellant was an

“Act, neglect, or default of the master . . . in the navigation or in the management of the ship;”.

It was not conceded, or found by the learned judge, to have been what is called “wilful” negligence.

In his judgment the learned judge dealt rather briefly with the question whether or not the appellant was a party to the contract of carriage. If he was, of course, it is quite clear that he was exempt from any liability arising out of his negligence either in contract or in tort, by virtue of r. 2 (a) of art. IV above quoted. The learned judge, having set out the amended para. 3 of the written statement of defence continued:

“This averment has not in my opinion been established. A bill of lading serves three purposes:

- (a) It is a receipt from the shipowner for the goods shipped,
- (b) It is evidence of the contract of affreightment and contains the conditions of such contract, and
- (c) It is a document of title to the goods mentioned in it.

“The bill of lading in this case has been put in and marked exhibit ‘A’. It is clearly a receipt for the goods mentioned in it, evidence of the contract and the conditions therein and a document of title to the goods. The signature on it is illegible but it is conceded that it was signed by the defendant. This document is clearly evidence of a contract between the Government and Coastal Freights Co. Ltd. There is nothing on it to suggest that the company were contracting as agents of the owners of the m.v. ‘Vera’.”

With great respect I must differ from the finding that there is nothing in the bill of lading to suggest that the Coastal Freights Co. Ltd. were contracting as agents for the owners; that matter is however to my mind only a part of the real point which is, upon whose behalf did the master make the contract, for he is the only signatory. On the first of these two matters I think there is a strong suggestion in the use of the word “owners” in Notes (b) and (d) contrasted with Note (e), in which the word “company” is used, that the owners and the company are not identical. It is the owners whose liability it is sought to limit—it is the company who reserves the right to ship in another vessel, which is compatible with its being in the position of agent for the owners. I do not think that the use of the possessive in the phrase “the company’s vessels” detracts from this argument, as in the context, the company could be equally well claiming agency as ownership.

It is necessary to digress briefly to refer to matters outside the actual document. There was before the learned judge unchallenged evidence that the Coastal Freights Co. Ltd. was only one of three owners of the m.s. “Vera”, but he makes no reference to this fact in considering whether the appellant was a party to the contract of carriage. Possibly he took the view that it was inadmissible

for the purpose, for during the hearing he excluded as irrelevant the evidence of a Mr. P. T. Austin a representative of the auditors of the Coastal Freights Co. Ltd., whom counsel for the appellant desired to call to show (*inter alia*) that there was a pooling system for the earnings and expenditure of a number of ships under which each owner received his share of the profits. This evidence was excluded after objection to it had been taken by counsel for the respondent. The notes of evidence contain no reference to the ground upon which objection was taken, but before this court the case of *Humble v. Hunter* (1) (1848), 17 L.J.Q.B. 350 was quoted as an authority for saying that parol evidence cannot be relied upon to show who are the parties to a bill of lading. The case does not of course support any such sweeping proposition, but before proceeding to consider it, it is necessary to observe that the legal position in Tanganyika is governed by the Indian Evidence Act and the Indian Contract Act as applied by the Indian Acts (Application) Ordinance (Cap. 2). Neither Act was cited to us by counsel, presumably as they considered that there was no material difference between English and Indian law so far as the matters in dispute are concerned. I would agree that this is the case, and in the circumstances deem it sufficient to refer only to the case of *Venkatasubbiah Chetty v. Govindarajulu Naidu* (2) (1908), 31 Mad. 45 in which extrinsic evidence was held admissible to show that the party liable on a contract, contracted for himself and as the agent of his partners. In the judgment at p. 46 and p. 47 is the following passage:

“In Roscoe’s Nisi Prius Evidence the law is stated thus:

“ ‘In an action on a written contract between plaintiff and B, oral evidence is admissible, on behalf of the plaintiff, to show that the contract was in fact, though not in form, made by B, as agent of the defendant; for the evidence tends not to discharge B, but to charge the dormant principal; *Wilson v. Hart*, and it is admissible although B named his principal at the time he entered into the contract (*Calder v. Dobell*).’

“In our opinion there is nothing in s. 91 or s. 92 of the Indian Evidence Act which is inconsistent with these decisions, since a question as to who the contracting parties are is not in our opinion one of the ‘terms of a contract’ within the meaning of these sections. We may further remark that none of the illustrations to the sections deal with this question. It would seem therefore it was not the intention of the legislature to depart from what would appear to be the settled rule under the English law.”

Section 91 and s. 92 of the Indian Evidence Act, referred to above, are those which deal generally with the question of the admissibility of parol evidence for the purpose of construing written instruments.

I return now to the case of *Humble v. Hunter* (1). The facts were that a charter party had been entered into by one C. J. Humble who was described in the charter party as “owner of the good ship or vessel, called the Ann”, but who was in fact not the owner but her son. It was held that it was not competent to call parol evidence to show that C. J. Humble had contracted as agent for the real owner. This case is merely an example of the rule, illustrated also by the case of *Collins v. Associated Greyhound Racecourses* (3), [1930] 1 Ch. 1, that where an agent has contracted in terms which indicate that he is the real and only principal the right of the undisclosed principal to intervene and his liability to be sued on the contract are excluded. The pith of the decision in *Humble v. Hunter* (1), which is referred to at p. 717 of *The Indian Contract and Specific Relief Acts by Pollock and Mulla* (8th Edn.), is contained in the following extract from the judgment of Pattenon, J., at p. 352 of the report:

“This question turns entirely on the terms of the written contract. If

it had merely named C. J. Humble as the contracting party without saying more, it would have been ambiguous, and evidence to explain it would have been receivable. But he calls himself “owner”, and thereby binds himself as principal: . . . The general principle is quite clear and untouched by our decision, that where there is nothing to define the character of the contracting party, he may be shown to be agent merely so as to cast the right of suing on the real principal.”

As is pointed out in *Anson on Contract* (20th Edn.) p. 413 the word “owner” is not an equivocal description and therefore to prove that another person was the real owner would have contradicted the terms of the contract.

No such consideration is applicable to the present case. The bill of lading was signed by the appellant over the description “Captain” and nothing more. It was not a contention of the respondent (and of course could not be) that the captain was personally liable on the contract of carriage; it was acknowledged that he was an agent and the question was for whom. The heading of the bill of lading “Coastal Freights Co. Ltd.” with the descriptive words “Coastal Freights Carriers”, leaves it completely open whether that company was owner, charterer or agent. Either on the principle exemplified by the case of *Venkatasubbiah Chetty v. Govindarajulu Naidu* (2), or under s. 96 of the Indian Evidence Act to elucidate the latent ambiguity in the word “owners” as used in the bill of lading, parol evidence would certainly be admissible to prove circumstances showing on whose behalf the master had contracted; in my view the learned judge was fully entitled to consider the evidence of the ownership of the vessel and was wrong to exclude evidence designed to indicate the basis upon which the vessel was operated: if the matter turned on this, the exclusion of evidence having been made a ground of appeal, I think that the appellant would be entitled to a new trial; upon the view which I take however this is not necessary.

I think that the contract of carriage in the present case must be considered with regard to the evidence given in the court below, secondly with regard to the form of the bill of lading itself and thirdly in relation to the general law affecting bills of lading signed by the masters of ships. In the first place there was the uncontroverted evidence that there were three owners of the m.s. “Vera”, of whom the Coastal Freights Co. Ltd. was one and the appellant a second. The Government Stores Officer, acting on behalf of the shipper of the goods was unaware that any other owner than the Coastal Freights Co. Ltd. existed and considered himself to be contracting with them. It follows that no question of any charter was in his mind. Lastly, on the question of evidence, the shipping broker described the Coastal Freights Co. Ltd. as “managing agents”. He would certainly have knowledge that they managed the ship, though he might not know in precisely what capacity. That such management by one of a number of co-owners is not unusual is indicated by the following passage from *Carver on the Carriage of Goods by Sea* (9th Edn.) (hereinafter referred to as “Carver”) at p. 23:

“The business of a ship having several owners is ordinarily conducted by a managing owner, or a ship’s husband, appointed by the owners for the purpose. He bears their authority, and acts as their general agent to do all the ordinary business of the ship. Thus, usually, he is empowered to make any such contracts for carrying goods in the ship, or for letting her, as are consistent with her ordinary employment; and to do what else may be ‘necessary to enable the ship to prosecute her voyage and earn freight.’ And the contracts so made are generally binding on all the part owners personally.”

It is not in the least unlikely therefore, and in fact it is extremely probable, that the Coastal Freights Co. Ltd. managed the vessel on behalf of itself and the other two owners, and contracts which it arranged would be binding upon the other owners. If so they would of course be parties and entitled to the benefit of any exceptions.

This tentative view is strengthened by examination of the bill of lading. The only specific references to the Coastal Freights Co. Ltd. are the heading and note (e), both of which, as has already been pointed out, are consistent with management or agency, and by contrast give the word “owners” in notes (b) and (d) a different or (having regard to the evidence) a wider meaning. Then there is the significance of the fact that the bill of lading was signed by the appellant as “captain” without more, which leads to a *prima facie* inference that he was signing on behalf of the owners of the vessel. The following passages from the judgment of Kennedy, L.J., in *Associated Portland Cement Manufacturers (1910) Ltd. v. Ashton* (4), [1915] 2 K.B. 1, support this proposition:

At p. 20:

“With regard to a master, there is *prima facie*, at any rate, the resumption that he is acting, not for himself, but as employed by those who are in fact the owners of the ship.”

At p. 24:

“... and you have the inference, which Bowen, J., says is the true legal inference in the absence of anything to the contrary, or a presumption at any rate, that he was employed to navigate, and those who navigate a ship are employed by those who are the owners of the vessel to act as masters.”

The matter of the authority of a shipmaster is referred to in *The Indian Contract and Specific Relief Acts* by Pollock and Mulla (8th Edn.) at pp. 633 to 635, in the commentary upon s. 188 of the Indian Contract Act; virtually all of the cases quoted in the textbook are decisions of English courts and there appears to be no divergence between the law on this topic under that Act and under English law.

If there was any question of a charter under which the appellant was to sign bills of lading on behalf of the charterers only, one would have expected to find some indication of it in the bill of lading. Where there is in fact a charter but where (as here) the shipper is in ignorance of it, the law is stated in Carver to be well established; the shipper is entitled to regard the owner as the person contracting to carry the goods and may sue him for a breach of the contract. (see p. 286). Again, in such a case, it would appear plain that the owner would have the benefit of any exceptions. Among the authorities relied upon by the learned editor is *Sandeman v. Scurr* (5) (1866), L.R. 2 Q.B. 86, which was a case of a voyage charter, pursuant to which the master signed bills of lading. At p. 95 and p. 96, in giving the judgment of the court Cockburn, C.J., said:

“It is unnecessary to decide whether the charterer would or would not have been liable, if an action had under the circumstances been brought against him. Our judgment proceeds on a ground, wholly irrespective of the question of the charterer’s liability, and not inconsistent with it, namely, that the plaintiffs, having delivered their goods to be carried in ignorance of the vessel being chartered, and having dealt with the master as clothed with the ordinary authority of a master to receive goods and give bills of lading on behalf of his owners, are entitled to look to the owners as responsible for the safe carriage of the goods.”

At p. 96 and p. 97 is the following passage:

“We think that so long as the relation of owner and master continues, the latter, as regards parties who ship goods in ignorance of any arrangement whereby the authority ordinarily incidental to that relation is affected, must be taken to have authority to bind his owner by giving bills of lading. We proceed on the well known principle that, where a party allows another to appear before the world as his agent in any given capacity, he must be liable to any party who contracts with such apparent agent in a matter within the scope of such agency. The master of a vessel has by law authority to sign bills of lading on behalf of his owners. A person shipping goods on board a vessel unaware that the vessel has been chartered to another, is warranted in assuming that the master is acting by virtue of his ordinary authority, and therefore acting for his owners in signing bills of lading.”

The learned editor of Carver, having considered a number of authorities not directly in point here, comes to the following general conclusion at p. 290:

“It would seem, then, that the shipowner is a party to the bill of lading contract; and, that being so, he must be entitled, on his side, to treat the contract of the shipper as made with himself as principal, and to sue for breaches of it. This is, in fact, recognised by allowing him to make claims under the bills of lading against consignees; for example, for demurrage and for freight, even though the bills of lading refer to a charter-party.

“In effect, then, the contract is in general with the shipowner; and the master should be regarded as having made it on his behalf, and not on behalf of the charterer. And this is the more consistent view. For if the master is agent for the charterer in giving the bills of lading, his agency ceases at that point; in carrying out the contract he clearly acts as servant of the owner.”

I will refer later to the case of *Paterson, Zochonis v. Elder Dempster* (6), [1924] A.C. 522 in which as Carver says (at p. 294) “in special circumstances” the contract may be with the charterers, but I rely meanwhile on the foregoing general principles as matters which should have been considered by the learned trial judge in deciding the question whether the appellant, as part owner, was a party to the contract of carriage. Upon the facts as I see them (and as no question of the credibility of witnesses arises this court is not at a disadvantage in assessing the evidence) I think with respect, and would so hold, that the learned judge came to a wrong decision; on the facts as to ownership of the vessel, its management by the Coastal Freights Co. Ltd., the form of the bill of lading particularly with regard to its use of the words “owners” and “company” and above all its signature by the appellant as “captain” simpliciter there is in my opinion a substantial preponderance of probability that the contract of carriage was made by the captain on behalf of the owners. No one has suggested that there is any question of a charter and, as has been pointed out above, if one existed, the respondent being ignorant of it, the owners would as a general rule remain bound. By pleading and insisting that the contract was made with the Coastal Freights Co. Ltd. only, the respondent may be said to imply that the appellant must have entered into some demise or other arrangement with that company whereby his rights as owner were suspended for the time being. If that is the suggestion (to my mind, one unlikely to have any basis in fact, both on the evidence, and because of the comparative rarity of such charters, a rarity referred to in the judgment of Fullagar, J., in the High Court of Australia in *Wilson v. Darling Island Stevedoring and Lighterage Co. Ltd.* (7), 95 C.L.R. 43 at 78) I think, in view

of the weight of the evidence which was in fact before the court, the onus had shifted to the respondent to prove it.

On the basis that the appellant, as part owner, was a party to the contract of carriage there can be no doubt that he is entitled to the protection of r. 2 (a) of art. IV. In argument, counsel for the appellant relied on the case of *Westport Coal Co. v. McPhail* (8) (1898), 67 L.J. Q.B. 674. In that case also the master was a part owner and goods were lost by his negligence. The bill of lading was signed “A. McPhail, master” and there was an exception of “the neglect and default of pilot, master, or crew in navigation of the ship”. In the judgment of the court it was accepted that the relationship of owners and captain may exist between part owners and one of their number, and also as being clear law that a party is not debarred from contracting against liability for his own negligence. The court considered also that the captain could rely on the exception whether he were sued as captain or owner. The final conclusion of the court is summarised in the following passage at p. 677:

“The plain common sense of the matter seems to be that the owners, including the defendant, bargained to be excused from the consequence of the negligence within the sphere of his duty of the person—whoever he might be—who should be properly charged with the command of the ship. That person was the defendant, and the loss has arisen by reason of the very negligence which they provided against—namely, negligence in the navigation of the ship. This construction involves no addition of words to those in the bill of lading, which, as they stand, are sufficient and unambiguous.”

Counsel for the respondent sought to distinguish this case by pointing to the statement in the judgment that the master, McPhail, had signed the bill of lading on behalf of himself and his co-owners. This was obviously a finding of fact or an admitted fact, for as far as the actual document is concerned it is clear that he signed it only “A. McPhail, master”, which is exactly parallel to the position in the present case. On the basis of my finding that the appellant acted on behalf of the owners there is no distinction between the two cases in this respect.

I have so far considered the position of the appellant as a party to the bill of lading by reason of his part ownership of the vessel. There is another aspect of the law which may be relevant quite apart from the position of the appellant as part owner. It is to be gathered from the following passage from Carver at p. 34:

“Frequently the master contracts for the ship’s employment in his own name. He signs bills of lading and charter-parties as master, not expressly as agent for the owners. Where that is so, he makes himself personally liable upon the contract; and though the freighters may enforce the contract against the owners, his principals, they are not obliged to do so, but may proceed against him. And, on the other hand, the master may himself enforce the terms of the contract which he has made.”

It is at least arguable that the present case falls within this statement of the law (and the same question would be equally arguable under s. 230 of the Indian Contract Act); if it does the appellant would in any event be a party to the bill of lading and entitled to the benefit of exceptions. In view of my opinion already expressed that the appellant is a party in his capacity as part owner, I do not consider it necessary to express any concluded opinion on this aspect of the matter.

As will be gathered from the earlier part of this judgment I see no reason whatever to assume that any question of a charter of the vessel need be considered in this case. Nevertheless, as the full position had not been disclosed

by reason of the exclusion of Mr. Austin's evidence, I mentioned the view expressed in Carver that usually where a charter is in existence but unknown to the shipper the owner is liable on the contract of carriage. It is necessary therefore to make brief reference to the case of *Paterson, Zochonis v. Elder Dempster* (6) in which in the particular circumstances, a bill of lading being signed by the master as "agent" and the vessel being under time charter, it was held in the court of first instance and not challenged on appeal, that the shipper's contract was with the charterers and not the owners. It is not however a decision which could avail the respondent in any circumstances, as it was held that the owners were nevertheless entitled to avail themselves of the exceptions in the bill of lading. It is unnecessary for me to discuss the ratio decidendi of the case, which was considered in detail in *Adler v. Dickson* (9), [1955] 1 Q.B. 158 and by the High Court of Australia in *Wilson v. Darling Island Stevedoring and Lighterage Co. Ltd.* (7). In the latter (in which the majority of the court were concerned to preserve, or it may be permissible in the context to say, to salvage, certain common law principles which appeared to be endangered by a threatened extension of the effect of the decision) Fullagar, J., with whom Dixon, C.J., agreed, considered that the majority of the House of Lords had based themselves upon a finding that there was a bailment to the owner upon terms including the exceptions in the bill of lading. Whatever the basis, however, the owners were held to be protected and the case does not assist the respondent.

There is a further argument which might be advanced against the case for the respondent. The immunities conferred by r. 1 and r. 2 of art. IV are expressed to extend to both the carrier and the ship. The definition of "carrier" is set out above and it includes the owner when he has entered into a contract of carriage with a shipper. There was no necessity, therefore, for his protection as party to such a contract, to include the ship in the category of those entitled to the immunity. The word "ship" is defined as "any vessel used for carriage of goods by sea". It would seem then that the intention was to protect the ship from an action in rem (a view which receives support from a dictum of Greer, L.J., in his judgment in *Gosse Millard v. Canadian Government Merchant Marine Ltd.* (10), [1928] 1 K.B. 717 at 749) and there is no limitation of such protection to cases in which the owner is the carrier. It would seem illogical, in the context, to read the word "ship" as being entirely limited by the literal meaning of its definition, as the owner is, ultimately, the person who has to meet the claim in an action in rem if he would retain his ship; the result would be that it would be open to a shipper, who contracted with a charterer for the carriage of his goods, to sue the owner personally for the negligence of (say) the master though he could not proceed against the ship. Why should the legislature protect the ship in circumstances where the immunities apply, and not the owner? Carver, and Scrutton on Charter-Parties and Bills of Lading (16th Edn.) both appear to favour giving the words used in the rules a wider meaning: Carver at p. 192:

" 'The carrier nor the ship.' The exemption may have been extended to the ship in order to make it clear that it was intended to benefit the shipowners even though they were not parties to the contract of carriage, and to make it clear that the exemptions applied in actions in rem. The exemptions in r. 2 and r. 5 of art. IV are also extended in this way."

Scrutton at p. 481 and p. 482:

" 'Neither the carrier nor the ship'. This phrase is used in para. 1 and 'the carrier or other person' in para. 2 of this rule. Probably the two phrases bear the same meaning, and extend the protection to the case of an action

in rem and to a shipowner if sued in tort in a case where the bill of lading is issued by a charterer and not by him.”

There appears to be no direct authority on this matter, but if these opinions are correct the appellant, as part owner, would be protected whether or not he was a party to the contract of carriage. The matter was not argued before us and I need express no final opinion on it.

For the foregoing reasons I would allow the appeal with costs, and set aside the judgment and decree in the court below. The action should stand dismissed but the order for costs in the court below made by the learned judge on November 18, 1957, should remain. Costs in the court below of and subsequent to that date should be the appellant’s.

Forbes V-P: I agree and have nothing to add. There will be an order in the terms proposed by the learned Justice of Appeal.

Windham JA: I also agree.

Appeal allowed.

For the appellant:

GN Houry QC and L Horne

George N Houry & Co, Dar-es-Salaam

For the respondent:

AE Taylor (Crown Counsel, Tanganyika)

The Attorney-General, Tanganyika

Guaranty Company of East Africa Ltd v S M Shah [1959] 1 EA 300 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	1 May 1959
Case Number:	33/1958
Before:	Forbes V-P, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya—Pelly Murphy, J

[1] *Moneylender – Loan to a firm – Memorandum signed by a partner – Memorandum not signed by retired partner who had not given notice of his retirement – Sufficiency of memorandum to render retired partner liable – Moneylenders Ordinance (Cap. 307), s. 11 (1) (K.) – Moneylenders Act, 1927, s. 6 (1) – Partnership Ordinance (Cap. 284), s. 7 (K.).*

[2] Moneylender – Contract for repayment unenforceable – Whether moneylender can recover loan as money had and received – Indian Contract Act, 1872, s. 2 (g), s. 2 (h) and s. 65.

Editor's Summary

The appellants, who were licensed moneylenders, lent Shs. 25,000/- to a firm, under a written contract dated November 26, 1956. This contract was signed by a partner in the borrowing firm, to whom only a copy was delivered. The respondent had been a partner in the firm, but had published in the official *Gazette*, dated December 11, 1956, a notice dated November 30, 1956, that he had retired from the firm with effect from May 31, 1956. The trial judge, having found that the appellants had advanced the money to the firm in the belief that the respondent was a partner thereof and since it was conceded (i) that prior to the date of the contract the appellants had no notice that the respondent had withdrawn from the partnership and (ii) that the respondent had in fact held himself out as a partner, ruled that the case must proceed on

the basis that the respondent at the relevant time was a partner in the firm. The trial judge further held that s. 11 (1) of the Moneylenders Ordinance had not been complied with, that the contract was unenforceable against the respondent, and accordingly the money advanced could not be recovered as money had and received. The main ground of appeal was that the trial judge was wrong in holding that before a partner can be held liable on a money-lending transaction made with his firm, he must personally sign the memorandum and that a copy of the memorandum must be delivered to him personally.

Held –

- (i) s. 11 (1) of the Moneylenders Ordinance requires the personal signature of the borrower and, since the partners in a firm are individuals, fully able to sign personally, the provisions of the section apply to each of them.
- (ii) failure to comply with s. 11 (1) of the Moneylenders Ordinance rendered the contract to repay the money unenforceable against the respondent.
- (iii) to grant relief under s. 65 of the Indian Contract Act would be to enforce the contract in whole or in part in direct contravention of the Moneylenders Ordinance.

Appeal dismissed.

Cases referred to in judgment

- (1) *Re British Games Ltd.*, [1938] 1 All E.R. 230.
- (2) *Grahame (John W.) (English Financiers) Ltd. v. Ingram and Others*, [1955] 2 All E.R. 320.
- (3) *Misser (J. P.) v. Bhadai Das and Others* (1953), A.I.R. Pat. 259.
- (4) *Naranbhai Ichharam v. Lobo* (1942), 9 E.A.C.A. 16.
- (5) *Kasumu v. Baba-Egbe*, [1956] 3 All E.R. 266.
- (6) *Lodge v. National Union Investment Co. Ltd.*, [1907] 1 Ch. 300.

May 1. The following judgments were read:

Judgment

Gould JA: This is an appeal from a judgment of the Supreme Court of Kenya dismissing a claim by the appellant company against the respondent for money lent and alternatively for money had and received for the use of the appellant.

The facts are not in dispute and are to be gathered from the following passages from the judgment of the learned judge in the court below:

“The plaintiff company are licensed money lenders. On November 26, 1956, they entered into a written contract with Ruiru General Stores whereby the latter acknowledged a loan of Shs. 25,000/- repayable on February 27, 1957, together with interest and stamp duty. This contract was signed ‘Ruiru’ General Stores. Sojpal Punja Shah–Partner.’ A copy of the contract was delivered to Sojpal Punja Shah only.

“The defendant, Somchand Manekchand Shah, used to be a partner in the firm known as Ruiru General Stores but, by notice dated November 30, 1956, and published in the official *Gazette* of December 11, 1956, he

intimated that he had retired from the partnership with effect from May 31, 1956.”

.....

“The only evidence given was that of Manubhai Ishwerbhai Patel, a director of the plaintiff company. On that evidence, I have no hesitation

in finding that the plaintiffs advanced the money to the firm in the belief that the defendant was a partner thereof. But it has not been proved that they would not have advanced the money had they believed otherwise. In my opinion, however, the question of the plaintiffs' beliefs as to this is unimportant, because it was conceded (i) that, prior to the date of the contract, the plaintiffs had not had notice that the defendant had withdrawn from the partnership and (ii) that the defendant had in fact held himself out as a partner. That being so, it seems to me that the determination of this case must proceed on the basis that the defendant was, at the relevant time, a partner in the firm."

The first question in the action was whether the provisions of s. 11 (1) of the Moneylenders Ordinance (Cap. 307) had been sufficiently complied with; if not the contract for repayment of the loan was unenforceable. The second question was whether, if, by reason of non-compliance with s. 11 (1) the contract was unenforceable, the actual sum advanced could be recovered by the appellant (in the terms of the plaint) "as money had and received by the firm for the use of the plaintiff". The learned judge found that s. 11 (1) had not been complied with, that the contract was therefore unenforceable against the respondent, and that the money advanced could not be recovered as money had and received.

Section 11 (1) of the Moneylenders Ordinance is in the following terms:

- "11. (1) No contract for the repayment by a borrower of money lent to him or to any agent on his behalf by a money-lender after the commencement of this Ordinance or for the payment by him of interest on money so lent, and no security given by the borrower or by any such agent as aforesaid in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract; and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not signed by the borrower before the money was lent or before the security was given, as the case may be."

It was common ground that the memorandum of the contract was not signed by the respondent and that no copy thereof had been delivered or sent to him, unless delivery of the copy to Sojpal Punja Shah should be regarded as delivery to the respondent. The grounds of appeal as set out in the memorandum and relied upon by counsel for the appellant company before this court were:

- "1. That the learned judge was wrong in law in holding that before a partner can be held liable on a moneylending loan made to the partnership he had to sign personally a note or memorandum of the contract.
- "2. That the learned judge was wrong in law in holding that before a partner could be held liable on such a loan it was necessary that a copy of the contract be delivered to him personally.
- "3. Alternatively, the learned judge was wrong in law in holding that the plaintiff was not entitled to relief under s. 65 of the Indian Contract Act."

On the first ground counsel sought to draw an analogy from the case of *Re British Games Ltd.* (1), [1938] 1 All E.R. 230. In that case it was found necessary to consider the application of s. 6 (1) of the Moneylenders Act, 1927 (the terms of which are identical with those of s. 11 (1) of the Moneylenders Ordinance) and in particular of the words "signed personally by the borrower", to the case of a limited company. In the judgment at p. 232 and p. 233 the gist of the court's finding is contained in the following passage:

"It is argued on behalf of the company that the provisions of that section are not complied with unless the memorandum has been sealed by the

borrowing company. On the other hand, it is argued that the provisions of the section are sufficiently satisfied if the memorandum is signed by the proper officers of the borrowing company, persons duly authorised thereunto. It appears to me that for this purpose I must have regard to the provisions of the Companies Act, 1929. Section 29 (1) of that Act (which was passed two years after the Moneylenders Act, 1927, and which itself embodied the language of the earlier Companies Act, 1908, s. 76) provided, in relation to the form of contracts of a limited company incorporated under the Act, that:

‘Contracts on behalf of a company may be made as follows:

- (a) A contract which if made between private persons would be by law required to be in writing, and if made according to English law to be under seal, may be made on behalf of the company in writing under the common seal of the company.’

“That sub-section does not apply to this case, because there is nothing which prescribes that a moneylending transaction must be perfected by a memorandum made under seal. Sub-s. (b) provides:

‘A contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied.’

“It appears to me that this is exactly such a contract. Here the contract, to satisfy the provisions of the Moneylenders Act, must be signed personally by the person charged therewith. Accordingly, if it is to be made by a company, the contract may be signed by a person acting under the authority of the company, express or implied, and section 29 (2) of the Act states:

‘A contract made according to this section shall be effectual in law, and shall bind the company and its successors and all other parties thereto.’

“Accordingly, reading, as I must read, the provisions of the Companies Act, 1929, s. 29, into the law relating to moneylenders, I find that the provisions of the Moneylenders Act, 1927, s. 6, are, in the case of a limited company, satisfied if the memorandum referred to in that section is signed by the persons who are officials of the company and authorised to sign on its behalf.”

Provisions similar to s. 29 (1) (b) and s. 29 (2) which are quoted in the above passage appear in the Kenya Companies Ordinance (Cap. 288) and although s. 29 (1) (a) appears to have no counterpart here, the argument is not thereby materially affected.

Counsel for the appellant company submitted that the signature of a memorandum by the authorised officers of a limited company was a signature by the company’s agents. In support of his argument that the position of a partnership was similar, he pointed to s. 7 of the Partnership Ordinance (Cap. 284) whereby every partner is constituted an agent of the firm and his other partners for the purpose of the business of the partnership, and to s. 8, whereby instruments executed in the firm-name by any person authorised, whether a partner or not, are binding on the firm and all the partners.

Though there is some similarity between the provisions of the Partnership Ordinance relied upon, and those of the Companies Ordinance, it is not one, in my opinion, which is sufficient to negative the full application of s. 11 (1) of the Moneylenders Ordinance to partnership borrowing. Whether a contract which is required by law to be in writing must be signed personally by the party

to be charged or whether it may effectually be signed by his agent is a matter of the construction of the particular law. Nothing could be clearer than that s. 11 (1) requires the personal signature of the borrower to the note or memorandum in writing of the contract. The *ipsissima verba* are used in the section and it is laid down that even if the loan be made to an agent on the borrower's behalf it is the borrower's personal signature which is required. If agents are thus expressly excluded there appears to be no reason at all to hold that there is anything special in the nature of the agency between partners which requires an exception in their case from the general rule. It is the ordinary relationship of agency between persons, though the legislature has seen fit to prescribe by s. 7 that the agency shall be deemed to exist in the case of all partnerships except in certain circumstances. Section 8 is merely declaratory of the ordinary law of agency with particular reference to the use of the firm-name. If agency of this type was held to be outside the scope of s. 11 (1) it would follow that the signature of any agent at all would be sufficient to bind his principal for the purposes of the section, a proposition which is clearly negated by its wording. The case of a limited company is different in that, though it is a "person" having an existence in law distinct from its officers and shareholders, it yet has no physical entity and can only act "personally" through its authorised officers, whether by affixing a seal or by signature. It is a creature of statute and therefore it is essential that the statute should prescribe the method by which it may make contracts "effectual in law" (s. 29 (2) of the Act and s. 30 (2) of the Ordinance). These words do not appear in s. 7 or s. 8 of the Partnership Ordinance, and a partnership has no corporate personality distinct from the partners, who, though partners, remain individuals. In the case of a limited company no personal signature is possible and what the statute prescribes is, as nearly as may be, the equivalent. This at least is the case where the contract is made, as was the case in *Re British Games Ltd.* (1), with authorised officers of the company in its name and on its behalf. It is not necessary to consider the remote possibility of some agent outside the membership of a company being authorised to borrow on its behalf from a licensed moneylender. I agree with the learned judge in the court below that the case of a limited company is distinguishable, for the reasons I have given, and as the partners in a firm are individuals, fully able to sign personally, there is no reason to say that s. 11 (1) given its ordinary meaning, does not apply to them.

A dictum of Parker, L.J., giving the judgment of the Court of Appeal in *John W. Grahame (English Financiers) Ltd. v. Ingram and Others* (2), [1955] 2 All E.R. 320 at 322 has some bearing on the question though the case itself was not one of partnership. He said:

"Finally, it is to be borne in mind that it is the borrower himself to whom the copy of the memorandum is to be sent, and, from the wording of s. 6 (1), it would appear that sending it to an agent of the borrower is insufficient. Accordingly, although for certain purposes one partner may be the agent of his other partners, nevertheless it seems to me that under s. 6 (1) service of copy on one partner would not be service on the other."

This relates to the latter portion of s. 6 (1) (in Kenya s. 11 (1)) but the word "personally" as used in the section, applies even more strongly to the requirement of signature. The appeal on this ground fails.

The second ground relates to the necessity or otherwise under s. 11 (1) of serving a copy of the memorandum of the contract on the respondent and the learned judge, though it was not strictly necessary in the light of his view on the first point, expressed the opinion that he would resolve that matter also in favour of the respondent. I refrain from expressing any view upon this question, as it is unnecessary, and particularly as, if my opinion on the first

ground of appeal is incorrect, such defect of reasoning as may be held to exist would almost certainly apply with at least equal force to the matter in issue on the second ground.

The third ground of appeal relates to the alternative claim for money had and received and to the learned judge's refusal to grant relief to the appellant company under s. 65 of the Indian Contract Act, which is as follows:

"65. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

Counsel referred also to s. 2, sub-s. (g) and sub-s. (h) of the same Act. They are as follows:

"(g) An agreement not enforceable by law is said to be void:

(h) An agreement enforceable by law is a contract."

By virtue of these provisions counsel for the appellant company submitted that, as regards the partners who did not sign the memorandum of the contract (including the respondent) the contract was void. It was declared to be unenforceable by s. 11 (1) of the Moneylenders Ordinance and, as an agreement not enforceable by law it was void by virtue of s. 2 (g) of the Indian Contract Act. Therefore it was submitted that the appellant was entitled to relief under s. 65 of that Act.

By reason of a decision of this court to which reference will shortly be made it is not open to us to have reference to these provisions. Had it been necessary to do so we should have had to consider a number of submissions made by counsel for the respondent for the purpose of showing that the point taken was a bad one. Without detracting from counsel's other arguments it might be of advantage to mention (without discussing the matter further) that the case of *Misser v. Bhadai Das and Others* (3) (1953), A.I.R. Pat. 259 appears to provide authority in conflict with the submission of counsel for the appellant company. The relevant portion of the headnote is:

"Section 4 does not extinguish the right of the moneylender but by forbidding the court to entertain a suit, makes the right an imperfect one. Therefore the principle underlying s. 65, Contract Act, that a right to restitution may arise out of the failure for contract though the right be not itself a matter of contractual obligation has no application, because the contract has not failed but it is merely the right to sue for recovery of loan that is barred."

Whatever may be the true view of the merits of the matter if it fell to be decided with reference to the abovementioned provisions of the Indian Contract Act, for this court to be guided by such provisions would be quite wrong in the light of the decision in *Naranbhai Ichharam v. Lobo* (4) (1942), 9 E.A.C.A. 16. The question in that case was whether a security given in respect of a contract which was unenforceable by virtue of s. 10 of the Moneylenders Ordinance, 1932 (now s. 11 Cap. 307) should be delivered up to the borrower only upon his being put on terms as to repayment of the loan. An argument by counsel that the provisions of the Moneylenders Ordinance should be construed with reference to the Indian Contract Act was rejected by the court and in his judgment (at p. 18) Sir Henry Webb, C.J., said:

"Mr. Kapila on the other hand, says that s. 10 (1) of our Ordinance cannot be given the same effect as s. 6 of the English Act because here the word 'unenforceable' bears a special meaning by reason of s. 2 (g) of the

Indian Contract Act: 'an agreement not enforceable by law is said to be void'; in England a contract which is unenforceable is not necessarily void, here, on the other hand, such a contract is void, and, by s. 65 of the Contract Act, any person who has received a benefit under an agreement which is discovered to be void must restore it, therefore the appellant was rightly ordered to restore the benefit which he had received. In my judgment the answer to this argument is that 'the Contract Act does not profess to be a complete code dealing with the law relating to contracts' (Pollock and Mulla (6th Edn.) p. 6) and where, as here, an Ordinance dealing with a specific subject has been plainly copied from an English Act expressions used in it should be given the same meaning as they would be given in England unless there is some general Ordinance which prohibits it."

In his argument before this court counsel for the appellant company submitted that he did not seek to construe the Moneylenders Ordinance with reference to the Indian Contract Act but to apply the latter as an independent enactment after construing the former. I am unable to agree. He is clearly seeking to give the phrase "No contract . . . shall be enforceable" a meaning and significance, derived from s. 2 and s. 65 of the Indian Contract Act, different from the meaning and significance attaching to it when construed in the English sense, in which the word "unenforceable" is used (with reference to contracts) in contradistinction to "void" and "illegal". For the reasons given in the passage abovequoted counsel's contention was rejected in *Naranbhai Ichharam v. Lobo* (4) and, in my opinion, must also be rejected in the present case.

Approaching the matter therefore entirely without regard to s. 2 and s. 65 of the Indian Contract Act there is no doubt that, the contract to repay the money in question in this case being unenforceable, the appellant company is unable to recover the money advanced or any part of it: to allow it any such right would be to enforce the contract in whole or in part in direct contravention of the Ordinance. Reference to passages in the judgment of the Privy Council in *Kasumu v. Baba-Egbe* (5), [1956] 3 All E.R. 266 will suffice to illustrate this rule. That, again, was a case in which the borrower was held entitled to the release of the security which he had given in relation to a loan which was found under the Nigerian Moneylenders Ordinance to be unenforceable, without being put on terms as to repayment of that portion of the loan which was outstanding. At p. 268 of the judgment, their Lordships, having set out the statutory provisions which rendered the particular loan unenforceable, said:

"One or two preliminary observations may be made with regard to this section. It was not in dispute that the effect of it was that a defaulting moneylender not only incurs a monetary penalty for his offence but also loses any right to take legal proceedings to recover the money he has lent. So far as legal rights of action go he loses his money."

At p. 271, in considering whether the decision in *Lodge v. National Union Investment Co. Ltd.* (6), [1907] 1 Ch. 300 was applicable to the case before them, they said:

"If it were, the result would be that a lender who, while offending against the Ordinance, had fortified himself by taking any sort of security, would be put by the courts in a position altogether more favourable than a similar lender who had taken no security for his loan. For any lender who, by taking security, had put himself in the position that his borrower would have to resort to the court in order completely to undo the effect of the transaction, would be protected by the court from parting with his security except on terms that rendered the unenforceable loan enforceable, either to its full effect or in some modified terms. Yet the lender who

had taken no security would lose any right to recover his money, as the Ordinance clearly intended.”

Later, at the same page of the report, is the following passage:

“Such requirements as that the moneylender must be registered or licensed, must use his authorised name, must procure a note or memorandum of the contract signed personally by the borrower, must keep a book in which is entered a contemporary record of the transaction strike indifferently at all moneylenders’ loans, however moderate the terms of any particular transaction. When the governing statute enacts that no loan which fails to satisfy any of these requirements is to be enforceable it must be taken to mean what it says, that no court of law is to recognise the lender as having a right at law to get his money back.”

The present case, in my opinion, falls clearly within these statements of the law and the third ground of appeal is therefore also without merit. For these reasons I would dismiss the appeal with costs.

Forbes V-P: I agree. The appeal is dismissed with costs.

Windham JA: I also agree.

Appeal dismissed.

For the appellant:

KA Master QC and RD Patel

RD Patel, Nairobi

For the respondent:

JM Nazareth QC and AP Shah

AP Shah, Nairobi

**Bwavu Mpologoma Growers’ Co-Operative Union Limited v Gasston and
Barbour and others**
[1959] 1 EA 307 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	22 April 1959
Case Number:	9/1959
Before:	Sir Kenneth O’Connor P, Forbes V-P and Windham JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda–Sheridan, J

[1] *Copyright – Infringement – Building plans – Principles on which damages should be assessed – Whether income tax on damages should be considered.*

[2] *Copyright – Infringement – Plans – Conversion – Whether conversion must be pleaded.*

Editor's Summary

The first respondents, who were consulting engineers, sued the appellants for infringement of their copyright in certain plans. The appellants joined the second respondents as third parties, claiming indemnity from them. The first respondents were awarded £2,000 damages and were granted an injunction restraining the defendants from making further use of the plans, and the claim against the second respondents was dismissed, with costs, pursuant to s. 8 of the Copyright Act, 1911. The appellants sought, on appeal, to have the damages reduced and the order for payment of the costs of the second respondents set aside, whilst the first respondents cross-appealed for increase of the damages.

Held –

- (i) the measure of damages in cases of infringement of copyright is very much at large and depends on the circumstances of each case; the trial judge was entitled to take into consideration the amount which the first respondents would have earned if they had been in charge of the work with their own plans, and had neither assessed the damages on wrong principles, nor disregarded material evidence. Observations of Crossman, J., in *Chabot v. Davies and Another*, [1936] 3 All E.R. 221 at p. 228, and of Uthwatt, J., in *Meikle and Another v. Maufe and Another*, [1941] 3 All E.R. 144 at p. 153 approved.
- (ii) in copyright actions, damages for conversion, as distinct from damages for infringement, must be specifically pleaded and proved, and since conversion was neither pleaded nor proved, it had to be assumed that the sum awarded included nothing for conversion.
- (iii) the damages awarded represented a loss of profit to the first respondents, which would have been taxable; the damages, therefore, would also be taxable, and in assessing the damages, account should not be taken of the incidence of tax. *Burmah Steam Ship Co. Ltd. v. Inland Revenue Commissioners*, 16 T.C. 67 adopted.
- (iv) since, but for the actions of the third parties, the infringement and ensuing litigation would never have taken place, the order requiring the appellants to pay the costs of the third parties was unjustified and would be set aside.

Appeal upon damages dismissed.

Appeal as to costs of third parties allowed.

Cross appeal dismissed.

[Editorial Note: The decision of Sheridan, J., is reported in [1958] E.A. 549 (U.).]

Cases referred to in judgment

- (1) *British Transport Commission v. Gourley*, [1955] 3 All E.R. 796.
- (2) *Chabot v. Davies and Another*, [1936] 3 All E.R. 221.
- (3) *Meikle and Another v. Maufe and Another*, [1941] 3 All E.R. 144.
- (4) *Sutherland Publishing Co. Ltd. v. Caxton Publishing Co. Ltd.*, [1936] 1 All E.R. 177; [1938] 4 All E.R. 389.
- (5) *Ash v. Hutchinson & Co. (Publishers) Ltd.*, [1936] 2 All E.R. 1496.
- (6) *Birn Bros. Ltd. v. Keene & Co. Ltd.*, [1918] 2 Ch. 281.
- (7) *The Telemachus*, [1957] 1 All E.R. 72.
- (8) *Burmah Steam Ship Co. Ltd. v. Inland Revenue Commissioners*, 16 T.C. 67.
- (9) *Hall & Co. Ltd. v. Pearlberg*, [1956] 1 All E.R. 297.
- (10) *Smythson (Frank) Ltd. v. Cramp (G.A.) & Sons*, [1943] 1 All E.R. 322; [1943] Ch. 133.
- (11) *Cramp (G.A.) & Sons v. Smythson (Frank) Ltd.*, [1944] 2 All E.R. 92; [1944] A.C. 329.

(12) *Savory (E. W.) Ltd. v. World of Golf Ltd.*, [1914] 2 Ch. 566.

April 22. The following judgments were read:

Judgment

Windham JA: The first respondents, who were the plaintiffs, sued the appellant-defendants in the High Court of Uganda for damages for infringement of their copyright in certain plans for the design and layout of machinery for use in a coffee factory, and for consequential relief by way of injunction and delivery up of infringing copies of the plans. The second respondents were joined as third-parties by the defendants, who claimed indemnity against them, pleading that the second respondents, being architects, had copied them and supplied them to the defendants without the defendants knowing that they were the plaintiffs' plans.

The facts, and the essential findings as between the plaintiff and the defendant, are clearly set out in the following passages from the judgment of the learned trial judge. The witness Mr. Willy Sekatawa therein referred to was a partner in the third-party firm.

"The plaintiffs, a firm of consulting engineers, claim damages for infringement of copyright and an injunction to restrain the defendants from making use of their plans. The defendants are an African Co-operative Union and the plans (exhibit A) related to the layout and installation of machinery in the coffee factory which they erected in 1957-1958 in the Masaka District. It is not disputed that these plans are copies of drawings (exhibit B) which the plaintiffs had previously prepared for a similar coffee factory which had been built for the Nkoba Za Mbogo Farmers Co-operative Association Ltd. (hereinafter referred to as 'Nkoba') and that the copying was done by Willy and Paul, a firm of unqualified African architects, whom the defendants have joined as third parties and from whom they seek an indemnity.

"Mr. Willy Sekatawa (D.W.4) gave evidence that in 1956 his firm prepared plans for the building of the Nkoba factory. He was not concerned with the installation of the machinery. In the same year the defendants approached him and he designed a similar coffee factory for them. These plans were submitted to the Protectorate agent, Masaka for approval. On August 8, 1956, the executive engineer P.W.D. Masaka wrote to the defendants (exhibit N) stating the plans could not be approved as they did not show the layout of the machinery. There followed an interview between Mr. Willy and Mr. Mwanje (D.W.1), the president of the defendant Union, at which the latter stated that they wanted a similar design of machinery to that at Nkoba. Mr. Willy procured the plans (exhibit B) from Nkoba and made copies of them by tracing. He admits that he saw the names of Nkoba and the plaintiffs, as consulting engineers, on them and that he erased them and substituted the defendants' and his firm's name. He states that he was unaware of any copyright subsisting in them and he believed them to be the property of Nkoba. He submitted copies to the Protectorate agent, Masaka, who approved them by his letter dated October 6, 1956 (exhibit O). The plans were then handed to the defendants. Mr. Willy did not inform the defendants that he had copied the Nkoba plans.

"On October 22, 1956, the defendants wrote to Mr. Robertson (P.W.2) the plaintiffs' Kampala representative (exhibit H.1) requesting them to give quotations for machinery needed for the factory. On October 25, 1956, the plaintiffs replied (exhibit H.2) explaining that they were not agents or suppliers of machinery and that their function was to draw plans, make estimates and supervise the building, and installation of work. On January 4, 1957, they wrote (exhibit I), offering to undertake the work and quoted their fees at £2,400. In April, 1957, Mr. Mwanje and Mr. Nakikubye (D.W.2), the defendants' secretary, saw Mr. Gasston (P.W.3),

a partner in the plaintiffs' firm, and Mr. Robertson. They brought with them the plans (exhibit A) which were immediately identified as copies of the plaintiffs' plans for the Nkoba factory. I accept the evidence of Mr. Gasston and Mr. Robertson, and it accords with the probabilities, that they went to considerable lengths to explain that the plans could not be used without their permission. It may be that the full significance of what they said did not penetrate to Mr. Mwanje and Mr. Nakikubye, due to their faulty knowledge of English, but the interview was followed by a letter dated April 12, 1957 (exhibit C), which contained an implied warning about the plaintiffs' copyright in the plans and referred to their unsuitability for the defendants' purposes . . . I believe that this letter was received. It follows that thereafter the defendants used copies of the plaintiffs' plans at their peril . . . Later in 1957 the defendants approached Mr. Bird (D.W.3), who holds a board of trade chief engineer's power certificate, to instal the machinery. He identified the plans as the plaintiffs' and in or about November, 1957, he took the precaution of showing them to Mr. Robertson, who expressed himself as being unable to prevent their use. Mr. Bird stated that he had to scrap the plans but it is clear from his evidence that they were of some use to him in the preparation of his own plans (exhibit M), and in one instance he used the plaintiffs' plans (exhibits E. 1-3) when he asked Mr. parkinson (P.W.5), the managing director of a plumbing and engineering contractors' company, for a quotation for the articles shown in the plans. Mr. Parkinson passed on the news to Mr. Robertson. The same thing happened in regard to a plan for a weighing hopper (exhibit G) which Mr. Bird showed to Mr. Smithers (P.W.4). Finally the plans (exhibit A) were produced to Mr. Boothroyd (P.W.1), acting on behalf of the Director of Agriculture in January, for his approval in accordance with s. 9 (3) (b) of the Coffee Industry Ordinance, 1953 . . . On the evidence I am satisfied that the plaintiffs have copyright of the plans (exhibits A and B) and that by submitting them to the director of agriculture the defendants infringed that copyright and converted them to their own use."

On the facts as found the learned trial judge gave judgment in the following terms:

"In the result there will be judgment for the plaintiffs against the defendants for £2,000 with interest and costs and an order to deliver up all copies to the plaintiffs and a further order for an injunction to restrain the defendants and the third party from making any further use of the plans. The defendants will pay the third parties' costs."

Against this judgment the defendants have appealed. On appeal they rightly do not challenge the finding that they infringed the first respondents' copyright, nor the granting of an injunction and a delivery order against them. They challenge only (a) the quantum of damages awarded, asking that the figure be reduced; (b) the order requiring them to pay the third-parties' costs, for which purpose the latter have been joined as second respondents. The first respondents (plaintiffs) have cross-appealed, asking that the damages be increased.

The appeal against the first respondents, which may be considered together with the latters' cross-appeal, raises both the general question whether the £2,000 awarded as damages ought to be reduced or increased, and two particular questions in the same connection. The first of these is whether the damages should be reduced by reason of there being in the plaint no specific allegation of, or claim for damages in respect of, conversion as distinct from infringement of the copyright. The second is whether they should be reduced by reason of the learned trial judge not having considered, when assessing them, the question

whether the profits the loss of which was represented by them would have been liable, or whether the damages themselves will in the first respondents' hands be liable, to income tax, a question required to be considered under the rule laid down by the House of Lords in *British Transport Commission v. Gourley* (1), [1955] 3 All E.R. 796. I will consider these points in turn.

On the general question, the first point raised was that the letter, exhibit C, dated April 12, 1957, which is referred to in a passage from the judgment which I have earlier set out, did not in clear terms warn the appellants that they would continue to use the first respondents' plans at their peril, nor call upon them to hand the plans back, and that if there had been a clear warning and demand the action would never have arisen, and that the damages should for this reason have been assessed at a low figure. In this letter, it is said, the plaintiffs were in effect acquiescing in the defendants' use of their plans. As to this, it is in my view unnecessary to say more than that, even in that letter, the defendants were told that the plans were the first respondents', and were warned of the "legal consideration in copying other people's work" without paying for it; while in a later letter, exhibit 5, dated March 12, 1958, some three weeks before the filing of the action, the plaintiffs' advocates in unequivocal terms threatened legal proceedings unless the appellants within one week ceased to continue using the plans and ceased to represent them as being other than the first respondents' plans. This warning was not needed, and so the action was lodged. Clearly the first respondents took all reasonable steps to warn the appellants and to avoid litigation, and I can see no ground for holding that the learned trial judge ought, by reason of their alleged failure to do so, to have reduced the damages that he would otherwise have awarded.

The criterion which the learned judge applied in assessing the first respondents' damages, admittedly no more than a rough one, since damages in copyright cases are, as he rightly observed in his judgment, "to some extent at large", was

"the amount which they would have earned if they had been in charge of the work with their own plans",

after taking the surrounding circumstances into consideration. This, in my view, was a proper criterion upon the decided authorities, in particular the two on which the learned judge relied. Of these, in *Chabot v. Davies and Another* (2), [1936] 3 All E.R. 221, the plaintiff's copyright which the defendant had infringed was in the blueprint plan and elevation of a shop-front, which the defendant had reproduced. In deciding on the quantum of damages Crossman, J., said at p.228:

"Damages presumably are at large in such a matter. But I think I am bound to consider this: What is the remuneration which the plaintiff would fairly have got for his plan if the defendant had applied for his leave and licence to use it? . . . having heard the plaintiff's evidence, and having considered the matter, I think that the sum which he himself put forward of 100 guineas is a fair remuneration."

In that case the actual commission which the plaintiff would have earned for the work, as an architect, would have amounted to £52 under the scale of the Royal Institute of British Architects; but the court did not limit itself to that figure but awarded the 100 guineas after considering all the surrounding circumstances. In *Meikle and Another v. Maufe and Another* (3), [1941] 3 All E.R. 144, where the infringed copyright was in the plaintiff architect's building plans, Uthwatt, J., at p. 153, considered the broad criterion laid down in *Chabot's* case (2) to be a sound one to begin on, but in assessing the damages at £150 he emphasized that neither the profit which would have accrued to

the plaintiff had he been employed as architect of the infringing building nor the fee which might be charged for a licence to reproduce the copyright design were the mathematical measure or basis of damages, but that they might be taken into account together with the other surrounding circumstances. In short, since the circumstances of every case differ, the effect of these two decisions is that the quantum of damages in infringement cases is indeed very much at large.

Applying to the present case the broad principles so laid down, the learned trial judge, after pointing out that in *Meikle's* case (3) the damages were as low as they were because

“a practising architect would not repeat the design of an important building in another building”,

went on to say:

“This is a material distinction from the present case because plans for the layout and installation of machinery in coffee factories do not exhaust their value once they are used. Although the plaintiffs’ plans could not have been used for the defendants’ factory owing to its different dimensions from the Nkoba factory, the plans would be repetitive and, as Mr. Gaston put it, after use they are of value as a record of what has been done in the past and on which they can improve. Counsel have been unable to find any precedent for estimating damages for the infringement of copyright in this type of plan. There were other special features in *Meikle's* case, including the fact that the plaintiffs were merely assignees of the copyright, that limit its usefulness as a guide in assessing damages—nevertheless I find it difficult to reconcile with *Chabot's* case on this issue. In the instant case there is no evidence that the plaintiffs’ reputation has been adversely affected as I understand that the defendants’ factory is operating satisfactorily. They estimate their fees at £2,400. Mr. Gasston calculated that the increased expenses, for which they could not charge, would be not more than £10. They have received £50 on account. Obviously the damages must be substantial and bear some relation to what the plaintiffs would have earned, or it would pay people in the position of the defendants to infringe subsisting copyright. I repeat the statement of Crossman, J., in *Chabot's* case that presumably damages are to a certain extent at large and doing the best I can on the material available and not very clear authorities I fix the plaintiffs’ damages at £2,000.”

Upon a careful perusal of the evidence, and reserving for later consideration the questions of damages for conversion and allowance for the incidence of income tax, I am unable to say that in assessing the damages at £2,000 the learned trial judge either disregarded or gave undue weight to any material evidence, or that he assessed them upon wrong principles. As a broad basis, just as in *Chabot's* case (2), he took the £2,400 which on January 4, 1957, the first respondents had by letter quoted as the fees they would have charged if the work had been entrusted to them. It is contended that, since in fact they did no work at all on the designing and layout of the appellants’ coffee factory, their staff that would have been engaged in earning that £2,400 must presumably have been employed instead in earning money for them on other work, and that only on deducting such money from the £2,400 could one arrive at even an approximate figure for the net loss of profit to the first respondents through the appellants’ infringement. Also it is said rightly that any extra office expenses which would have been incurred in earning that £2,400 should be deducted. But the defence neither adduced through their witnesses nor extracted in cross-examination any evidence on these matters, with the result that the only evidence on the point which the learned trial judge could take

into consideration, and which in fact he did take into consideration, was that of Mr. Gasston, a partner in the first respondent firm, who said: "We wouldn't have to engage extra staff", and who, presumably in answer to a question what the extra office outlay would have been, said: "It might be £10 extra paper and pencils". It may well be, however, that in reducing the figure of £2,400 by £400, to arrive at the £2,000 damages, the learned trial judge very reasonably took into account the probability that the extra office outlay would have been more than the £10; for had he only deducted the £10 and the £50 already received by the first respondents on account, the result would have been £2,340.

This, indeed, is the substance of the cross-appeal, namely that the damages ought to have been fixed at the figure quoted by the first respondents, which Mr. Gasston said in evidence was £2,480, deducting from it only the £10 and the £50, and then adding to the result some figure for possible injury to their reputation. As regards the last point, however, the learned judge rightly pointed out in his judgment that there had been no evidence of any actual or probable injury to the first respondents' reputation; while for the reasons I have given, I consider that the deduction of approximately a further £300 to £400, in arriving at the round figure of £2,000, was in all the circumstances quite justified, having in mind that, subject to the following of the broad principles to which I have referred, damages were at large. For these reasons there is in my view no merit in the cross-appeal.

Lastly, it was suggested at one point by learned counsel for the appellants that the original basis for the assessment should have been, not £2,400, but £1,300, which was approximately the quotation offered by the first respondents to the appellants for doing the work for them in their letter of April 12, 1957. But an examination of that letter shows that this quotation was in respect of a proposal to erect a coffee factory considerably smaller than the one in respect of which the first respondents' plans were used, and there is accordingly nothing in this contention.

For these reasons I would hold that, subject to the questions of conversion and of income tax, to which I now turn, the figure of £2,000 as an assessment of the plaintiffs' damages is not one with which this court would be justified in interfering.

On the question whether that figure includes, or ought to be allowed to include, damages for conversion of copies of the first respondents' copyrighted plans, as distinct from damages for mere infringement of the copyright, the first point urged for the appellants is that no conversion is pleaded in the plaint, and that in order to obtain damages for conversion such damages should be specifically prayed for and the act or acts of conversion specifically pleaded. To this the respondent-plaintiffs rejoin that although the words "conversion" or "converted" are not used in the plaint, the acts pleaded in para. 6 of it, coupled with the prayer in para. 9 for "delivery up to the plaintiffs of all copies of the said plans" amount to the pleading of conversion. Para. 6 reads as follows:

- "6. The defendant has infringed or threatens to infringe the plaintiffs' said copyright in the said plans by submitting copies of the said plans (with the drawing numbers alone altered) to the Director of Agriculture and the Chief Factories Inspector of the Uganda Protectorate as plans of the design and layout of machinery intended to be erected by the plaintiffs at its coffee factory situate at Nakaiba in the Masaka district of the Uganda Protectorate. Photostat copies of three of the said infringing plans are hereunto annexed and marked respectively 'B.1.', 'B.2.' and 'B.3.'."

It is true that in copyright actions the cause of action for infringement is different from that for conversion, the former arising under s.6 of the Copyright

Act, 1911, (which Act is applied to Uganda by the Copyright Ordinance, Cap. 220) and the latter under s. 7, and the damages awardable in one suit on each cause of action are cumulative and not alternative: see *Sutherland Publishing Co. Ltd. v. Caxton Publishing Co. Ltd.* (4), [1936] 1 All E.R. 177; *Ash v. Hutchinson & Co. (Publishers) Ltd.* (5), [1936] 2 All E.R. 1496. But the act of conversion, in copyright cases, must be distinguished from that of mere detention of copies of the subject matter of the copyright. Conversion implies that the copies have not only been detained by the defendant, or even submitted by him temporarily to someone else; it implies that they have been wrongfully disposed of or destroyed or otherwise rendered irrecoverable, the defendant having unequivocally dealt with them as his own. The wording of s. 7 itself makes this clear, for it provides that the owner of the copyright may take proceedings for the recovery of the possession of infringing copies or in respect of the conversion thereof. The distinction is also clearly drawn in the standard form of claim in copyright actions set out in Bullen and Leake's *Precedents of Pleadings*, (11th Edn.) at p. 435 and p. 436. And see *Sutherland Publishing Co. Ltd. v. Caxton Publishing Co. Ltd.* (4), where, the infringement being the incorporation of the plaintiff's copyrighted literary material with non-infringing material, it was held that there was no conversion until the copyrighted sheets were bound up with the others, because until that stage the infringing matter could still have been delivered up to the plaintiffs.

Now in para. 6 of the plaint in the present case there is no allegation of any facts that would constitute conversion properly so called, as described above, but only of wrongful detention of infringing copies and their submission to certain Government officials. The word "submit" does not imply any alienation inconsistent with delivery back intact in due course to the owner. And while in a copyright action damages for conversion, as distinct from damages for infringement, must be specifically claimed and proved, the reason for this is that the one is of a different nature from the other. For while damages for infringement are to a considerable extent at large, damages for conversion, at least for conversion by way of sale, would depend on the amount of the proceeds of the sale, the damages being the value of the goods at the time of their conversion. This was made clear in *Birn Brothers Ltd. v. Keene & Co. Ltd.* (6), [1918] 2 Ch. 281, where, though it was rightly pointed out that conversion and detention both fall under s. 7 of the Act and not under s. 6, the reason why damages for conversion, as distinct from infringement and from mere detention (detinue) must be specially prayed for and proved, arises from the nature of conversion and the criterion for assessing damages arising from it. See also on the same point the *Sutherland Publishing Co.* case (4), at p. 179. I am not aware of any authority for the proposition that where, as here, facts constituting detention (not conversion) have been pleaded and proved, and there has been a general prayer for damages, the court may not assess the damages, as it must be presumed that the court here assessed them, so as to cover at the same time both what the first respondents have suffered through the infringement strictly so called and what they have suffered through infringing copies having been detained. The only apparent difficulty is that in his judgment the learned trial judge states that by submitting the infringing copies to the Director of Agriculture the defendants infringed the copyright "and converted them to their own use". But since conversion, as distinct from detention, was neither pleaded nor proved, the learned judge must be taken to have awarded the damages in respect of what the plaintiffs did plead and prove, and to have used the word "converted" in a loose and inaccurate sense as meaning whatever the submission of the plans to the Director of Agriculture did in fact and in law amount to, namely their detention, the damages being in respect of the infringement and of that act. We cannot assume that if he had realised that the act did not

amount technically to conversion he would have awarded less damages than he did.

I turn now to the appellant's contention that the learned trial judge erred in not having considered, as indeed neither he nor counsel for either side appears to have considered, whether the damages which he would otherwise have awarded ought not to be reduced by a sum roughly approximating to the amount of income tax (if any) which would have been payable on the profits of which the plaintiffs had been deprived by the defendants' infringement, and for which they were being compensated by those damages. The rule laid down by the House of Lords in *British Transport Commissioner v. Gourley* (1), a case of damages awarded as compensation for the loss of prospective earnings of which the plaintiff was deprived by personal injuries, has since been held to be of general application in all cases of damages awarded for loss of earnings which would have been taxable, and has of necessity, if with some misgivings on occasion, been consistently followed. The rule may be stated briefly thus. In assessing such damages a court ought to award a sum approximating to the plaintiff's net loss of profits, that is to say the net profit that he would have made after deducting the approximate amount of tax (if any) that he would have had to pay on it, unless the damages that are being awarded will themselves be subject to taxation in the plaintiff's hands after he has received them. This latter part of the rule is, of course, necessary in order to prevent the plaintiff from being in effect taxed twice over, once by the judge's approximate deduction and later by the tax authorities' precise taxation. In *Gourley's* case (1) itself this vital prerequisite to the decision that the trial judge should have taken into account the taxability of the lost earnings and to have reduced proportionately the damages of £37,720 which he awarded in lieu of them, is recorded thus briefly in the judgment of Earl Jowitt at p. 799:

"It was agreed by counsel on both sides—and I think rightly agreed—that the respondent would incur no tax liability in respect of the award of £37,720 . . ."

In *The Telemachus* (7), [1957] 1 All E.R. 72, a case of a salvage award, the principle was applied in the reverse direction, so as to enhance the sum that would otherwise have been awarded and not to diminish it; for in that case, while the salvage award did not of course represent any loss of profits which would otherwise have accrued to the salvagers and have been taxable, it was agreed, and was so held by the court, that the award would be taxable in the plaintiff salvagers' hands; and on this ground the court in its judgment expressly stated that the award was being made larger than it would have been so that, when eventually taxed, it should amount approximately to the sum originally intended. But in a case where both the lost profits would have been taxable and also the damages that have taken their place will be taxable, then clearly, applying the rule in *Gourley's* case (1), no account need be taken of the incidence of tax; for what has been undeservedly gained in the court by no deduction being made to represent tax on the profit will soon be lost again to the tax collector on the damages awarded. In the common phrase, what has been gained on the swings will soon be lost on the roundabouts. Such a case, in my view, is the present one. The profits of which the first respondents were deprived by the appellants' infringement of their copyright would certainly have been taxable in the ordinary way as profits accruing from professional earnings; so much is conceded. And the damages which have been awarded in lieu of and as compensation for those lost profits will, in my view, certainly fall to be taxable in the first respondents' hands, on the general principle lucidly laid down in *Burmah Steam Ship Co. Ltd. v. Inland Revenue Commissioners*

(8), 16 T.C. 67, at p. 71, in the following passage, which is also set out in Simon's Income Tax (2nd Edn.) Volume 1, at p. 38:

"Suppose some one who chartered one of the appellant's vessels breached the charter and exposed himself to a claim of damages at the appellant's instance, there could, I imagine, be no doubt that the damages recovered would properly enter the appellant's profit and loss account for the year. The reason would be that the breach of the charter was an injury inflicted on the appellant's trading, making (so to speak) a hole in the appellant's profits, and the damages recovered could not therefore be reasonably or appropriately put by the appellant—in accordance with the principles of sound commercial accounting—to any other purpose than to fill that hole. Suppose, on the other hand, that one of the appellant's vessels was negligently run down and sunk by a vessel belonging to some other shipowner, and the appellant recovered as damages the value of the sunken vessel, I imagine that there could be no doubt that the damages so recovered could not enter the appellant's profit and loss account because the destruction of the vessel would be an injury inflicted, not on the appellant's trading, but on the capital assets of the appellant's trade, making (so to speak) a hole in *them*, and the damages could therefore—on the same principles as before—only be used to fill *that* hole."

Clearly the damages awarded in the present case, being awarded in order to "fill the hole" made in the first respondent's profits by the appellants' infringement, will upon the above principle be taxable just as those profits would have been.

Nor is it relevant whether or not the first respondents are under the laws of Uganda taxable at all, by reason of any personal category into which they may fall. For if for any such reason they would not have been taxable in respect of the lost profits, then no more will they be taxable in respect of the damages. The legal position is the same if they are taxable in respect of both as it is if they are taxable in respect of neither. Lastly, it would seem, on the authority of *Hall & Co. Ltd. v. Pearlberg* (9), [1956] 1 All E.R. 297, that the onus lay on the first respondents (plaintiffs) to show either that the lost profits would not have been subject to tax or that the damages will be subject to tax. If that is so, then they have in my opinion discharged that burden: not, it is true, by any evidence or (in the court below) argument; but from the very nature of the case which they have pleaded and established, together with the position in law as laid down in the authorities which they have cited to us and which I think should be followed.

Finally, I turn to the appeal against the court's order that the appellants should pay the costs of the second respondents. The appellants, as defendants, had joined them as third-parties and had sought an indemnity against them against any liability of the appellants to the plaintiffs. This was on the ground that it was the third-parties, a firm of architects, who had made the infringing copies from the first respondents' plans and had handed them to the appellants without the latter's knowledge that they had been so copied. The evidence clearly disclosed that it was the third-parties who were at the root of the whole trouble and that if they had not done what they did there would have been no infringement and no suit. The learned trial judge in effect so held in his judgment. But, while restraining the third-parties by the same injunction as he imposed upon the appellants (an injunction which had not been asked for against the third-parties but against which no cross-appeal has been preferred), he refused to order them to indemnify the appellants and at the same time he ordered the latter to pay their costs. In adopting this course the learned judge

acted, or purported to act, under s. 8 of the Copyright Act, 1911. Section 8 provides as follows:

- “8. Where proceedings are taken in respect of the infringement of the copyright in any work and the defendant in his defence alleges that he was not aware of the existence of the copyright in the work, the plaintiff shall not be entitled to any remedy other than an injunction or interdict in respect of the infringement if the defendant proves that at the date of the infringement he was not aware and had no reasonable ground for suspecting that copyright subsisted in the work.”

The paragraph of the judgment below which deals with s. 8 and the liability of the third-parties (a firm in which it will be recalled that Mr. Willy was a partner) reads thus:

“Can s. 8 of the Act avail the third party? At first sight it seems improbable that a man who poses as an architect can innocently copy another man’s plans but, having listened to Mr. Willy’s evidence, and he was quite frank about it, I am by no means certain that he fully appreciated that he was doing anything wrong. This view is fortified by his reply to the defendants’ advocate’s letter dated April 14, 1958 (exhibit P), asking for an assurance that the plans were his firm’s original plans. This was the first intimation to Mr. Willy that he might be infringing the plaintiffs’ copyright. The reply (exhibit R) states that there is no such thing as trademark (sic) in plans so that they should not be copied and that an examination of these plans did not show any restriction of having them copied. This situation could hardly have arisen in a country where the qualifications and practice of architects are controlled by legislation. Mr. Willy was certainly ingenuous, but, with some hesitation, I give him the benefit of s. 8 of the Act. The third party will be restrained only by an injunction.”

Reading this passage as a whole, it seems clear that the learned trial judge was exempting the third-parties from liability, notwithstanding their admitted acts, on the ground not of any mistake of fact on Mr. Willy’s part but of ignorance of the law. This is further borne out by Willy’s evidence, in which he said of the plans: “I didn’t think there was any copyright in them”, and later: “We had no fear, as we knew that no copyright existed”, a statement, which repeats the allegation in para. 4 of the third-parties’ written statement of defence that they “do not admit that copyright subsists in drawings of plans . . .”

It has been held, however, that mere ignorance of the law will not entitle a party to avail himself of s.8: *Smythson (Frank) Ltd. v. Cramp (G.A.) & Sons* (10), [1943] Ch. 133. Moreover, s.8 requires that the court shall have satisfied itself not only that the party was not aware that copyright existed in the work, but also that he had no reasonable ground for suspecting its existence. The learned trial judge did not advert to this point and made no finding on it; nor was the evidence such as could in my view have reasonably supported such a finding. For the third-parties were admittedly a firm of architects whose activities included the making and copying of plans of machinery, and even if they were in fact ignorant that copyright existed in such plans, as to which the learned judge with some hesitation accepted their word, it could hardly be held that they had no reasonable ground, from the very nature of their profession and their presumed knowledge of the elements of that branch of the law which touched it, for suspecting that copyright might exist in them.

The limited scope and purpose of s.8 is explained clearly in the following passages from the judgments in *Smythson (Frank) Ltd. v. Cramp (G.A.) & Sons* (10). That case was reversed on appeal to the House of Lords, sub nomine *G.A. Cramp & Sons v. Frank Smythson Ltd.* (11), [1944] A.C. 329; but only on

the ground that there was no copyright at all in the subject matter of the suit; the findings and pronouncements of the Court of Appeal on s. 8 were not challenged and were nowhere questioned or overruled by their Lordships. The passages containing them are the following:

Lord Greene, M.R., at p. 138 and p. 139 said:

“The next matter which has to be mentioned is the argument presented on s.8 of the Copyright Act, 1911. It is said that in 1942 the defendants were not aware that copyright subsisted and had no reasonable ground for suspecting that copyright subsisted in the ‘Liteblue’ diary. In my opinion that argument cannot succeed. The defendants copied a work in respect of which, at the lowest, copyright was capable of subsisting, and they did so without inquiring or troubling themselves about the question whether the work was in fact entitled to copyright. I cannot see how the language of s.8 can cover such a case. Not merely must a defendant who relies on that section show that he was not aware that copyright subsisted—and that, in my judgment, cannot protect him if his ignorance is due merely to a mistake in law—but he must have no reasonable ground for suspecting that copyright subsisted. The defendants, without making any inquiry or any investigation, resolved in their own favour all doubts as to the existence of copyright in this compilation. The section was never designed to protect people who act in that way.”

And Mackinnon, L.J., at p. 140 and p. 141 said:

“The defendants, as an alternative defence as to copyright, sought to rely on s. 8 of the Act of 1911. What will enable one who has infringed copyright to rely on that section is a very difficult question. The substance of the section appears to have been copied from s. 33 of the patents and Designs Act, 1907. There is, I think, no case reported in which a defendant has successfully relied on s.8. What the section contemplates is obscure but I am certain that it is not intended to render void the ancient maxim ‘Ignorantia legis neminem excusat’. One who has infringed copyright cannot rely on his ignorance of the law as giving him relief from liability under this section. In the present case the only thing the defendants can rely on for that attempt is that they were ignorant of the law. The section, therefore, cannot avail them.”

For these reasons it cannot in my view be said that the learned judge exercised his discretion under s. 8 upon right grounds, or even that the third-parties proved all those matters required by the section to be proved before he was empowered to apply its provisions at all. That being so, it is open to us to set aside any order which he made or purported to make under the section, if we think it proper to do so and provided that such order has been appealed against. There is no appeal against the judge’s refusal to make an order for indemnity for damages; but the order requiring the appellants to pay the third parties’ costs may now be considered on its merits.

In my opinion, that order was unjustified on the facts and pleadings. In the first place, it is open to a court, even when exempting a defendant under s.8 from payment of damages, to order him to pay costs; such a course was followed in *E.W. Savory Ltd. v. World of Golf Ltd.* (12), [1914] 2 Ch. 566. And I see no reason why the same course should not in a proper case be followed, at least to the extent of making no order for costs, as between an exempted third-party and an unsuccessful defendant. In the present case, as we have seen, the infringement and the ensuing litigation would never have taken place but for the action of the third-party. Moreover, both in the written pleadings and at the hearing of the case it was the third-party, and not the appellant,

who obstinately maintained that there was no copyright at all in the first respondent's plans. This was contended by their counsel even in the closing addresses in the court below. In all the circumstances I feel that, at the least, there should be no order regarding the payment of the third-parties' costs, and I would set aside the order of the court below that the appellants should pay them.

Subject to that I would, for all the foregoing reasons, uphold the judgment below, dismiss the appeal as against the first respondents with costs, allow it as against the second respondents with costs, and dismiss the cross-appeal with costs.

Sir Kenneth O'Connor P: I agree. There will be an order in the terms proposed by the learned Justice of Appeal.

Forbes V-P: I also agree.

Appeal upon damages dismissed.

Appeal as to costs of third parties allowed.

Cross appeal dismissed.

For the appellants:

REC Russell

Russell & Co, Kampala

For the first respondents:

JFG Troughton

Hunter & Greig, Kampala

For the second respondents:

SV Pandit

SV Pandit, Kampala

Yowana Kahere and others v Lunyo Estates Limited

[1959] 1 EA 319 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	30 June 1959
Case Number:	125/1959
Before:	Bennett J
Sourced by:	LawAfrica

[1] Practice – Parties – Misjoinder of plaintiffs – Whether misjoinder of causes of action – Right to

relief arising out of the same act or transaction or series of acts or transactions – Civil Procedure Rules, O.1, r.1 (U).

Editor's Summary

The eight plaintiffs, each of whom claimed to be a tenant of the defendant company, sued for alleged interference with their right to possession. The plaintiffs were not joint tenants of the same holding but each claimed to be the tenant of a separate holding. The second, third, fourth and fifth plaintiffs claimed that they were unlawfully evicted from their holdings on different dates and that their houses and crops were destroyed. The first and eighth plaintiffs who were still in possession of their holdings alleged that their crops and houses were destroyed. Objection was taken on behalf of the defendant company to the plaint on the grounds that there was a misjoinder of parties and causes of action, but it was submitted for the plaintiffs that the acts complained of in the plaint were a series of acts or transactions within the meaning of O.1, r.1 of the Civil Procedure Rules and that there was a common question of law, namely, what provisions of the Crown Lands Ordinance were applicable.

Held –

- (i) the causes of action set out in the plaint did not arise out of the same act or transaction or series of acts or transactions but out of wholly distinct and independent acts of dispossession or interference with the right of possession.

- (ii) there was no question of law or fact common to the several plaintiffs and there was misjoinder of plaintiffs and a misjoinder of causes of action.

Order that the suit be stayed.

Cases referred to in judgment

- (1) *G.G. Kanani v. M. H. Desai and Another*, Uganda High Court Civil Case No. 469 of 1953 (unreported).
- (2) *Barclays Bank D.C.O. v. C. B. Patel and Others*, [1959] E.A. 214 (U.).
- (3) *Stroud v. Lawson*, [1898] 2 Q.B.44.
- (4) *Sirimani Kasirye and Others v. Lunyo Estates Ltd.*, Uganda High Court Civil Case No.18 of 1959 (unreported).

Judgment

Bennett J: Objection has been taken to the plaint on the grounds that there is a misjoinder of parties and a misjoinder of causes of action. In the plaint eight plaintiffs, each of whom claims to be a tenant of the defendant company, sue the defendant in respect of various acts of alleged interference with their right to possession. It is not alleged that the plaintiffs are joint tenants of the same holding but each claims to be a tenant of a separate holding. Plaintiffs Nos. 2, 3, 4 and 5 claim that they were unlawfully evicted from their holdings on different dates and that their crops and houses were destroyed. Plaintiffs Nos. 1 and 8, who are still in possession of their holdings, allege that their crops and houses were destroyed. Mr. Thacker, for the plaintiffs, contends that each of the acts complained of in para. 8 of the plaint is a series of acts or transactions within the meaning of O.1, r. 1 and that there is a common question of law—namely, what provisions of the Crown Lands Ordinance are applicable?

A somewhat similar situation arose in *G. G. Kanani v. M. H. Desai and Another* (1), Uganda High Court Civil Case No. 469 of 1953 (unreported) in which a landlord claimed in one suit to eject two tenants from different portions of the same building. To quote from the ruling of Ainley, J.:

“... Mr. Agard put his finger on the fallacy of the argument. He pointed out that the right to relief against the first defendant arose when the first defendant defied the will of the plaintiff by ignoring his notice to quit, and that the right to relief against the second defendant arose when the second defendant defied the will of the plaintiff by ignoring his notice to quit. No right to relief arose when the scheme was approved, no right to relief arose when the notices were served. No right to relief existed until there was defiance on the lawful will of the landlord. In this case there were two separate acts of defiance. These acts may have been simultaneous, they may have been based on the same grounds, but for all that they were two separate and distinct acts each of which (on the assumption that the plaintiff's allegations are well founded) gave rise to a right of relief against separate and distinct persons.”

It was held that there was a misjoinder of parties and of causes of action.

Sheridan J: reached a somewhat similar conclusion in *Barclays Bank D.C.O. v. C.B. Patel and Others* (2), [1959] E.A. 214 (U.) in which the plaintiff bank sued on two guarantees. Some of the defendants were parties to one guarantee and other defendants were parties to the other guarantee, but only two of the defendants were parties to both guarantees. Here again, it was held that there was a misjoinder of

causes of action.

In interpreting the corresponding English rule, namely O. 16, r. 1, Chitty, J., said in *Stroud v. Lawson* (3), [1898] 2 Q.B. 44 at p. 52:

“It is necessary that both these conditions should be fulfilled, that is to say, that the right to relief alleged to exist in each plaintiff should be in respect of or arise out of the same transaction, and also that there should be a common question of fact or law, in order that the case may be within the rule.”

In my judgment, the causes of action set out in para. 8 of the plaint do not arise out of the same act or transaction or series of acts or transactions. They arise out of wholly distinct and independent acts of dispossession or interference with the right to possession.

Nor on the plaint as it stands, does any question of law or fact arise which is common to the claims of the several plaintiffs. The only matter which is common to their claims is the fact that they are all suing the same defendant. In *Sirimani Kasirye and Others v. Lunyo Estates Ltd.* (4), Uganda High Court Civil Case No. 18 of 1959 (unreported) to which Mr. Thacker referred, the claims of the plaintiffs were based upon an agreement to pay compensation for disturbance and no objection was taken to the plaint on the grounds of misjoinder. The learned judge in fact never considered the question whether or not the plaintiffs and the causes of action had been properly joined. In my opinion, in the instant case there has been a misjoinder of plaintiffs and a misjoinder of causes of action. The matter is not curable under O. 1, r. 9 because that rule applies only to misjoinder or non-joinder of parties. I have been asked to strike out the plaint under O. 6, r. 17 but I am not disposed to adopt that course although agreeing with the defendant's counsel that the plaint in its present form is embarrassing. It is also, in my view, an abuse of the process of the court.

In *G. G. Kanani v. M. H. Desai and Another* (1), Ainley, J., gave the plaintiff leave to withdraw the suit and to institute a fresh suit or suits as he chose against the defendants or either of them on payment of the defendants' costs. Sheridan, J., made a similar order in *Barclays Bank D.C.O. v. C. B. Patel and Others* (2). I propose to adopt the same course. I order that the suit be stayed. The plaintiffs are given leave to withdraw the present suit and to institute fresh suits on the terms that they pay the defendant's costs of this suit.

Order that the suit be stayed.

For the plaintiffs:

RS Thacker

RS Thacker, Kampala

For the defendant:

RJ Daphtary

AC Patel & Daphtary, Kampala

Nyakite s/o Oyugi v R
[1959] 1 EA 322 (CAN)

Division: Court of Appeal at Nairobi

Date of judgment: 2 June 1959

Case Number: 63/1959
Before: Sir Kenneth O'Connor P, Forbes V-P and Windham JA
Sourced by: LawAfrica
Appeal from: H.M. Supreme Court of Kenya–Edmonds, J

[1] *Criminal law – Murder – Misdirection – Intoxication – Burden of proof.*

Editor's Summary

The appellant was convicted of murder on the evidence of five eye-witnesses. The evidence of the prosecution and that of the appellant himself established that the appellant had been drinking, but at the trial neither the appellant nor his advocate raised the issue of intoxication as affecting his liability, the defence being that the appellant did not kill the deceased. Since there was ample evidence to support the conviction the only point which the court found it necessary to consider was a misdirection by the trial judge regarding the burden of proving whether the appellant in spite or because of intoxication, was or was not capable of forming the specific intention necessary to establish a charge of murder.

Held – although the trial judge had erred in directing himself that the burden of raising a defence of intoxication so as to negative an intent to kill or cause grievous harm was on the accused, the judge would have found the accused guilty had he directed himself correctly and no failure of justice had occurred.

Appeal dismissed.

Cases referred to in judgment

- (1) *Director of Public Prosecutions v. Beard*, [1920] A.C. 479; 14 Cr. App. R. 159.
- (2) *Woolmington v. Director of Public Prosecutions*, [1935] All E.R. Rep. 1; [1935] A.C. 462.
- (3) *Mancini v. Director of Public Prosecutions*, [1949] 3 All E.R. 272; [1942] A.C. 1.
- (4) *Cheminingwa v. R.* (1956), 23 E.A.C.A. 451.
- (5) *Manyara v. R.* (1955), 22 E.A.C.A. 502.
- (6) *Kongoro v. R.* (1956), 23 E.A.C.A. 532.
- (7) *Hill v. Baxter*, 42 Cr. App. R. 51.
- (8) *Chan Kau v. R.*, [1955] 1 All E.R. 266; [1955] A.C. 206.

Judgment

Windham JA: read the following judgment of the court: On April 29, 1959, we dismissed this appeal without reserving judgment, but intimated that we would give our written reasons in view of a misdirection by the learned trial judge regarding the burden of proving whether the accused, in spite or because of intoxication, was or was not capable of forming the specific intention necessary to establish a

charge of murder. We now give those reasons.

The appellant was convicted of murder by the Supreme Court of Kenya. The conviction was based on the evidence of five eye-witnesses to the killing, and the facts to which they deposed were that a fight had broken out between two other men, that the deceased (a headman) intervened to separate them, and that the appellant thereupon, without provocation, jumped up on to the top of a wall, leaned over it, and with a knife stabbed the deceased in the neck and deep into the chest, as a result of which he died. There was ample evidence to support the conviction, and only point which in our view called for comment was the direction of the learned trial judge regarding the appellant's

intoxication. The appellant did not, either himself or through his advocate, raise the question of intoxication as affecting his liability, the defence being that he did not kill the deceased at all. But there were statements in the prosecution evidence and in that of the appellant himself which established that he had been drinking, and the court very properly considered the possible effect of this evidence upon the appellant's intention to kill or do grievous harm, and directed the assessors upon it.

The relevant passage in his judgment is in the following words:

"As I have said the defence of intoxication so as to negative an intent to kill or cause grievous harm was not raised by the defence although the burden of raising this defence is upon the accused. There is evidence that the accused had been drinking—he himself says he drank three bottles of native tembo but he does not claim that he was drunk and the highest that any prosecution witness puts it is that he was half drunk. The killing of Owino would appear to have been quite motiveless, yet the nature of the wounds and the place where they were inflicted would seem to indicate a positive intention to kill or cause grievous harm. Although the burden upon an accused of rebutting the natural presumption of the intent to kill or cause grievous harm is not great, and by no means as great as that upon the prosecution to prove its case, there is no sufficient evidence before me which would justify the conclusion that the accused was so intoxicated as to be incapable of forming any intention."

Without adverting for the moment to the learned trial judge's conclusion of fact in the above cited passage, we are satisfied that he misdirected himself seriously with regard to the burden of proof where an accused's drunkenness (not being of such a degree as to render him temporarily insane) is being considered in relation to the formation of a specific intent to kill or do grievous harm. The passage contains two specific and similar misdirections. The first is where it is stated that "the burden of raising this defence is upon the accused". The second is that which refers to

"the burden upon an accused of rebutting the natural presumption of the intent to kill or do grievous harm".

The latter sentence is not a misdirection if and in so far as it refers to the presumption that a man intends the natural and probable consequences of his acts, but it is a misdirection in so far as it states that it lies on the accused to rebut that presumption.

The true position in law, embodied in the fundamental principles enunciated in *Director of Public Prosecutions v. Beard* (1), [1920] A.C. 479 regarding the relevance of evidence of an accused's intoxication in a murder charge, and in *Woolmington v. Director of Public Prosecutions* (2), [1935] A.C. 462, and *Mancini v. Director of Public Prosecutions* (3), [1942] A.C. 1., regarding the burden of proof generally in criminal cases, has been laid down clearly by this court on a number of occasions, of which we would mention only some of the more recent. In *Cheminingwa v. R.* (4), (1956) 23 E.A.C.A. 451, where there was a misdirection of a similar nature to that in the present case, this court, following its own earlier decision on the point in *Manyara v. R.* (5) (1955), 22 E.A.C.A. 502, said:

"It is of course correct that if the accused seeks to set up a defence of insanity by reason of intoxication, the burden of establishing that defence rests upon him in that he must at least demonstrate the probability of what he seeks to prove. But if the plea is merely that the accused was by reason of intoxication incapable of forming the specific intention required to constitute the offence charged, it is a misdirection if the trial court lays the onus of establishing this upon the accused."

In *Kongoro v. R.* (6) (1956), 23 E.A.C.A. 532, this court reviewed the authorities and, after overruling a submission that s. 105 of the Indian Evidence Act affected the position regarding the burden of proof in cases of self-induced intoxication not causing temporary insanity, again applied the principle which it had enunciated in *Manyara v. R.* (5).

There is, however, one recent decision of a divisional bench of three judges in England, delivered in 1957, *Hill v. Baxter* (7), 42 Cr. App. R. 51, in which certain observations might at first sight appear to present a rather different view of the position regarding the burden of proof in cases where intoxication is relied on as negating a specific criminal intent; and it is possible that the learned trial judge's direction in the present case was coloured by reading a passage from the judgment of Devlin, J., in that case. The charges there were dangerous driving resulting in a collision with another car, and failure to halt at a "halt" sign. The question of mens rea was irrelevant, liability under the charging statute being absolute. The defence was the somewhat unusual one of automatism; in other words, that the accused was suffering from a mental "black-out" at the time and was not responsible for his acts. Drunkenness was not pleaded, nor was evidence of it adduced. But Devlin, J., in his judgment made observations on (*inter alia*) drunkenness which, while obiter, are of interest. He said:

"In any crime involving mens rea the prosecution must prove guilty intent, but if the defence suggests drunkenness as negating intent, they must offer evidence of it, if indeed they do not have to prove it: *D.P.P. v. Beard*, 14 Cr. App. R. 159, at p. 199; [1920] A.C. 479 at p. 507. It would be quite unreasonable to allow the defence to submit at the end of the prosecution's case that the Crown had not proved affirmatively and beyond a reasonable doubt that the accused was at the time of the crime sober, or not sleep-walking or not in a trance or black-out. I am satisfied that such matters ought not to be considered at all until the defence has produced at least *prima facie* evidence. I should wish to reserve for future consideration, when necessary, the question of where the burden ultimately lies."

This passage must be related to the facts of *Hill v. Baxter* (7). It must be remembered that Devlin, J., was dealing with a case of alleged automatism and with an offence in which mens rea was not an ingredient. Accordingly, his remarks on cases involving mens rea and, in particular, on drunkenness not amounting to insanity were obiter dicta. Moreover, in *Hill v. Baxter* (7) there was nothing in the prosecution evidence to suggest that the accused was suffering from a "black-out" or that he was liable to suffer, or had ever previously suffered, in that way: the statement that he had given to the police was consistent with his having become drowsy and having fallen asleep at the wheel. The defence of unconsciousness due to sudden illness was only raised after the close of the prosecution case. If Devlin, J., merely meant that in cases involving mens rea a defence of automatism or of drunkenness negating intent ought not to be considered at all unless there is some evidence (called either by the prosecution or the defence) to support it, and that if there is nothing in the prosecution evidence to support such a defence, it is unnecessary for the Crown to prove affirmatively, before they close their case, that the accused was sober and not sleep-walking or in a trance or "black-out", then the passage quoted makes no departure from previous authority. We think that in that passage Devlin, J., cannot have meant either (*a*) that in any crime involving guilty intent where there is evidence in the prosecution case that the accused was or might have been so drunk as to be incapable of forming the necessary intent, that factor ought not to be considered until the defence has offered evidence of it; or (*b*) that the burden of proving drunkenness sufficient to negative intent and falling short of insanity lay or could, in a case of murder or manslaughter,

lie on the accused. If in the above-cited passage the learned judge propounded either of those propositions, we should, with the greatest respect to a very learned judge, be unable to follow it. Their Lordships of the Privy Council in *Chan Kau v. R.* (8), [1955] A.C. 206, 211, laid down in the clearest language that the rule as to the onus of proof in cases of murder or manslaughter permits of no exception, save only in cases of insanity; and the House of Lords in *Director of Public Prosecutions v. Beard* (1) specifically preserved the distinction between cases of insanity produced by drunkenness and of drunkenness falling short of insanity but negating intent.

In the present case, we think, with respect, that the learned trial judge erred in directing himself that the burden of raising a defence of intoxication so as to negative an intent to kill or cause grievous harm was on the accused. As already stated, there was evidence from some of the prosecution witnesses and from the accused that the accused had been drinking before the stabbing took place. One prosecution witness said that the accused was “about half drunk”. In these circumstances, and notwithstanding that the defence offered insufficient evidence of drunkenness, the learned judge rightly considered, and took the assessors’ opinions, whether the appellant was so drunk as to be incapable of forming the necessary intent. He found that he was not. We were satisfied that there was evidence to support that finding, that the learned judge must have reached the same conclusion had he directed himself correctly on the onus of proof, and that no failure of justice had occurred. We therefore dismissed the appeal.

Appeal dismissed.

The appellant in person.

For the respondent:

MJ Howard (Assistant Secretary for Legal Affairs, Kenya)

The Attorney-General, Kenya

Dutt v R
[1959] 1 EA 325 (CAM)

Division:	Court of Appeal at Mombasa
Date of judgment:	4 June 1959
Case Number:	54/1959
Before:	Forbes V-P, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya—Edmonds, J

[1] *Criminal law – Larceny – Stealing by finding – Plea of “I found it and sold it” – Plea recorded as plea of guilty – Failure to explain nature of the charge – Penal Code, s. 263 (4) (K.) – English Larceny Act, 1916, s. 1 (2) (d).*

Editor's Summary

The appellant was charged with stealing a gold bracelet by finding and in answer to the charge he said "I found it and sold it". The trial magistrate without any explanation of the nature of the charge or of the circumstances in which a person finding an object and disposing of it is guilty of stealing, recorded a plea of guilty and convicted the appellant. The appellant's appeal to the Supreme Court was dismissed on the ground that it was not incumbent upon the trial magistrate to explain to the appellant the effect of s. 263 (4) of the Penal Code or to ask him whether he knew who the owner was and whether he believed that the owner could be found.

Held –

- (i) in view of the provisions of s. 263 (4) of the Penal Code the appellant's words "I found it and sold it" were not an unequivocal plea of guilty and it was incumbent upon the trial magistrate to explain to the appellant

the effect of s. 263 (4) or to ask him whether he knew who the owner was and whether he believed that the owner could be found.

- (ii) the effect of s. 263 (4) is that a person finding and selling a lost article does not necessarily convert it fraudulently and, therefore, does not necessarily steal it, unless at the time of conversion, he either knows who its owner is or has no reasonable ground for believing that the owner cannot be discovered.

Appeal allowed. Conviction quashed.

Cases referred to in judgment

(1) *R. v. Wood*, 3 Cox C.C. 453.

(2) *R. v. Glyde* (1868), 37 L.J.M.C. 107.

June 4. The following judgment was read by direction of the court:

Judgment

This was a second appeal from the conviction of the appellant in the resident magistrate's court, Mombasa, upon a charge of theft, on what was recorded as a plea of guilty. The conviction was upheld by the Supreme Court of Kenya on first appeal. At the conclusion of arguments before us we allowed the appeal and quashed the conviction on the ground that the appellant's plea had not been an unequivocal plea of guilty, intimating that we would give our reasons later. We now give them.

The charge was theft, contrary to s. 270 of the Penal Code, and the particulars of the charge were that "on or about January 3, 1959, at Mombasa, in the Coast Province", the appellant

"stole by finding one 9-carat gold bracelet, the property of person or persons unknown".

In short, the charge was one of theft by finding, the elements of which offence are set out in sub-s. (1), para. (a) of sub-s. (2), and sub-s. (4), of s. 263 of the Penal Code. In answer to the charge the appellant, who was unrepresented, said:

"I found it and sold it".

Without (so far as appears from the record) any further question by the learned trial magistrate, or any explanation, either before or after the appellant's plea, of the nature of the charge or the circumstances in which a person finding an object and disposing of it is guilty of stealing it, these words of the appellant were recorded as a plea of guilty, and he was convicted on that plea and sentenced to imprisonment for three months, a term which he had unfortunately completed before the appeal came before us.

The provisions of the Penal Code which set out the elements of the offence with which the appellant was charged, and which reproduce substantially though not exactly the corresponding English law on the subject, are, as we have said, s. 263 (1), 2 (a) and (4). They provide as follows:

"263 (1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing.

"(2) A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he does so with any of the following intents, that is to say:

(a) an intent permanently to deprive the general or special owner of the thing of it;

.....

“(4) When a thing converted has been lost by the owner and found by the person who converts it,
the conversion is not deemed to be fraudulent

if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that the owner cannot be discovered.”

In the light of the foregoing provisions, and in particular those of sub-s. (4) of s. 263, it is clear that the appellant’s words: “I found it and sold it” were not an unequivocal plea of guilty to the charge. The effect of the sub-section is that a person finding a lost article and selling it does not necessarily convert it fraudulently and therefore does not necessarily steal it. He will only do that if, at the time of the conversion, he either knows who its owner is or has no reasonable ground for believing that the owner cannot be discovered. There was nothing in the appellant’s plea which admitted or even suggested either of these things. Nor was any such admission to be presumed against him. It was argued that sub-s. (4) of s. 263 creates an exception and that it is for an accused to bring himself within the exception. Sub-s. (4) creates an exception in so far that, if a person is charged with stealing and there is nothing in the charge or evidence to suggest that the offence charged is other than a plain theft, it will be for the accused to raise the issue that he found the article in question, if he relies on that as his defence. Here, however, it was clear from the particulars in the charge itself that the appellant had found the bracelet which was the subject of the charge, and it was therefore essential, before he could be convicted, that the magistrate should be satisfied, not only that he had found the article and converted it, but that, at the time he converted it, he neither knew the owner nor had reasonable grounds for supposing that the owner could be found.

Sub-s. (4) embodies the English common law on the subject of larceny by finding, as expounded in such cases as *R. v. Wood* (1), 3 Cox. C.C. 453, and *R. v. Glyde* (2) (1868), 37 L.J.M.C. 107, and as contained in s. 1 (2) (d) of the Larceny Act, 1916, save that under the English law it is the moment of the taking, whereas under sub-s. (4) it is the moment of the conversion, at which the accused’s knowledge or belief regarding the ownership of the chattel determines legally whether or not his act was fraudulent. Both under the English law and under s. 263 of the Penal Code of Kenya such knowledge or such belief is an essential ingredient of the offence; and an accused who in pleading to a charge of theft by finding is silent on the question of such knowledge or belief cannot be held to have pleaded guilty to the charge. It is for this reason that we further consider that the learned judge, in dismissing the appeal in the Supreme Court, erred in holding, as he did, that it was not incumbent upon the trial magistrate to explain to the appellant the effect of sub-s. (4) or to ask him, after he had said “I found it and I sold it”, whether he knew who the owner was and whether he believed that the owner could be found. Such is the duty of a trial court in a charge of this nature, if the accused says nothing about his knowledge or belief regarding the ownership of the chattel, and particularly is this so where, as in the present case, the accused is unrepresented.

It was for these reasons that we held that the appellant’s plea was wrongly entered as one of guilty, and that we allowed the appeal and quashed the conviction.

Appeal allowed. Conviction quashed.

For the appellant:

SS Ghalia

Anjarwalla & Ghalia, Mombasa

For the respondent:

KC Brookes (Crown Counsel, Kenya)

Batten and others v Kampala African Bus Company
[1959] 1 EA 328 (HCU)

Division: HM High Court for Uganda at Kampala
Date of judgment: 15 April 1959
Case Number: 68/1958
Before: Sir Audley McKisack CJ
Sourced by: LawAfrica

[1] Practice – Evidence – Application to take evidence of plaintiffs on commission – Civil Procedure Rules, O. 25, r. 4 and O. 16, r. 11 (U.).

Editor's Summary

The five plaintiffs, who claimed damages in respect of a motor accident which occurred in Uganda and for which the defendant company had admitted negligence, applied for an order that the evidence of two of the plaintiffs, one of whom was aged and the other who had gone to England for medical treatment after the accident, and of a doctor residing in London be taken in England on commission. The application was opposed on the grounds that since the plaintiff normally has the choice of forum there must be very strong grounds for making such an order, and that in any event the plaintiffs could have availed themselves of O. 16, r. 11 and had their evidence taken whilst they were still in Uganda.

Held –

- (i) the great expense of bringing the plaintiffs and the doctor from England and the advanced age of the first plaintiff were strong reasons for granting a commission.
- (ii) the plaintiffs could have made use of O. 16, r. 11 but this was not applicable to the doctor, and it was not a sufficient ground for refusing a commission.

Application allowed.

No Cases referred to in judgment in judgment

Judgment

Sir Audley McKisack CJ: This is an application for the taking of evidence on commission in England. It is proposed that the evidence should be there taken of Plaintiff No. 1 and Plaintiff No. 2 (who are residing in Devonshire) and a doctor residing in London. The suit is for damages arising out of a motor accident which occurred in Uganda, and the defendant company has admitted negligence. The issue remaining is the quantum of damages in respect of the various plaintiffs, who are five in number. Plaintiff No. 1 is a lady aged eighty-four years. Plaintiff No. 2 was, according to the applicant's affidavit,

obliged to go to England together with her three children (who are Plaintiffs Nos. 3, 4 and 5) for medical treatment. It is not disputed that the evidence of the witnesses which it is desired to take on commission is necessary for the purpose of assessing damages.

The application is opposed by the defendant on two grounds. The first is that a court should be very reluctant to order the evidence of plaintiffs to be taken on commission, and should not do so except for very strong reasons. The authority for this proposition is the comment in Chitaley and Rao's A.I.R. Commentary on the Indian Code of Civil Procedure (6th Edn.) at p. 3550, respecting the Indian O. 26, r. 24, which is equivalent to the Uganda O. 25, r. 4. It is there said:

“The general and accepted rule is that the evidence of a plaintiff in a case ought not to be taken on commission except for very strong reasons. The reason is that the plaintiff has had a choice of the forum and having chosen to institute his suit in a particular court, he cannot ask for his examination elsewhere.”

But there is no question of the plaintiff having had any “choice of forum” in the instant case. The general principle, as stated in the 6th Edn. of the A.I.R.

Commentary (p. 3543), is that the court is not bound to issue a commission if it

“may result in manifest injustice to any party, or where it is not calculated to permit of evidence being tested fairly, or when the application is made to avoid cross-examination before the court.”

In the instant case I do not consider that any of those objections arise and, particularly in view of the great expense of bringing the plaintiffs and the doctor from England to Uganda and of the advanced age of Plaintiff No. 1, there are strong reasons for granting a commission.

The other ground of objection advanced by the defendant is that the plaintiffs have failed to avail themselves of the provisions of O. 16, r. 11, under which their evidence could have been taken while they were still in Uganda. It may be that the plaintiffs could have taken this course, though it is otherwise with the doctor, who has not been in Uganda. But I do not regard this as a sufficient ground for refusing a commission. At the conclusion of the trial of the case it will be open to the court to make an appropriate order as to the costs of the commission and, if it should appear that the evidence of the two plaintiffs could have been taken in this country before they returned to England, they can be ordered to pay the costs of the commission even if they should be successful in the suit.

A commission will issue in the terms asked for. Costs of this application will be costs in the cause.

Application allowed.

For the plaintiffs:

RE Hunt

PJ Wilkinson, Kampala

For the defendant:

BD Dholakia

Parekhji & Co, Kampala

The Commissioner of Transport v the Attorney-General of Uganda and another

[1959] 1 EA 329 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	21 April 1959
Case Number:	2/1959
Before:	Sir Kenneth O'Connor P, Forbes V-P and Windham JA
Sourced by:	LawAfrica

[1] Practice – Court of Appeal – Extension of time for appeal – Record for appeal lodged without copy of decree appealed from – Decree extracted after time had expired – Discretion of court to extend time

for “sufficient reason” – What is not “sufficient reason” – Eastern African Court of Appeal Rules, 1954, r. 9, r. 10 A., r. 54, r. 56, r. 58 and r. 72 – Civil Procedure Ordinance (Cap. 6), s. 2, s. 60, s. 68 (U.).

Editor’s Summary

In certain interpleader proceedings a decision was given by the High Court of Uganda on October 22, 1958. Notice of appeal was filed on November 1, 1958, and on January 2, 1959, the applicant lodged the record for the appeal, but did not include therein a copy of the decree from which he wished to appeal. The time for lodging the appeal under r. 58 of the Court of Appeal Rules expired on January 12, 1959. Later the applicant realised that the decree had never been extracted, and on February 9, 1959, this was done and on March 11, 1959 an application for extension of time for lodging the appeal was filed. At the hearing, counsel for the applicant conceded that until the decree appealed from had been extracted the appeal was incompetent, but contended that there were “sufficient reasons” for extending time.

Held –

- (i) the power conferred on the court by r. 9 of the Court of Appeal Rules to extend time is limited and can only be exercised for “sufficient reason”.
- (ii) the terms of r. 5 of the Court of Appeal Rules (which requires a decree or order to be extracted before an appeal is lodged) are too plain to admit of either misinterpretation or an error of judgment by an advocate.
- (iii) it is not a “sufficient reason” within r. 9 of the rules either that the application is not opposed or the respondent will not be prejudiced. Quare whether a point of law of general public importance would be a “sufficient reason”.
- (iv) the decision from which it was sought to appeal was not, as headed, an “order”, but by reason of s. 60 and s. 2 of the Civil Procedure Ordinance a “judgment”, and when formally drawn up to be expressed in a “decree”.

Application dismissed.

Cases referred to in judgment

- (1) *Farrab Incorporated v. Official Receiver and Provisional Liquidator*, [1959] E.A. 5 (C.A.).
- (2) *N.A.S. Airport Services Ltd. v. Attorney-General of Kenya*, [1959] E.A. 53 (C.A.).
- (3) *Gatti v. Shoosmith*, [1939] 3 All E.R. 916.
- (4) *Ribeiro v. Siqueira e Facho*, [1936] 1 All E.R. 537; [1936] A.C. 300.
- (5) *Mohammedbhai & Co. Ltd. v. Ghani* (1952), 19 E.A.C.A. 38.
- (6) *Mansion House Ltd. v. Wilkinson* (1954), 21 E.A.C.A. 98.

April 21. The following judgment was read by direction of the court:

Judgment

This was an application for an extension of time for lodging an appeal against a decision of the High Court of Uganda. After hearing counsel for the applicant we refused the application, and we now give reasons for our decision.

The decision against which the applicant desired to appeal was an adjudication of the High Court in certain interpleader proceedings. This decision was given on October 22, 1958. Notice of appeal under r. 54 of the Eastern African Court of Appeal Rules, 1954 (hereafter referred to as the Appeal Rules) was filed by the applicant on November 1, 1958. On January 2, 1959, the applicant purported to lodge the appeal in accordance with r. 58 of the Appeal Rules but did not include a copy of the decree on the record. Making allowance for the Christmas vacation (see r. 10 A) the time for lodging the appeal under r. 58 expired on January 12, 1959. Subsequently, the applicant realised that a decree embodying the decision from which he wished to appeal had not been extracted before the lodging of the appeal. The decree was extracted on February 9, 1959. This application for extension of time was filed on March 11, 1959.

The interpleader proceedings referred to were intituled, *inter alia* “In the matter of Civil Procedure Rules, O. 31”, and the written decision of the learned judge was headed “Order”. It is clear, however, that in law the proceedings were an interpleader suit under s. 60 of the Civil Procedure Ordinance, that the learned judge’s “Order” was a “judgment” as defined in s. 2 of that Ordinance, and that the decision was therefore properly embodied in a “decree” and not an “order” when the formal expression of the adjudication was eventually drawn up.

The application for extension of time was supported by the affidavit of Mr. Summerfield, Deputy Legal Secretary of the East African High Commission, which reads as follows:

“(1) that I am acting as counsel for the appellant above named;

- (2) that the record of appeal in the above named appeal was filed in the registry at Nairobi on January 2, 1959;
- (3) that due to an error of judgment on my part the decree appealed against had not been extracted before the record of appeal was so filed and, consequently, no copy of such decree was filed as part of the record of appeal;
- (4) that the decree appealed against was extracted on February 9, 1959, and a copy thereof received by me on March 2, 1959;
- (5) that I have been advised by the second respondent above named that he has no interest in the subject matter of this appeal and will not appear at the hearing thereof;
- (6) that I have been advised by the advocate for the first respondent Mr. Dickie, Acting Solicitor-General, Uganda, that the first respondent supports this application for an extension of time within which to re-lodge the appeal as the first respondent wishes the appeal to be determined on its merits and not dismissed on the ground of the defect in the manner of lodging the appeal hereinbefore disclosed;
- (7) that the points of law for determination in this appeal are of importance generally to the appellant and the first respondent;
- (8) that the first respondent and the second respondent will not be prejudiced by the grant of this application in that the notice of appeal and the record of appeal (with the exception of the copy of the decree appealed against) were filed within the period provided by the East African Court of Appeal Rules, 1954, and the hearing date fixed therefor, namely March 19, 1959, is the earliest practical date for the hearing in Kampala.”

At the hearing of the application Mr. Summerfield informed us that para. (7) of the affidavit required modification in that he had misunderstood the views of the first respondent, who did not, in fact, support the statement contained in the paragraph, though, for himself, Mr. Summerfield still contended that points of law of general importance were involved.

In argument, Mr. Summerfield conceded that until the decree had been extracted the appeal was incompetent. He stated that the defect had occurred as a result of his being unaware of the line of decisions of this court which culminated in *Farrab Incorporated v. Official Receiver and Provisional Liquidator* (1), [1959] E.A. 5 (C.A.) and *N.A.S. Airport Services Ltd. v. Attorney-General of Kenya* (2), [1959] E.A. 53 (C.A.). He contended that the application had the support of the first respondent; that a point of law of fundamental importance was at issue, namely whether contracts of the nature of that which was the subject of the suit required registration as a floating charge under s. 80 of the Companies Ordinance; that no prejudice was caused to the respondents since the main documents in the appeal had been lodged in time, and that both parties were ready to argue the appeal; that the application had been made and the decree extracted before the date fixed for hearing the appeal and before the dismissal of the appeal as incompetent, and that the case therefore should be distinguished from the *Farrab* case (1); that the case should be equated with the *N.A.S. Airport Services* case (2), in which an extension of time was granted, because the ground on which such extension was allowed was that without it a cross-appeal could not be heard and that this reduced itself to the respondent supporting the application for extension; that the defect was due to an error of judgment on his part and that accordingly the principle of *Gatti v. Shoosmith* (3), [1939] 3 All E.R. 916, should be applied; and that therefore the court ought to exercise its discretion under r. 9 of the Appeal Rules and grant the application.

We thought that there was no doubt that it was properly conceded that the appeal was incompetent until the decree had been extracted. There is a series of decisions relating to the necessity to extract a formal decree or order before an appeal will lie. The relevant cases are *Ribeiro v. Siqueira e Facho* (4), [1936] A.C. 300; *Mohammedbhai & Co. Ltd. v. Ghani* (5) (1952), 19 E.A.C.A. 38; *Mansion House Ltd. v. Wilkinson* (6) (1954), 21 E.A.C.A. 98; *Farrab Incorporated v. Official Receiver and Provisional Liquidator* (1); and *N.A.S. Airport Services Ltd. v. Attorney-General of Kenya* (2). These decisions are under the Kenya Civil Procedure Ordinance, but the principle applies equally under the Uganda Civil Procedure Ordinance. Section 68 of the Uganda Civil Procedure Ordinance provides:

“68. Unless otherwise expressly provided by this Ordinance an appeal shall lie from the decrees or any part of the decrees and from the orders of the High Court to the Court of Appeal.”

In s. 2 of the Civil Procedure Ordinance “decree” is defined as

“the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit . . .”;

“judgment” is defined as “the statement given by the judge of the grounds of a decree or order”; and “order” is defined as

“the formal expression of any decision of a civil court which is not a decree”.

As was pointed out in *Mohammedbhai & Co. Ltd. v. Ghani* (5) the Kenya Civil Procedure Ordinance was amended in 1935 by the addition of the following proviso to the definition of “decree”:

“Provided that for the purposes of appeal the word ‘decree’ shall include judgment and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up.”

No corresponding amendment has been made in the Uganda Civil Procedure Code, and accordingly the position in Uganda remains the same as it was in Kenya at the date of *Ribeiro v. Siqueira e Facho* (4), namely that an appeal does not lie until the formal decree or order comes into existence, and the principle which still applies in Kenya in regard to orders applies in Uganda in regard to both orders and decrees. By the municipal law of Uganda therefore no appeal is competent until the formal decree or order embodying the decision complained of has come into existence. The matter is not, therefore, merely procedural and the defect cannot be waived under r. 72 of the Appeal Rules. (*Farrab Incorporated v. Official Receiver and Provisional Liquidator* (1)). The only way in which this position can be cured is by extending the time for filing an appeal.

The material part of r. 9 of the Appeal Rules, which confers on the court a limited power to extend time, reads as follows:

“9 (1) The court shall have power for sufficient reason to extend time for making any application, including an application for leave to appeal, or for bringing any appeal, or for taking any step in or in connection with any appeal, notwithstanding that the time limited therefor may have expired . . .”

It is to be noted that the power can only be exercised “for sufficient reason”. In this respect the power of the court in regard to extension of time for appealing differs from the power of the Court of Appeal in England under O. 58, r. 15 of the English Rules of the Supreme Court. As was pointed out in *Gatti v.*

Shoosmith (3), under O. 58, r. 15 the discretion of the court is entirely unfettered. Mr. Summerfield relied upon *Gatti v. Shoosmith* (3) but it seems to us that r. 9 of the Appeal Rules more nearly approximates to the original form of O. 58, r. 15 of the English Supreme Court Rules before amendment in 1909. SIR Wilfred Greene, M.R., at the beginning of his judgment in *Gatti v. Shoosmith* (3) (at p. 917) says:

“Before 1909, O. 58, r. 15 which is the order regulating the time for appeals to this court, was in a different form from that in which it is now cast. Under the order as it then stood, the power of this court to extend the time for appealing required some special reason, because the appeal could not be brought except by special leave of the Court of Appeal. Under the rule as it then stood, the case of *Re Coles and Ravenshear*, [1907] 1 K.B. 1 was decided. That was a case where counsel had misconstrued the rule, and, as a result of the advice given, the appeal was out of time. It was there held that the fact that the delay was due to a mistake of a legal adviser, did not constitute a ground for giving the special leave which the rule required.”

“Sufficient reason” may not be as stringent a requirement as “special reason”, but adequate reason must still be shown before this court can exercise its discretion.

We deal first with the suggestion that the failure to extract the decree was due to an “error of judgment”. The relevant rule is r. 56 of the Appeal Rules which reads:

“56. If the intended appeal is against a decree or order it shall not be necessary that the decree or order shall in any event be extracted before an appeal is lodged, and the court or judge may require production of a sealed copy of the decree or order on the hearing of any application relating to an intended appeal.”

We considered that the words of the rule, and in particular the words “but a decree or order shall in any event be extracted before the appeal is lodged” were too plain to admit of misinterpretation or any “error of judgment”. It was not, and could not be, suggested in argument that there was any misunderstanding of the meaning of these words. Accordingly, the case would not have fallen within the rule in *Gatti v. Shoosmith* (3), even if our discretion had been as wide as that of the Court of Appeal in England. The decision in *Gatti v. Shoosmith* (3) turned upon the fact that there was there, in the words of the Master of the Rolls:

“a mere misunderstanding . . . which, to anyone who was reading the rule without having the authorities in mind, might well have arisen.”

In view of the terms of r. 56, no such argument was open to the applicant in this case. Moreover, there are many authorities on the point. Neglect by advocates to ascertain and follow the plain requirements of the law with regard to the necessity for extracting decrees and orders is no new matter. In 1936 in *Ribeiro v. Siqueira e Facho* (4), their Lordships of the Privy Council said (at p. 305):

“There can be no doubt that the appellant had an opportunity, if not a duty, in the event of desiring to appeal, to take steps to have the judgment of August 19, 1932, drawn up in the form of a decree. The Court of Appeal say ‘Once the judgment was delivered he [the appellant] could and should have taken steps to ensure his appeal being within time, and, having failed to do so, there are no special circumstances which would justify our granting the application’. If further authority on that

proposition be required, it will be found in the case of *Jivanji and Another v. Jivanji and Another*, (1930), 12 K.L.R. 41. The headnote in that case bears 'that it is the duty of a party who wishes to appeal against or apply for a review of a decree or order to move the court to draw up and issue the formal decree or order'. In that duty the appellant failed. In these circumstances it is not possible for their Lordships to hold that the Court of Appeal exercised its discretion improperly in the matter."

In 1953 in the case of *Mansion House v. Wilkinson* (6) this court said at p. 104:

"It is time that all local advocates should understand clearly the necessity for extracting decrees and orders promptly and using them in a proper manner. Any alleged long standing practice to the contrary has repeatedly been denounced by the court and could now form no answer to an allegation of negligence."

There has since been a long line of cases in this court, not all reported, where the same point has arisen. In particular, there have been two very recent decisions.

In *N.A.S. Airport Services Ltd. v. Attorney-General of Kenya* (2) the court exercised its discretion to allow the appeal to be lodged out of time. The reason for this exercise of the court's discretion was the existence of a properly instituted cross-appeal, as appears in the following paragraph at p. 3 of the leading judgment delivered by Windham, J.A.:

"The appellants allowed a period of almost two months to elapse, namely from October 6 until December 4, before they even submitted the draft of a formal order for the respondent's approval, fully knowing that in a further eight days from then their time for lodging their appeal would expire. They advanced certain reasons which, in our view, did not amount to an adequate excuse for this delay, a delay but for which they should with an ample margin of time have obtained approval of the draft and filed the formal order with their memorandum of appeal. Accordingly the appellants did not, in our view, show sufficient reason for being granted the indulgence of an extension of time. Nor did the mere fact of the respondent's not opposing the application constitute in itself, in our view, sufficient reason for the extension. The ground for our granting the extension was the fact that the respondent had lodged a cross-appeal and had included the formal order in the record of his cross-appeal, and that a refusal of the application would thus cause unmerited hardship to him by depriving him of his right of cross-appealing through no fault or irregularity on his part. This, we considered, constituted a 'sufficient reason' under r. 9 for allowing the extension of time for filling the appeal, so as to permit the appellants to re-lodge the necessary documents in the registry including the formal order."

No similar considerations arise in this case.

In *Farrab Incorporated v. Official Receiver and Provisional Liquidator* (1) an application was made for extension of time after the dismissal of the appeal as incompetent. In refusing the application the court said:

"We have come to the conclusion that this application should be refused. We only have power to extend time under r. 9 'for sufficient reason'. While we regret that the consequences of this decision may be enhanced costs and that a certain delay in winding up the company may occur, we cannot find anything in the circumstances of this case which we could properly hold to be 'sufficient reason' within the rule. We feel that if we allowed this application, we should be setting a precedent which would to a great extent nullify the provisions of the law. This is not a new matter. We refer particularly to *Mansion House Ltd. v. Wilkinson* decided as long ago

as 1953 and reported in (1954), 21 E.A.C.A. 98, and in particular to the remarks of Briggs, J.A., as he then was, at p. 104.”

There was, in our opinion, no error of judgment, properly so called, in the present case.

As to the other reasons advanced in support of the application by Mr. Summerfield, we were of opinion that none of these showed “sufficient reason” for the exercise of the court’s discretion. In the *N.A.S. Airport Services* case (2) and the *Farrab* case (1) we held that the mere fact of the respondent’s not opposing the application did not constitute in itself sufficient reason for granting an extension. We adhere to that view, though, if it were not for the requirement that “sufficient reason” must be shown, we should be inclined to accept consent of the respondent as a ground for extending time. Similarly, the fact that the respondent may not have been prejudiced is not in itself “sufficient reason” for granting extension, though it may be very material to the question whether extension should be granted in a proper case. As to the argument that a point of law of fundamental importance was at issue, it is to be noted that this contention was not supported by the respondent. We were not impressed by the argument and thought that there would be little difficulty in testing the matter in other proceedings. We saw no reason to hold that the importance of the point at issue was such as to constitute “sufficient reason” for extension of time under r. 9 of the Appeal Rules.

We regret the necessity for shutting out any appeal and would always hear an appeal if we could properly do so. We felt, however, that it would not be a proper exercise of discretion to accept as “sufficient reason” the grounds for non-compliance with the rule put forward in this case, and that if we were to do so, an extension would have to be granted in every case and we should be setting a precedent which would nullify the provisions not only of r. 56 of this Court’s Rules, but the relevant provision of the Uganda Civil Procedure Code.

In the result, therefore, we were of opinion that the application should be refused. No order as to costs was made, as costs were not claimed by the respondent.

Application dismissed.

For the applicant:

JC Summerfield (Deputy Legal Secretary, East Africa High Commission)

For the appellant:

The Legal Secretary, East Africa High Commission

For the first respondent:

JJ Dickie (Ag. Solicitor-General, Uganda)

The Attorney-General, Uganda

The second respondent did not appear and was not represented.

East African Navigators Ltd v Grundy and others
[1959] 1 EA 336 (CAD)

Division: Court of Appeal at Dar-Es-Salaam

Date of judgment: 27 April 1959
Case Number: 73/1958
Before: Sir Kenneth O'Connor P, Forbes V-P and Gould JA
Sourced by: LawAfrica
Appeal from: H.M. High Court of Tanganyika–Crawshaw, J

[1] Shipping – Collision – Ships on approaching courses – Negligent navigation of one ship imperilling other – Wrong step taken by other ship when collision imminent – Whether blame should be apportioned – Regulations for Preventing Collisions at Sea, r. 18, r. 19, r. 21, r. 28 (a) and r. 28 (b).

[2] Practice – Trial – Ships in collision – Evidence given of inconsistent testimony by witnesses at previous port enquiry – Whether irregular procedure vitiates trial – Indian Evidence Act, 1872, s. 145, s. 155 (3) – Eastern African Court of Appeal Rules, 1954, r. 77.

Editor's Summary

Two ships, the m.v. “Huria” and the m.v. “Malindi”, collided at night, when sailing on approaching courses between Dar-es-Salaam and Zanzibar, as a result of which the “Huria” sank with all her cargo, including a consignment of paint owned by the second respondents. The first respondent, as the owner of the “Huria”, sued the appellants, as owners of the “Malindi” for damages, alleging that the collision was due to the negligent navigation of the “Malindi”. The second respondents claimed from the appellants the value of the paint lost when the “Huria” sank. The first respondents recovered damages amounting to £4,224 10s., and the second respondents £44 for the paint. On appeal it was submitted that there had been errors of procedure at the trial, and in particular that the port officer at Zanzibar, who had conducted an enquiry into the loss of the “Huria” was, by leave, recalled to give evidence of what certain witnesses at the trial had said at the previous enquiry, and that if a witness was to be contradicted by proof of what he had said at the enquiry, that evidence should, pursuant to s. 145 of the Indian Evidence Act, have been put to him as the best evidence of what he had said. It was also contended that since the trial judge had found that had both ships remained on their original courses no collision would have occurred, the navigation of the “Huria” was not free from blame, in that those navigating her had failed to appreciate soon enough the risk of collision and should have slowed down and sounded her whistle, that the navigation of the “Huria”, when the risk of a collision was evident, was wrong, and that the award of damages was erroneous.

Held –

- (i) whilst the procedure of calling a witness to prove what other witnesses had said at a previous enquiry, without confronting those witnesses individually with their previous evidence, was irregular and undesirable, this was not a case of inadmissible evidence being admitted, or of evidence being improperly rejected, but a case of admissible evidence being admitted irregularly, and since the merits of the case were not affected, r. 77 of the Eastern African Court of Appeal Rules, 1954, would be applied, and no new trial would be ordered.
- (ii) there was no risk of collision to be appreciated until the “Malindi” turned to port at a distance of two to three hundred yards from the “Huria”, when the “Malindi” started to bear down upon the

“Huria”; thereafter there was an imminent risk of collision; and whilst the further turn to starboard of the “Huria” was a wrong step, that and the failure to whistle were actions done and omitted in the agony of collision and did not make her liable for the damage.

Appeal dismissed. Award of damages varied.

Cases referred to in judgment

- (1) *The Bywell Castle* (1879), 4 P.D. 219.
- (2) *The Harmonides*, [1903] P. 1.
- (3) *Liesbosch Dredger v. Edison s.s. (Owners)*, [1933] A.C. 449, sub. nom. *The Edison*, [1933] All E.R. Rep. 144.

April 27. The following judgments were read by direction of the court:

Judgment

Sir Kenneth O'Connor P: This is an appeal from a judgment and decree of the High Court of Tanganyika under which the first respondent recovered damages against the appellant company amounting to £4,224 10s. 0d., and the second respondent recovered against the appellant damages amounting to Shs. 880/25, with interest on each sum and costs.

The first respondent, Grundy, was the owner of the m.v. “Huria”, a vessel of 42 tons measuring 491½ feet in length which had, during the eight years during which Grundy was its owner, traded between Dar-es-Salaam, Zanzibar and Tanga. The second respondent was the owner of a consignment of paint which formed part of the cargo of the “Huria”. The appellant company is the owner of the “Malindi” which also trades between the places mentioned and appears to be a vessel of roughly similar size to the “Huria”. The damages arose out of a collision between the “Huria” and the “Malindi” which took place on the night of February 26-27, 1957, as a result of which the “Huria” sank with the loss of virtually all her cargo, including the paint owned by the second respondent.

Grundy and his wife lived on the “Huria” in special accommodation which he had had constructed for the purpose. Though himself certificated, he employed one Hassan Omari who was also certificated in Zanzibar as master of mechanically driven native vessels up to 120 tons. On the night in question, Grundy was on board the “Huria”, but prior to, and at the time of, the collision was asleep in his cabin below, Hassan Omari being in charge. It appears that one Faraj was steering before the collision and Mohamed Salim was the lookout. On the “Malindi” the captain, Mohamed Omar, had gone to sleep and had handed over the steering to one Abdullah Mohamed, who gave his age as twenty-three.

The learned judge summarised Grundy’s account as follows:

“Grundy (and let me say now that I thought him essentially an honest witness) says that the ‘Huria’ left Dar-es-Salaam for Zanzibar about 9.30 p.m. on February 26 carrying twenty-five passengers, twelve crew and full cargo of about twenty tons. He went to bed after passing the outer buoy leaving Faraj as helmsman and Mohamed Salim as look-out. The weather was fine, the sea calm but the sky slightly overcast, and he described it as ‘a dark night’. All the ship’s lights were working properly and they were cruising at normal speed of about 6¾ knots. Some time before 2 a.m. he was awakened by the sound of glass in their cabin starboard window being smashed, and through the window he saw the red port light of another vessel. He says that within about thirty seconds he was on deck and saw the ‘Malindi’ on his starboard side facing about 20° from the same direction as the ‘Huria’. He went to the engine room where at first he found no water, but about ten seconds later the engineer pointed out that it was entering from the hold, which it seems had by then filled up sufficiently to flow over the partition. Grundy says that his pump was ‘wholly inadequate to deal with the quantity of water’ so he decided to get the passengers off. He says the ‘Malindi’ after the collision drew astern for over 200 yards but then came back and after some to and fro movements (he says the handling of the

'Malindi appeared to be very unseamanlike) came near

enough to allow the 'Huria' to throw ropes to her and to lash the ships together.

.....

"The passengers were all taken on board the 'Malindi' which then drew away. Virtually the whole of the goods were left on the 'Huria', which, Grundy says, sank within about fifteen to twenty minutes. Other witnesses assess the time as longer. Grundy admitted in cross-examination that within twenty minutes some of the goods could have been taken off the 'Huria', but that he thought it too great a risk to human life."

The learned judge summarised the evidence of Hassan Omari, the captain of the "Huria" as follows:

"The evidence of the captain, Hassan, is that when Faraj took over the steering after leaving the danger area of Dar-es-Salaam he, Hassan, sat behind him on a raised roof or deck with a clear view forward through the wheelhouse. Beside him sat Mohamed Salim, the watchman and pumpman. When the latter went to pump, Hassan acted as watchman. With regard to the incident Hassan says that at a distance of what he reckoned was two and a half to three miles, or, by his indication, one and a half miles, he saw a white light almost dead ahead but slightly to his right. This meant (and the witnesses throughout demonstrated with models) that the 'Malindi' (for the vessel turned out to be her) was approaching almost head on. As the vessels came nearer he saw a red light on his port bow, which indicated the 'Malindi' had come slightly across his path towards the 'Huria's' port side. He ordered Faraj to turn to starboard so that the 'Malindi' would see his red light; he indicated that at this time the vessels were about three quarters of a mile apart. Having turned to starboard he saw the white, red and green lights of the 'Malindi' which he says meant that the 'Malindi' had turned to port, though from his demonstration not very hard to port. If indeed the 'Malindi's' green light did appear as he describes, it would seem necessarily to follow that she must have turned to port, and this is the view of the assessors. At this stage he says he could see the outlines of the vessel, though he agrees with Grundy that it was a dark but calm night. He took over the wheel and turned full to starboard. He looked round and saw the 'Malindi' was then behind him; he described it as 'following' him and says he saw her green light. He realised there was danger and continued to turn hard to starboard. The 'Malindi' then hit 'Huria' amidships, at which time the 'Huria', he says, had turned so far round as to be facing approximately the direction from which she had come. He says the 'Huria' sank about half an hour later."

The evidence of Mohamed Salim, look-out of the "Huria", was not of great importance as, having sighted and reported "Malindi's" light, he went to carry out routine pumping.

The evidence of Faraj, steersman of the "Huria" will be referred to later.

For the appellant company Abdullah Mohamed steersman of "Malindi" gave evidence. His evidence and the evidence of the "Malindi's" captain, Mohamed Omar are summarised by the learned judge as follows:

"The chief evidence for the defence is that of Abdullah Mohamed who at the relevant time was steering the 'Malindi'. He described in examination-in-chief (I will draw attention later to subsequent evidence by him which appears to be contradictory) the movements of the two vessels very much as Hassan describes them, but with this all-important difference, that what Hassan says the 'Huria' did he, Abdullah, says the 'Malindi' did, and what Hassan says the 'Malindi' did, he says the 'Huria' did. In other words,

he showed the 'Malindi' turning to starboard and the 'Huria' to port. He says that when he first saw the 'Huria' the vessels were virtually head on. The 'Malindi' then turned about 15 to starboard and the 'Huria' turned to port. The 'Malindi' then turned full to starboard and he saw the 'Huria's' green light. He demonstrated the 'Huria' turning slightly to port and crossing the bows of the 'Malindi' from port to starboard so that the 'Malindi's' bows struck the 'Huria' amidships on the starboard side.

"The captain of the 'Malindi', Mohamed Omar, said he went to sleep after handing over the steering to Abdullah, and was awakened by the bump of the collision. He looked at the position of the 'Malindi's' steering wheel and found it hard to starboard. This, though consistent with Abdullah's account, is not, I should have thought necessarily inconsistent with the account as given by Hassan, as on Hassan's story Abdullah might well if realising all too late that a collision was imminent have turned the wheel to starboard in the hope of saving the situation or lessening the effect.

"Apart from Abdullah, there was apparently a watchman on duty on the 'Malindi', Ali Bakari. He was not called to give evidence (which in the absence of an explanation suggests, I think it is fair to say, that his evidence might have been unfavourable to the defence) but Abdullah says that he, Ali, told him there was a ship coming. Abdullah in cross-examination at first said that Ali did not tell him to do anything but then said 'He told me after seeing the steamer to turn to my left'. Abdullah says he refused to comply."

The learned judge was impressed by the captain of the "Huria" Hassan Omari whom he described as "a good witness" who

"gave his evidence in a quiet and confident manner in strong contrast to the evasive manner of Abdullah and the demonstrative manner of Mohamed Omar".

As to the demeanour of Mohamed Abdullah, the learned judge says:

"I am afraid that I cannot say that I was favourably impressed with Abdullah Mohamed. He seemed uncertain of himself in the witness box (he is of course young) and was so evasive at times that no relevant answer could be obtained from him, and this in spite of his holding himself out as being educated. I would observe that Mr. Murray for the plaintiff showed the greatest patience in cross-examination. Abdullah gave me the impression of being either extremely stupid or else very hesitant of speaking the truth."

The learned judge and the assessors preferred the version of the collision given by witnesses who had been on the "Huria" to that of the "Malindi" witnesses and, as already mentioned, found for the plaintiffs/respondents.

I will deal first with Grounds V and VII (1) of the Memorandum of Appeal, which raised matters of procedure. Mr. Khanna, for the appellant, argued that there had been serious defects in procedure at the trial. He alleged that the learned trial judge had been misled by an erroneous statement of fact from the Bar made by counsel for the plaintiffs regarding a previous statement of the witness Faraj; that an erroneous procedure had been followed in taking the evidence of Lt. Commander Waddington and that inadmissible evidence had been admitted; and that information had been improperly elicited by counsel for the plaintiffs by means of leading questions.

One of the "Huria" witnesses was (as already mentioned) Faraj, a sailor on board the "Huria" who had been steering her from about 11 p.m. until about 1 a.m. when, after sighting the "Malindi's" masthead light and later her port light and having, on captain's instructions turned somewhat to starboard, he

handed over the steering to Hassan Omari captain of the “Huria”. This witness affected in court to be able to remember nothing whatever of what happened as regards the collision after he had handed over the steering to Hassan. When asked if he knew that there had been a collision, he said “I didn’t know anything. I cannot tell lies.” He knew that the “Huria” had been sunk, but reiterated that he did not know what had happened after Hassan took over. The court warned him that he must answer questions in an intelligent manner and learned counsel for the defendant (Mr. Houry) suggested that counsel for the plaintiff (Mr. Fraser Murray) should treat Faraj as a hostile witness and cross-examine him. It was known to the court that there had been an inquiry held, shortly after the collision, by Lt. Commander Waddington, R.N. (ret’d.), who was the port officer at Zanzibar. The following is the record of what took place after the suggestion was made that Faraj should be treated as a hostile witness.

“Murray: My Lord, my learned friend had made that suggestion. My Lord, I give your Lordship the proof of evidence which I have taken from this witness, and I have no reason whatsoever to treat this witness as a hostile witness, and the evidence he has given is fully consistent with . . . I don’t want the situation to be in any way misunderstood by my learned friend.

Discussion follows.

Is your evidence this, then that you don’t recollect? I don’t know.

Very well.

No cross-examination.

“Assessors: No questions.

Discussion as to whether witness has ever in fact made a statement.

“Murray: So far as your Lordship’s question is concerned, nothing he has said to-day is inconsistent with—

“Court: He has said no more than he did at the inquiry.

“Murray: No, my Lord.

More discussion, and it is noted that he was not able to give information as to how the collision occurred.”

Mr. Khanna made a great point of this, alleging that the answer by Mr. Fraser Murray that Faraj had said no more at the trial than he did at the inquiry was untrue and misleading and that the judge had thereby been misled into considering Faraj an honest witness. This was made one of the principal grounds of appeal. We found it impossible to adjudicate upon it without knowing what Faraj had in fact said at the inquiry before the port officer and, after hearing argument, allowed an application to exhibit a copy of Faraj’s evidence at the inquiry. It appeared that, at the inquiry (in addition to stating that he was at the steering when the collision occurred—a discrepancy of which the learned trial judge was aware and with which he dealt) Faraj had said at the inquiry that the collision took place near Pungume and that the “Malindi” had hit “Huria” on the starboard side and that he was sure of this. The learned judge dealt with the evidence of Faraj as follows:

“Faraj’s evidence supports that of Hassan up to the time of his changing course to starboard and Hassan taking over the steering from him; after that he seems to be unable to remember what happened. I frankly cannot understand his inability to recollect subsequent events, even that the ‘Malindi’ took him with the other passengers and crew from the ‘Huria’ to Zanzibar. Whether it is medically possible that the shock of the collision and the subsequent loss of his ship could result in loss of memory I do not know, but I can see no purpose in his deliberately lying as to this, for the events following the collision are comparatively unimportant. He

says he does not remember if he made a statement to the port officer, Zanzibar, after the incident. He cannot, I think, in saying this have been endeavouring to conceal anything, for the port officer gave evidence and could, if asked, have no doubt informed the court whether he had made a statement and if so what he had said. Neither counsel questioned him as to this. Further, had he decided to commit perjury to support Hassan's evidence, one would have expected him to have given a full account of the movements of the two ships up to the time of the collision. His confession of loss of memory, remarkable as it is, as to these important events tends, in my opinion, to suggest that he is an honest witness. It can hardly be that he feigned loss of memory rather than tell lies in support of Hassan's story, Abdullah's the helmsman of the 'Malindi' version being the correct one, for he said without hesitation that on instructions from Hassan he turned to starboard and this is vital evidence for the plaintiff and directly opposed to the evidence of Abdullah."

If the learned judge had known that Faraj had been able at the port inquiry to say that the collision had occurred near Pungume and to say that the "Huria" had been hit on the starboard side, he might have been much more sceptical about Faraj's loss of memory and his estimate of him as an honest witness might have been revised. But the responsibility for the fact that the judge did not have this information does not rest solely upon counsel for the plaintiffs in the court below, but also upon counsel for the defendant. Mr. Fraser Murray's representation to the court that nothing Faraj had said in court was inconsistent with what he had said at the inquiry and that he had said no more in court than at the inquiry was correct to the extent that Faraj's account given at the inquiry of the events preliminary to the collision was not inconsistent with his account given at the trial; but his account at the inquiry was inconsistent with what he had said at the trial as to his lack of recollection of the collision. Faraj had said in court that he knew nothing after he had handed over the steering to Hassan, whereas at the inquiry he had known something at least about the collision. It was open to counsel for the defendant, Mr. Houry, to correct any misapprehension which might have been caused in the judge's mind by Mr. Fraser Murray's statement, if he so wished. Mr. Houry did ask that the whole record of the inquiry should be put in evidence or that the whole of the statements of the witnesses who had given evidence at the inquiry and in court should be put in evidence (a course to which he was not entitled: see s. 39 of the Indian Evidence Act). Instead of making a request which was rightly refused, counsel for the defendant could have said that Mr. Murray's statement was inaccurate and, (as the time for cross-examination as of right had passed) could have applied for leave to cross-examine Faraj further. He could then have followed the well-known procedure laid down by s. 145 of the Evidence Act, that is to say, put to Faraj that part of his statement at the inquiry which was alleged to be contradictory, and, if the witness denied it, have that part of his statement proved. If the judge had refused to allow this to be done, that would have been a ground of appeal. But no such application was made. In the circumstances I do not think that the defendant/appellant can now be heard to complain that the judge was misled, when his counsel in the court below could have removed any misapprehension at once by adopting a very simple and well-known procedure and did not do so. It is unfortunate that he did not, because the learned judge, though he did not rely on Faraj's evidence to a great extent, did consider him to be an honest witness and did accept him as corroborating Hassan's evidence that the "Huria" turned to starboard. However on that, which was the important point, there was no inconsistency between Faraj's evidence at the inquiry and in the court.

Mr. Khanna's next objection to the conduct of the trial was that Lt. Commander Waddington, port officer, Zanzibar, who had conducted the inquiry

into the loss of the “Hurria” was recalled for the purpose of giving evidence as to what some of the witnesses had said at the inquiry. Apparently both counsel wished to have him recalled. Mr. Houry would have preferred to have him produce the reports which he took on the inquiry; but the learned judge ruled that he could not produce the reports as a whole, but could be recalled and asked whether the people who appeared before him said certain things. Commander Waddington was recalled. He was first asked by Mr. Fraser-Murray what Abdullah Mohamed, steersman of the “Malindi”, had said at the inquiry, for the purpose of showing inconsistencies between Abdullah Mohamed’s statement at the inquiry and his evidence in court. When Commander Waddington could not remember precisely what Mohamed Abdullah had said at the inquiry, he was allowed to refresh his memory as to the statement of Mohamed Abdullah and of other witnesses from the transcript of the shorthand note of their statements at the inquiry. An extract from the court record of what took place is as under. Mr. Fraser Murray was examining Commander Waddington:

“I am talking about this particular question. When he” [Mohamed Abdullah] “answered this particular question ‘How many times did you steer the ship’?, did he say anything in his answer about steering in the daylight? would you like to refresh your memory on this?—If I am allowed to.

“My Lord, I ask permission for the witness to refresh his memory, in accordance with s. 159 of the Indian Evidence Act.

“Court asked if Houry had any objection, to which Houry replied that he wished to have all the evidence taken at the preliminary inquiry put in. This was not allowed. Houry asked for admission of the evidence given by all witnesses called in the High Court, since several of them had apparently contradicted themselves. Not allowed. Court ruled that Commander Waddington might be questioned on answers given in the High Court which were inconsistent with the answers given at the preliminary inquiry.

“Murray: Does your Lordship allow the witness to refresh his memory?

“Court: I see no objection. He can’t be expected to remember every word.

Examination-in-chief continued

“Commander Waddington, would you look at the records. Look at p. 8.

“Houry: May we have this quite clear, Sir, he is looking at the record of the evidence he took at the inquiry?

“Court: That is so, yes.

Examination-in-chief continued

“Having looked at that, can you now tell my Lord what the exact answer to that question was?—The question being ‘How many times did you steer the ship’?, and the answer was ‘I have often steered during the daylight, but this Omari is always near me.’

“Court: Omari is always near me?—Omari, yes.

“Court: Who steered the vessel by daylight?

“ ‘I have often steered during the daylight, but this Omari is always near me.’

Examination-in chief continued

“What did you then ask this man?

“ ‘Did you ever steer at night before,’

“And what was the answer to that?

“ ‘No, only in the daylight’ .”

The examination then continued, Commander Waddington (who had no, or only a vague, independent recollection of the answers given by the witnesses at the inquiry, though he had read through the transcript. shortly after the inquiry and thought that it was then correct) read aloud the answers of the witnesses from the transcript.

On the appeal, Mr. Khanna objected strongly to this procedure. He argued that once the previous statements of the witnesses (at the inquiry) had been reduced to writing, that writing was the best evidence of what they had said, and if it was desired to contradict a witness at the trial by proving what he had said at the inquiry, the writing should have been put to him both because it was the best evidence of what he had said and because s. 145 of the Indian Evidence Act (which for this purpose controls s. 155 (3)) expressly requires this to be done. He said that since the judge in his assessment of the witness's credibility had relied on the discrepancies disclosed by this procedure, there had been a mis-trial and there must be a new trial.

Mr. Fraser Murray argued that the matter did not fall within s. 145 of the Indian Evidence Act; the transcript of what the witness had said at the inquiry was not a “previous statement made by him in writing or reduced into writing” since it had not been read over to the witness and adopted or signed by him; what validated it was the evidence of Commander Waddington's recollection of it and the evidence of the interpreter. Mr. Murray said that he was only seeking to prove what was said at the inquiry, not what was recorded, and only so far as Commander Waddington's recollection went. He argued that s. 145 only applied “if it is intended to put in such writing to contradict a witness” (Woodfall (9th Edn.)p. 998), and that he had not intended to put in the writing. Evidence given at a port inquiry was not, he said, by law required to be reduced into writing and secondary evidence of it was admissible and s. 65 of the Indian Evidence Act did not apply. Mr. Fraser Murray maintained that the principle of s. 145 had been complied with, in that the attention of the witnesses had been called to those parts of their statements at the inquiry which were to be used for the purpose of contradicting them.

In my opinion, the transcript of the shorthand note of evidence given by a witness at the inquiry translated by a court interpreter and recorded by a stenographer (of whose competence there is evidence) and shortly afterwards checked by the officer who presided at the inquiry was a “previous statement made by him . . . reduced into writing” within s. 145, and, before the writing could be proved, the attention of the witness must be called to those parts of it which were to be used for the purpose of contradicting him. I think also that when the officer who presided at the inquiry, who had little or no recollection of what the witnesses at the inquiry had said, was called upon to read out from the transcript of their evidence at the inquiry—the writing—the contradictory answers which they had then given, the witnesses were, in effect being contradicted by the writing. If it was desired to contradict them by the writing (and this was what was, in fact, done) the relevant part of the writing should have been properly proved. I think that the procedure adopted was irregular and undesirable. In Sarkar's Law of Evidence (10th Edn.) at p. 1191, the learned author says:

“Where the examination of witnesses has been reduced by an investigating officer to writing, it is undesirable to permit the accused's counsel to ask the officer if a certain witness made a particular statement to him although the language of s. 155 (3) is wide enough to permit of such questions. The officer cannot be expected to remember all that many witnesses told him.

If he is refreshing his memory by looking at the diary, the procedure is outside the scope and intent of s. 159. In the circumstances the written record by the police officer is the only proper and right thing to prove to discredit a witness.”

The above passage was written of police investigations in criminal cases. The present case is not a criminal case or the port inquiry a police investigation; but, in my opinion, the same principles apply. The only proper and right thing if contradictions between the accounts given by the witnesses at the trial and the inquiry were to be relied upon, would have been, after a proper confrontation, to prove the relevant parts of the record made at the inquiry.

It remains to consider whether this irregularity vitiates the trial. In my opinion it does not. The relevant answers of the witnesses at the inquiry could have been properly proved. It is not suggested that Commander Waddington read out the answers incorrectly: if he had made any slip, no doubt counsel for the defendant would have drawn attention to it. The learned judge, therefore, had before him answers which he could (and, to enable him to make a proper assessment of the evidence, should) have had adduced to him by another method. The principle lying behind s. 145 was observed since the attention of the witnesses had been fully drawn in cross-examination to their statements at the inquiry which it was desired to use in order to contradict them. In my opinion, this is not a case of inadmissible evidence being admitted or of evidence being improperly rejected: it is a case of admissible evidence being admitted by an irregular method. This irregularity did not affect the merits of the case and, in my opinion, r. 77 of the Eastern African Court of Appeal Rules, 1954, applies and no new trial should be ordered.

I should briefly mention Ground VII (1) of the Memorandum of Appeal and Mr. Khanna’s contention that the evidence of the respondents was, for the most part, elicited by leading questions. I do not think that the shorthand note establishes this and there seems to have been no such allegation by leading counsel for the appellants in the court below.

Having dealt with Mr. Khanna’s procedural objections, I will now consider his grounds of appeal based on the merits.

The learned judge, supported by the opinions of the assessors, found that had the two ships continued on their original courses, there would have been no collision; and had they continued on their courses after “Huria” turned slightly to starboard, there would have been no collision; that the real cause of the collision was the negligence of the “Malindi” in turning to port; and that Hassan’s action in turning “Huria” hard a-starboard should not be “too nicely weighed”, since it was done in the agony of the moment when collision was imminent. The assessors disagreed as to whether, when “Malindi” was sighted, r. 18 or r. 19 of the Regulations for Preventing Collisions at Sea applied. The judge made no definite finding on this, since he held that under either rule Hassan would not have done wrong in turning somewhat to starboard, if he thought there was risk of collision. I do not think that r. 18 applied since each vessel was not in a position to see both side-lights of the other.

Mr. Khanna argued that on the evidence four facts emerged:

- (1) that there had been a bad look-out on the “Huria” and that those responsible for her navigation had failed to appreciate sufficiently early that there was a risk of collision, that she should have slowed and sounded her whistle and was not free from blame;
- (2) that the “Huria” was wrong to starboard to a green light: she should either have kept her course and speed as the “stand-on” ship or have slowed and whistled;
- (3) that, in any event, to starboard so much as to cross the “Malindi’s” bows *twice*, was wrong;

- (4) that as the “Malindi” had been observed by the “Huria” 1½ miles away, this was not a case of the “Huria” having acted in the “agony of the moment”: and that the “Huria” could not excuse herself on the ground of sudden peril unless she herself was not in any way responsible for the emergency: and he relied on Marsden on Collisions at Sea (10th Edn.) p. 8 and p. 9.

I will deal with these arguments in order.

I do not think that the evidence shows that the look-out on the “Huria” was faulty. The mast-head light of the “Malindi” was seen at a distance of approximately one and a half miles and her port light shortly afterwards. There was no risk of collision to be appreciated until, as found by the learned judge, the “Malindi” turned to port at a distance of two or three hundred yards from “Huria” and started to bear down upon her. Thereafter there was an imminent risk of collision. The finding of the judge, backed by the opinion of the assessors, was that, since the “Huria” was taking avoiding action, she was not called upon to reduce speed, and with that I agree. She should, however, have indicated her further change of course to starboard by one short blast on her whistle (r. 28(a)), and, if she was the stand-on ship, as argued by Mr. Khanna, she could also have given five short and rapid blasts on her whistle to indicate that she was in doubt whether sufficient action was being taken by the “Malindi” to avert collision (r. 28(b), Marsden p. 556). It is by no means clear, however, whether, at that stage, whistling would have done any good. Even if “Huria” was the stand-on ship, she was bound, if she thought that collision could not be avoided by action by the giving-way vessel, to take such action as would best aid to avert collision: r. 21, Marsden, p. 514 and p. 515. She did not know whether the “Malindi”, having altered course to port, was coming straight on or turning more to port, in which latter case, for “Huria” to keep on her course would be to invite collision. The assessors advised and the learned judge agreed that, in the circumstances, the “Huria” was not to blame in turning away further to starboard. The fact that this brought “Huria” round in a half circle so that, having crossed “Malindi’s” bows, she crossed them again was singularly unfortunate and undoubtedly, as it turned out, contributed to the accident. But I am not prepared, on the facts as found, to go against the opinions of the judge and the assessors and to find that this amounted to negligence on the part of the “Huria”. I agree with the learned judge that

“the real cause of the collision was the negligence of the ‘Malindi’ in turning to port”.

This caused an imminent danger of collision and the action of Hassan in turning had to starboard, which turned out to be a wrong step, and his failure to whistle, were actions done and omitted respectively in the agony of the collision.

“A wrong step thus taken in the agony of collision is not negligence, and, unless the emergency was caused by her fault, the ship will not thereby incur liability. If the imminent danger of collision leading to the wrong step being taken was the result of negligence on the part of the other vessel, that owner will be held to blame for the collision (Marsden p. 6 and p. 7)”.

As was said by James, L.J., in *The Bywell Castle* (1) (1879), 4 P.D. 219, at p. 223, in a well-known passage:

“But I desire to add my opinion that a ship has no right, by its own misconduct, to put another ship into a situation of extreme peril, and then charge that other ship with misconduct. My opinion is that if, in that moment of extreme peril and difficulty, such other ship happens to do

something wrong, so as to be a contributory to the mischief, that would not render her liable for the damage, inasmuch as perfect presence of mind, accurate judgment, and promptitude under all circumstances are not to be expected. You have no right to expect men to be something more than ordinary men. I am therefore of opinion that the finding of the court below, that the 'Bywell Castle' was, for the purposes of this suit, to be considered to blame, must be overruled, and that the 'Princess Alice' was alone to blame."

Mr. Khanna argued that, as the "Malindi" had been sighted one and a half miles away, there was plenty of time and this was not a case of "agony of the moment". I have, however, already indicated my opinion that there was no risk of collision until, at a distance of only two or three hundred yards, the "Malindi" turned to port, and then collision was imminent. I think that the *Bywell Castle* (1) principle fully applies and that Mr. Khanna's arguments on the merits fail.

I turn now to the question of damages. In the course of the hearing Mr. Khanna applied to amend the appellant's pleadings to enable it to plead that its liability was limited under s. 503 of the Merchant Shipping Act, 1894. This application was refused without prejudice to any other remedy which the appellant might have by way of a separate proceeding for limitation of liability. Accordingly, any assessment of the quantum of damages recoverable in the present action is not necessarily conclusive but is without prejudice to any further limitation which may be decreed in proceedings to apply s. 503 of the Merchant Shipping Act.

The learned judge assessed £3,000 as the market value of the "Huria" and he allowed in addition £500 for the special superstructure which Mr. Grundy had had constructed on her, and £724 10s. 0d. for loss of apparel etc. The total amount of compensation awarded to Mr. Grundy by the judgment was £4,250 amended in the decree to £4,224 10s. 0d., which appears to be the correct figure.

I think that, on the evidence adduced in this case, it was apparent that there was little or no market for ships of the special construction of the "Huria". I think that the test was "What is the value to the owners as a going concern at the time the vessel was sunk?": *The Harmonides* (2), [1903] P. 1, 6; *Liesbosch Dredger v. Owners of s.s. Edison* (3) [1933] A.C. 449, 464. There was a great deal of evidence regarding the value of the "Huria" as a going concern at the time that she was sunk. The learned judge reviewed this and I do not think that I should be justified in differing from his assessment of her value except in one minor respect. The learned judge, in approaching the question of the value of the "Huria" accepted Grundy's evidence that he had paid Shs. 33,000/- for her in 1949 and then spent £1,500 on her, making the total cost to him £3,150. This included the cost of special work on the superstructure to provide living quarters for himself and his wife. Though he accepted these figures, the learned judge did not use them as the real basis of his valuation though they, no doubt, served in some measure as a check. What he apparently accepted as his basis was the sum of £2,000 which Grundy had mentioned to Champs in 1955, and he made this his starting point as indicating the value as at that time. He then added the sum of £1,000 spent by Grundy in 1956 on renovations and overhaul and a further £500 for the special value to Grundy of the superstructure. These items call for consideration.

The £1,000 was spent during a six month's overhaul in the first half of 1956. A number of beams were replaced, some planks were replaced in the hull and decking, the engine was overhauled and fitted with a new crankshaft and crank case, new rigging and sails were provided, the bulwarks were heightened slightly and there was repainting and some rewiring. These repairs, though they would result in the "Huria" being rendered staunch and sound, would not in

my opinion be reflected to the full extent of £1,000 (even allowing for the fact that Grundy made no charge for supervising the work) in the value of the vessel either for the purposes of sale or as a going concern to her owner. Her cargo carrying capacity would not have been enhanced, and while the expectancy of her period of useful service as a capital asset would have been in some measure improved, there can be no doubt that some proportion of the moneys expended should be attributed to ordinary maintenance to keep the vessel in good seaworthy condition. In the absence of detailed and expert guidance, it would, in my opinion, be reasonable to allow approximately two-thirds (£667) of the sum expended as a capital accretion for the purposes of valuation.

As to the sum of £500 allowed for the “special value” to Grundy of the superstructure, Mr. Khanna argued that this amount had been allowed twice as it was already included in the sum of £1,500 expended at the time of the purchase of the vessel. This submission would be a valid one had the original cost plus the moneys then expended by Grundy been taken by the learned judge as the basis of valuation. This was not so. The sum of £2,000 was taken as the basis as at 1955 because Grundy had given some indication that he would have accepted that sum. Although the cost of altering the superstructure had then already been incurred, the learned judge must have accepted that, in mentioning the sum of £2,000, Grundy was prepared to waive the special value of the superstructure to him, in the knowledge that it was most unlikely that it would have the same value to a possible purchaser. That is not to say however that, having put the idea of sale behind him and expended a further substantial sum on the vessel, Grundy should be barred from recovering its special value to him when it was lost by the action of a wrongdoer. This was, I think, the approach of the learned judge to the question and I do not dissent from it.

In the result, I think that the value which should have been attached to the vessel is the sum £3,167, being the amount as estimated by the learned judge (£3,500) less approximately one third of the sum of £1,000 expended in 1956.

Interest was awarded on the damages and the decretal sums from March 1, 1957. Mr. Khanna, while admitting that it is the Admiralty practice in England to award interest on damages (Marsden (10th Edn.) p. 110), says that this practice is ousted by Tanganyika legislation relating to interest in the High Court. He cited s. 34 of the Indian Civil Procedure Code and various Indian cases. I am of opinion that by virtue of s. 18 of the Tanganyika Order-in-Council Laws (Vol. V, p. 23) and s. 2 of the Colonial Courts of Admiralty Act, 1890, the High Court, when sitting as a Court of Admiralty, may follow the practice of the High Court in England in its Admiralty jurisdiction. I think that this ground fails.

Mr. Khanna objected to the judgment in favour of the second respondent on the grounds (a) that its title to the lost paint was not shown; (b) that the value of the paint was laid or proved; and (c) that this plaintiff should not have been given anything in respect of freight.

There was evidence that the second plaintiff was the owner of the paint and that it was on board the “Huria” when she sank. As a cargo-owner the second plaintiff was entitled to recover damages for its loss: Marsden p. 98. It was, however, bound to prove what its damages were. The plaint was a joint plaint in which it was pleaded that the “Huria” was carrying eight cases of paint belonging to the second plaintiff and that this was lost; and there was a claim for “the value of the goods . . .” claimed at Shs. 1,660/50. The learned judge dealt with the matter as follows:

“Finally, there is the claim of Shs. 1,660/50 cents by Kettles, Roy and Tysons Limited for loss of their paint. There is sufficient evidence to satisfy me that the paint was on board when the “Huria” sank, and I do not think this is contested by the defendant. Noronha, the claimant’s

head clerk, says it was shipped, and Grundy refers to it as being part of the cargo, none of which was saved. Noronha gives the selling value as Shs. 1,460/50 and 'freight and insurance . . . about Shs. 200/-'. This evidence seems astonishingly inadequate. He produced no books, invoices or documents of any kind. The paint was consigned to their Tanga branch and there is no evidence as to how the figures are made up. The witness could not even give the cost price, and anyway was not prepared to divulge the difference between that and the selling price. From his evidence the selling price he gave may have been no more than a hopeful guess. It had not apparently been contracted to be sold and there is no evidence of any offer at that or any other price. If there had been previous transactions there is no evidence when these were; prices may have changed since then. When Mr. Houry put it to the witness that the cost price would be half the normal selling price, the witness did not seem certain. Anyway, what does the cost include? There might, I suppose, be handling charges at Tanga and possibly storage. It would not be right to award the full selling price at Tanga. In any event I do not think that the possible selling price is the right basis. There is no evidence that other paint of a like kind and quality was not obtainable at a similar cost price to the second defendant. I am only prepared to award the cost price and my assessment of that must necessarily be arbitrary. In view of Noronha not being prepared to say that the cost price was more than half what he said was his selling price, I award the second defendant half of Shs. 1,460/50 cents, or Shs. 730/25 cents. In addition I will allow something for freight and insurance. Noronha said this was 'about Shs. 200/-'. I suppose that anything less than Shs. 150/- could not be 'about Shs. 200/-' and I allow Shs. 150/- making Shs. 880/25 cents in all. If the claimant does not take the trouble to help the court it cannot complain if a margin is given which may be to his disadvantage."

The strictures of the learned judge were fully justified. In my opinion, the second plaintiff failed to prove its damages and left the judge without any firm basis on which to assess them. The suggestion of Mr. Houry that the cost price was half the selling price was not accepted by the witness. It was not shown that the paint could have been expected to sell for the alleged selling price or even that it was in good condition and saleable at all. The cost price was concealed and the learned judge's estimate of half the selling price was a mere guess. In the circumstances, I think the damage suffered by the second plaintiff was not adequately proved. I think that the second plaintiff failed to prove its damages or to give the court any material on which to assess them and was entitled to nominal damages only.

I would dismiss the appeal except that the decree should be varied by substituting for the sum of £4,224 10s. 0d. in sub-para. (1) of para. 1, the sum of £3,891 10s. 0d., and by substituting for sub-para. (2) the following:

"(2) the defendants do pay to the second plaintiff the sum of forty shillings (shillings forty)".

I would not allow interest on nominal damages.

As to costs, we were informed by Mr. Khanna that the second plaintiffs had received in costs something like £600 on their claim for about £83. This seems to have been an error. We have called for the taxed bills, and it seems that one bill was submitted on behalf of both plaintiffs. This would be correct, as both were represented by one advocate. If any allowance for the claim of the second plaintiff was made by the taxing officer in his assessment it would necessarily have been very small, as the claim of the second plaintiff was hardly 1 per cent. of the total, the time devoted to it was very little, and the joinder of the second plaintiff cannot therefore have affected the costs appreciably.

The first respondent should have his costs of the appeal and below. The fact that he has obtained judgment for £333 less than in the court below should not, I think, deprive him of the whole costs. He has succeeded substantially. As to the second respondent, if there were any point in doing so, I would limit his costs in the court below to £30 plus disbursements. Since, however, it does not appear that his joinder as a plaintiff enhanced the costs which would anyhow have been payable by the defendant to the first plaintiff by even £30, there is no point in altering the order of the trial court. The appellant has had a measure of success in his appeal against the second respondent and though that does not, in the circumstances, affect the position as to costs in the court below, the appellant is entitled as against it to the second respondent to some very small proportion of its costs in this court. In order to save the costs of taxation, I would fix the costs of the appeal to which the appellant is entitled as against the second respondent as Shs. 200/-.

As my brethren are in agreement, there will be an order accordingly.

Forbes V-P: I agree and have nothing to add.

Gould JA: I also agree.

Appeal dismissed. Award of damages varied.

For the appellant:

DN Khanna and Tahir Ali

Mohamed Hussein & Co, Tanga

For the respondents:

WD Fraser Murray

Fraser Murray, Thornton & Co, Dar-es-Salaam

NAS Airport Services Ltd v The Attorney-General of Kenya
[1959] 1 EA 349 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	6 May 1959
Case Number:	98/1958
Before:	Sir Kenneth O'Connor P, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya—Miles, J

[1] *Costs – Appeal – Practice of the Court of Appeal.*

[2] *Costs – Certificate for two counsel – Noting brief.*

Editor's Summary

When the judgments of the court (reported at p. 53) were read by a single judge, counsel for the appellants intimated that he wished to apply for a certificate that the appeal was fit for two counsel. This application was, by consent, deferred until convenient for consideration by the full court which had heard the appeal, when counsel for both the appellants and the respondents sought to argue the matter of costs generally. The respondents urged that the costs of the appeal and in the court below should be reserved to the trial judge, since the appeal had been brought from an order made on an interlocutory application by the respondents under O. XII, r. 6 and O. VI, r. 27 of the Civil Procedure (Revised) Rules, 1948, and if at the trial of the action the appellants did not produce evidence affecting the proposition of law on the basis of which the order had been made, it would be shown ex post facto that the respondents had been right to bring their interlocutory application. For the appellants application was made for costs on the higher scale and a certificate for two counsel, but it was conceded that on appeal junior counsel for the appellants held only a nothing brief.

Held –

- (i) since the court from time to time moves to other territories, the practice of the court in hearing counsel on questions of costs cannot follow that of a court which remains always in one place; normally submissions on costs should be subjoined to the general arguments before judgment is reserved and where, owing to special circumstances, this cannot either adequately or conveniently be done, application for the question of costs to be deferred and argued after delivery of judgment should be made.
- (ii) the respondents had made an erroneous assessment of the effect of the pleadings which had put the appellants to the expense of contesting the applications under O. XII, r. 6 and O. VI, r. 27 and must bear the costs accordingly.
- (iii) since the case was of sufficient difficulty, the appellants were entitled to an order for costs “in any event” on the higher scale in the court below, and the costs of the appeal and cross-appeal to include those of second counsel, limited in the case of junior counsel to Shs. 200/- in all.

Order accordingly.

Case referred to in judgment

(1) *Wright v. Bennett*, [1948] 1 All E.R. 227; [1948] 1 K.B. 601.

May 6. The following judgments were read by direction of the court:

Judgment

Gould JA: The judgments of all members of the court which heard this appeal were read in court by Windham, J.A., on February 6, 1959, when the appeal was allowed with costs in this court and court below and the cross-appeal was dismissed with costs. Counsel for the appellants then applied to have the appeal certified as being fit for two counsel but the application was deferred and brought again before the court which heard the appeal. The respondent was not represented at the delivery of the judgments by Windham, J.A., until a very late stage of the proceedings and then not by counsel who had argued the appeal.

When counsel for the appellants brought his application before the court counsel for the respondent also appeared and desired to argue the matter of the order for costs generally, on the basis that no argument on this question had been preferred at the hearing of the appeal and no opportunity had been afforded for argument on costs when the judgment was delivered. The court’s order having been made, and the matter not appearing to fall within the provisions of r. 13 (2) of the Eastern African Court of Appeal Rules, 1954, we would have had difficulty in entertaining this application had we not been informed from the Bar that the order had not been drawn up: we were accordingly in a position to give the matter further consideration (see the cases quoted under note 6 at p. 636 of the Annual Practice, 1959).

Before dealing with the merits of the matter it would be well, I think, to say a word as to the practice of this court in the matter of hearing counsel on the question of costs. This is not, and cannot be, the same as the practice of a court which remains always in one place. It is not always either practicable or necessary to give counsel on opportunity of being heard on costs at the time of delivery of judgment. In

many cases where judgment is reserved the court has moved to another territory before it is delivered, in which event it is usually read by a single judge or by the registrar. The question of costs could not be argued at that stage and it would be unduly onerous, expensive and inconvenient to both parties and the court if it were necessary for the court to re-convene frequently for the purpose of such arguments. It is therefore necessary whenever possible for counsel to subjoin their submissions on the matter of costs to their

general arguments before judgment is reserved and this practice is well-understood and usually followed. In many cases, of course, argument on costs is hardly necessary, and in that event counsel should normally indicate that they leave the matter of costs to the court. If, by reason of the number or complexity of the issues in the appeal, counsel feel that they cannot adequately or conveniently deal with the question of costs before the decision of the court is known, they should make special application for that question to be deferred and argued after delivery of judgment. Each such application would of course be dealt with on its particular merits, but normally such applications are granted.

It is convenient in the present case to deal first with the submissions of counsel for the respondent, who urged that the appropriate order was that costs of the appeal and in the court below should be reserved to the trial judge. He said that this was an appeal from an interlocutory application and that costs “in any event” should only be awarded when no further light upon the matter in issue could be thrown at the trial. The judgment of this court was based, in his view, on the supposition that the appellants might, and not that they necessarily would, be able to produce evidence of facts at the trial which, if accepted, might affect the proposition of law set down for hearing by the order under appeal. Therefore, if they were, when the action came to trial, unable in fact to produce such evidence, it would be shown *ex post facto* that the respondent had been right to bring the interlocutory applications.

The word “interlocutory” was perhaps strained by counsel beyond its proper limits when he applied it to his application under O. XII, r. 6 (the refusal of which was the subject of the cross-appeal) to have judgment entered forthwith for the respondent. Be that as it may, no distinction as regards costs was sought to be drawn in this application by either counsel, between the appeal and the cross-appeal, which is in accord with the manner of presentation of the case to this court, and with the resulting decision. As to the basis of the judgment of this court, I would to some extent vary counsel’s version, which I trust I have accurately reproduced above. The basis of the decision was that the *pleadings* (from which must be ascertained the point of law which would fall to be decided under either application appealed from) apparently raised issues of fact and admitted of the calling by the plaintiffs (appellants) of evidence which might affect the point or points of law relied upon or might make it manifest that the particular point of law did not dispose of the action as a whole.

The respondent, in endeavouring to obtain early dismissal of the action, relied upon his own assessment of the effect of the pleadings, which this court has held to be erroneous. By reason of this error the appellants have been put to the expense of the proceedings in question and the appeal there from and I am unable to see any valid reason why the respondent should not pay the costs. I disagree with the proposition that if the appellants fail to produce at the trial evidence which might induce a decision in their favour, the respondent is proved *ex post facto* to have been right in bringing these proceedings. In proceedings of this kind regard must be had to the pleadings and not to what evidence may eventually be available to support them. Success or failure at the trial will be reflected in the costs then awarded—the present proceedings were in my opinion brought on an erroneous view of the law and the respondent must pay the costs accordingly. I would make this variation of the order now under consideration—there appears to be no reason why costs in the court below should be payable forthwith and, as is normal when interlocutory applications of this nature are rejected, these should be ordered “in any event”. The appeal and cross-appeal themselves stand on a different footing and call for no such limitation; with respect to them I would not depart from the order already made. I should add, for clarification, that the reference to costs in the court below is to the costs of the applications both under O.XII, r. 6 and O. VI, r. 27, which were heard together.

I turn now to the application of counsel for the appellant. He asked for a direction that costs in the court below be on the higher scale. To this counsel for the respondent made no objection. Counsel for the appellant asked also that costs of the appeal in this court be on the higher scale or alternatively that there should be a certificate for two counsel. There is in fact only one scale of costs in this court and therefore the only question is whether the costs should include a second counsel. In my opinion the case was of sufficient difficulty to warrant this expense but we were informed that Mr. De Souza, who appeared as junior to Mr. Parker, held only a noting brief, which presumably denotes that he was not fully instructed or in a position to argue the case had it been necessary. (See the references to this type of brief in *Wright v. Bennett* (1), [1948] 1 K.B. 601 at p. 602 and p. 608). In these circumstances, it seems reasonable to limit the costs payable in respect of second counsel to the sum of Shs. 200/-.

In the result I would order that the respondent (defendant) should pay the taxed costs of the appellants (plaintiffs) both on the appeal and the cross-appeal; that the respondent (defendant) should pay the costs of the appellants (plaintiffs) in the court below upon the applications under O. XII, r. 6 and O. VI, r. 27 in any event; costs in the court below to be on the higher scale and costs on the appeal and cross-appeal to be certified to include those of second counsel limited to the sum of Shs. 200/- in all.

Sir Kenneth O'Connor P: I agree. There will be orders for costs as proposed by the learned Justice of Appeal.

Windham JA: I also agree.

Order accordingly.

For the appellants:

FR Stephen

Stephen & Roche, Nairobi

For the respondents:

JF Marnan QC (Crown Counsel, Kenya)

The Attorney-General, Kenya

Paulo Osinya v R
[1959] 1 EA 353 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	29 June 1959
Case Number:	3/1959
Before:	Bennett Ag CJ
Sourced by:	LawAfrica

[1] Criminal law – Appeal – Alleged failure of magistrate to record evidence properly and fully – Whether affidavits of witnesses admissible on appeal – Evidence Ordinance (Cap. 9), s. 112 (U.).

Editor's Summary

The appellant was convicted of robbery contrary to s. 272 of the Penal Code. In support of the main ground of appeal that the trial magistrate failed to record the evidence of the accused and his witnesses properly and fully, affidavits of three defence witnesses at the trial were tendered to the court but none of the deponents was called for cross-examination on the affidavits.

Held – by virtue of s. 112 of the Evidence Ordinance the court is entitled to presume that the evidence of witnesses was properly interpreted and recorded and since the truth of these affidavits was not tested by cross-examination, the affidavits were not sufficient to displace that presumption.

Appeal dismissed.

Cases referred to in judgment

(1) *Cheung Shing v. R.* (1956), 23 E.A.C.A. 459.

(2) *Aladesuru v. R.*, [1956] A.C. 49.

Judgment

Bennett Ag CJ: The appellant was convicted of robbery contra s. 272 of the Penal Code and sentenced to seven years' imprisonment with hard labour. Evidence was led by the prosecution to prove that the appellant had been found in a canoe with six others removing fishing nets from the water which belonged to one, Rajabu Bandali. When the appellant and his accomplices were interrupted in their nefarious purpose by Rajabu's fishermen who were in another canoe, the appellant stood up in the bows of his canoe and fired a shot gun in the direction of the fishermen. The incident occurred in broad daylight.

The appellant's defence was that he had never gone on to the lake on that day at all and that he was arrested on the lake shore when he was about to embark. He suggested that a case had been fabricated against him because Mukenyee, one of Rajabu's fishermen who gave evidence inculcating him had a grudge against him.

The first ground of appeal in the memorandum is that the learned magistrate failed to record the evidence of the accused and his witnesses properly and fully. In support of this ground affidavits have been tendered from three persons who gave evidence as defence witnesses at the trial. If the contents of these affidavits are true it is apparent that the evidence of these three witnesses was not recorded in full at the trial.

There is no affidavit from the appellant himself.

The Crown rely upon an affidavit from the trial magistrate in reply to the affidavits tendered on behalf of the appellant. In *Cheung Shing v. R.* (1) (1956), 23 E.A.C.A. 459 it was held by the Court of Appeal for Eastern Africa that

“a lacuna in the judge's notes may here properly be proved by an affidavit of an advocate who appeared as counsel on the occasion in question. The passage from his note may be quoted or exhibited. We do not think that a motion to admit fresh evidence is strictly appropriate”.

The Court of Appeal did not hold that a lacuna in a judge's notes of evidence could be proved by the affidavit of the witness himself deponing to what he said in evidence before the judge. I have considerable doubt as to whether affidavits by witnesses can properly be admitted for this purpose. No provision is made for evidence by affidavit in part X of the Criminal Procedure Code. Assuming however that I am wrong, it is plain that if the facts are in dispute affidavits are of little value unless the deponents are subject to cross-examination on their affidavits. In the instant case the facts are in dispute and the appellant's counsel has not tendered any of the deponents for cross-examination.

Under s. 112 of the Evidence Ordinance I am entitled to presume that the evidence of these three defence witnesses was properly interpreted and properly recorded. See illustration (e).

In my judgment these affidavits, the truth of which has not been tested by cross-examination, are not sufficient to displace that presumption.

The first ground of appeal therefore fails.

The second ground of appeal is that the judgment is against the weight of the evidence. This is not a good ground of appeal in a criminal matter. See *Aladesuru v. R.* (2), [1956] A.C. 49.

During the course of the hearing learned Crown counsel produced a police statement which he thought had been made by Asani Musana, P. 3, for the purpose of drawing my attention to a discrepancy between the evidence of Asani and the statement. I am, however, satisfied that this statement was not made by P. 3 for the following reasons. The name of P. 3 is Asani Musana; the name of the maker of the statement is Azedi Musa. That a man called Azedi was present when the offence was committed appears from the evidence of Mulani s/o Musa, P. 1. It also appears from the evidence of Mulani that Azedi was not in Uganda at the time of the trial.

The appellant was convicted on the evidence of three eye-witnesses whom the learned magistrate regarded as wholly honest and reliable.

It is impossible for this court to say that the conclusion at which the learned magistrate arrived was unreasonable or that it cannot be supported having regard to the evidence. The sentence was a very proper one. The appeal is dismissed.

Appeal dismissed.

For the appellant:

JH Bhatt

JH Bhatt, Kampala

For the respondent:

JE Hopkinson (Crown Counsel, Uganda)

The Attorney-General, Uganda

Ramus v Donaldson
[1959] 1 EA 355 (CAD)

Division: Court of Appeal at Dar-Es-Salaam

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Date of judgment: 11 June 1959
Case Number: 15/1959
Before: Forbes V-P, Gould and Windham JJA
Sourced by: LawAfrica
Appeal from: H.M. High Court of Tanganyika–Biron, J

[1] Foreign judgment – Registration in High Court of Tanganyika – Judgment of South African Court – Setting aside registration – Meaning of “notice” in s. 6 (1) (a) (iii) of Foreign Judgments (Reciprocal Enforcement) Ordinance (T.) – English Foreign Judgments (Reciprocal Enforcement) Act, 1933, s. 4 (1) (a) (iii) – Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 8), s. 4 and s. 6 (1) (a) (iii) (T.).

Editor’s Summary

The appellant was the judgment debtor under a judgment made against him in the Supreme Court of South Africa under a mortgage bond. The respondent was the attorney of the assignees of the judgment debt. The mortgage bond provided in cl. V that any notices required to be given under the bond by the mortgagee should be addressed to the appellant “at the property which place he selects as his domicilium citandi et executandi for all processes to be served under this bond”. Service of South African proceedings was effected by affixing a copy thereof to the mortgaged property which was accepted as sufficient service by the South African Court. The appellant had been absent from South Africa from a date long before the date on which service of process was effected and no notification of the existence of the South African proceedings reached the appellant before judgment. Consequently the appellant did not appear in those proceedings and judgment was entered against him. The judgment of the South African Court was registered in the High Court of Tanganyika under s. 4 of the Tanganyika Foreign Judgments (Reciprocal Enforcement) Ordinance, subject to the appellant’s right to apply to have the registration set aside. The appellant accordingly applied to have the registration set aside under s. 6 (1) (a) (iii) of the Ordinance but the application was dismissed, the trial judge holding that under s. 6 (1) (a) (iii) of the Ordinance the appellant had received “notice of the proceedings” in accordance with the terms of his contract and in sufficient time to enable him to defend them. The substantial ground of appeal was that “notice” in s. 6 (1) (a) (iii) of the Ordinance meant actual notice brought to the knowledge of the appellant, and that the appellant never received actual notice of the proceedings in South Africa.

Held –

- (i) the provisions of s. 6 (1) (a) (iii) of the Ordinance are mandatory and “notice” means that notice of the proceedings must actually come to the knowledge of the defendant;
- (ii) service under cl. V of the mortgage bond was simply such substituted service (valid for proceedings in South Africa) as is contemplated in s. 6 (1) (a) (iii) of the Ordinance; and in the absence of actual notice to the appellant in time for him to defend the action in South Africa the registration of the South African judgment could not stand.

Appeal allowed. Registration of judgment set aside.

Cases referred to in judgment

- (1) *Schibsby v. Westenholz* (1870), L.R. 6 Q.B. 155.
- (2) *Robinson v. Canadian Pacific Railway Co.*, [1892] A.C. 481.
- (3) *Re a Debtor*, [1939] 2 All E.R. 400.

June 11. The following judgments were read by direction of the court:

Judgment

Forbes V-P: This is an appeal from an order of the High Court of Tanganyika.

The appellant is the judgment-debtor under a judgment obtained in the Transvaal Provincial Division of the Supreme Court of South Africa by one Barbara Denne Willis whereby it was adjudged that the appellant pay the sum of SA£10,779 18s. 0d. upon and by virtue of a certain mortgage bond, together with interest and costs. The respondent is the attorney of the assignees of the judgment debt. In pursuance of an application by the respondent in that behalf, the judgment of the South African Court was registered in the High Court of Tanganyika under s. 4 of the Tanganyika Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 8) (hereinafter referred to as the Ordinance) subject to the appellant's right to apply to have the registration set aside. Application was duly made by the appellant to the High Court to have the registration set aside, but the application was dismissed with costs on December 1, 1958. The appeal is against this decision.

It appeared that the mortgage bond (in which the appellant is referred to as the principal) contained a clause in the following terms:

“V—That any notice or notices which shall or may be required to be given under this bond by the mortgagee or other legal holder hereof, shall be addressed to his said principal at the property which place he selects as his domicilium citandi et executandi, for all processes to be served under this bond”;

that service of process in the South African proceedings was effected by affixing a copy thereof to the principal door of the mortgaged premises; that such service was accepted as sufficient service by the court in South Africa; that the defendant had been absent from South Africa from a date long before the date on which service of process was effected; that no notification of the existence of the South African proceedings reached the appellant before judgment; and that the appellant did not appear in those proceedings.

In these circumstances the appellant claimed that he was entitled to have the registration of the judgment set aside under s. 6 of the Ordinance, the relevant part of which reads as follows:

“6 (1) On an application in that behalf duly made by any party against whom a registered judgment may be enforced, the registration of the judgment:

(a) shall be set aside if the registering court is satisfied:

.....

(iii) that the judgment debtor, being the defendant in the proceedings in the original court, did not (notwithstanding that process may have been duly served on him in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear;

.....”

The provisions of the Ordinance are substantially identical with the provisions of the English Foreign Judgments (Reciprocal Enforcement) Act, 1933, and s. 6 of the Ordinance corresponds with s. 4 of the Act.

The reasons for the learned judge's rejection of the appellant's contention appears from the following passages in his judgment:

“Mr. Donaldson for the respondents, the judgment creditors, submits that the applicant received the notice he

contracted to receive.

.....

“In support of his contention that the applicant did receive proper notice in time, Mr. Donaldson argued that this section is founded on natural justice and in natural justice the applicant should be held to have received the requisite notice in accordance with his contract.

“Mr. Morrison for the applicant maintains that notice in the section means actual notice.

“Were I deciding this case on the principles of natural justice alone, I would unhesitatingly incline to Mr. Donaldson’s view, as in popular parlance the applicant ‘got what he bargained for’, . . .

“However, I am bound by the wording of the Ordinance, the language of which is mandatory, ‘shall be set aside.’

“The short and simple answer to this case is the construction of the words, ‘did not receive notice of these proceedings.’ In other words, what constitutes receipt of notice.

“In the absence of any authority, as none has been cited to the point and I am not aware of any, I find it extremely difficult and vexing how to construe those words. I feel that whichever of the two constructions contended for I put on these words, the other could be put with equal force and persuasion. I have already indicated where I consider justice lies. And if ever I must, I prefer to err on the side of the angels. The applicant was served with notice of the proceedings in accordance with the terms of his contract. And he has no cause to complain as he should have left a forwarding address. I therefore find that he cannot be heard to say and has not established that, ‘he did not receive notice of the proceedings in sufficient time to enable him to defend them’, within the meaning of the Ordinance. To hold otherwise would, in effect, mean that a defendant could evade service under the Ordinance by giving a false address.”

Several grounds of appeal are set out in the appellant’s memorandum of appeal, but the substantial ground is that “notice” in s. 6 (1) (a) (iii) of the Ordinance means actual notice brought to the knowledge of the defendant, and that the appellant never did receive such actual notice of the proceedings in South Africa.

Before us Mr. Donaldson, the respondent, conceded that the appellant had had no personal knowledge of the existence of proceedings in South Africa. He contended, however, that s. 6 (1) (a) (iii) of the Ordinance (s. 4 (1) (a) (iii) of the English Act) was a codification and not an alteration of the common law; that accordingly the force of earlier judgments of the English courts on natural justice was not affected; that the words in s. 6 (1) (a) (iii)

“notwithstanding that process may have been duly served on him in accordance with the law of the country of the original court”

ought, in accordance with the earlier English decisions, to be construed to refer to process for service which is repugnant to our own procedure and concept of natural justice; that “notice” should not be confused with “personal service”; that the appellant, though not resident in South Africa, had contracted to accept notice and service in a certain way; that service in the manner effected is not repugnant to the laws of Tanganyika; and that the appellant cannot now complain when the method of giving notice provided for in the contract, being a notice which is not repugnant to local concepts, was the method in fact adopted. And Mr. Donaldson referred to *Schibsby v. Westenholz* (1) (1870), L.R. 6 Q.B. 155, and Cheshire, *Private International Law*, and relied on the following passage at p. 820 (3rd Edn.) (p. 644 in the 5th Edn.):

“The plea that no notice has been received will not, however, avail a party who has agreed, either expressly or implicitly, to be content with something less than actual notice in fact.”

I am unable to accept the gloss which Mr. Donaldson seeks to put on s. 6 (1) (a) (iii). It may be noted that in *Schibsby v. Westenholz* (1) it was found as a fact that the defendants had notice and knowledge of the pending of proceedings in time to have appeared and defended the action in the French court. But in any case, where, as here, there is statutory provision for enforcement, it is the words of the statute which govern the matter. As was said by the Privy Council in *Robinson v. Canadian Pacific Railway Company* (2), [1892] A.C. 481 at p. 487:

“In the course of the argument counsel for the parties brought somewhat fully under their Lordships’ notice the law of reparation applicable to cases like the present, as it existed prior to the enactment of the Code; and they discussed the question whether and, if so, how far c. 78 of the Statute of 1859 altered or superseded the rules of the old French law. These may be interesting topics, but they are foreign to the present case, if the provisions of s. 1056 apply to it, and are in themselves intelligible and free from ambiguity. The language used by Lord Herschell in *Bank of England v. Vagliano Brothers*, [1891] A.C. 145 with reference to the Bills of Exchange Act, 1882 (45 and 46 Vict. c. 61), has equal application to the Code of Lower Canada: ‘The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities.’ Their Lordships do not doubt that, as the noble and learned Lord in the same case indicates, resort must be had to the pre-existing law in all instances where the Code contains provisions of doubtful import, or uses language which had previously acquired a technical meaning. But an appeal to earlier law and decisions for the purpose of interpreting a statutory Code can only be justified upon some such special ground.”

In the instant case I can see no ambiguity in the words

“notwithstanding that process may have been duly served on him in accordance with the law of the country of the original court”

and I think those words must be given their plain and ordinary meaning. I see no justification for giving the words a limited interpretation which would involve reading into the section an entirely new proviso.

The construction for which Mr. Donaldson contended, if it could be accepted, would certainly lead to the interpretation of the word “notice” in the section in a much wider sense than actual notice. It remains to consider whether, notwithstanding the rejection of Mr. Donaldson’s contention, the word “notice” may still be construed to mean a notice other than actual notice brought to the knowledge of a defendant.

On a plain reading of the section I find it difficult to construe the word “notice” in any sense except notice which has been brought to the knowledge of the defendant. It is difficult to see what other form of notice would “enable him to defend the proceedings”. The passage in *Cheshire* on which Mr. Donaldson relies refers to what was to be regarded as adequate notice apart from statute, having regard to principles of natural justice. It is followed by the following comment:

“It is significant that the Foreign Judgments (Reciprocal Enforcement) Act, 1933, in specifying what judgments shall be incapable of registration, does not mention the requirement of natural justice, but does insist that sufficient notice of the proceedings should have been received by the defendant.”

I do not think that any question of confusion between notice and personal service arises. Notice of the existence of the proceedings might reach a

defendant in many ways not amounting to personal service, e.g. by notice in a newspaper, if such notice actually came to his attention. I have no doubt that, in the context in which they are used, the words

“notwithstanding that process may have been duly served on him in accordance with the law of the country of the original court”

refer to any form of substituted service in the country of the original court. Substituted service is service which, of necessity, may or may not come to the attention of the defendant. The plain meaning of the section, as I see it, is that such service is insufficient to sustain registration of the judgment unless knowledge of the proceedings has actually come to the defendant in time to enable him to defend the proceedings. As was stressed in argument, the section distinguishes between “service” and “notice”. And while, as remarked by the learned judge at first instance, there is no direct authority on the construction of s. 6 (1) (a) (iii), there is a remark in the judgment of Sir Wilfred Greene, M.R., in *Re a Debtor* (3), [1939] 2 All E.R. 400 at p. 403 in relation to s. 4 (1) (a) (iii) of the English Act which, though obiter, supports the view I have taken. He there said

“He [i.e. the debtor] says that he did not receive notice of the proceedings in the Court of Appeal in sufficient time to enable him to defend the proceedings, and he did not appear. Let me assume in his favour that he did not receive notice. The notice of appeal was served apparently in accordance with French law. However, that is immaterial if the debtor did not actually receive notice . . .”

It has been argued that in the instant case the appellant contracted to receive notice and service in a certain way, and that service in accordance with his contract must be sufficient notice for the purposes of s. 6 (1) (a) (iii) of the Ordinance: and the decision of the learned judge of the High Court was based on this view of the matter. The section is mandatory, and, if I am right in my view that the plain meaning is that notice of the proceedings must actually come to the knowledge of a defendant, I doubt whether it is competent for a person to contract out of the section and agree that some form of constructive notice should suffice. However, I do not think it necessary to decide this point. The mortgage bond in the instant case is a South African contract, and I see no reason to assume that cl. V, which is set out above, gives more than an address for service in South Africa for the purposes of South African law. If indeed it is competent for a person to contract out of s. 6 (1) (a) (iii) of the Ordinance (which I doubt) I think the intention to do so must at least clearly appear in the contract. There is nothing in the mortgage bond here to indicate that the parties ever contemplated proceedings for the recovery of the debt outside South Africa, or had in mind the legislation in other territories for the reciprocal enforcement of judgments. I am not prepared to infer from cl. V any intent to contract out of the provisions of any such foreign legislation. It seems to me that service under cl. V of the mortgage bond is just such substituted service (valid for the purposes of proceedings in South Africa) as is contemplated in s. 6 (1) (a) (iii) of the Ordinance, and that in the absence of actual notice to the appellant in time for him to defend the action in South Africa (which, it is conceded, he did not receive) the registration of the South African judgment cannot stand.

For these reasons I think the learned judge at first instance was wrong in refusing to set aside the registration of the judgment of the South African Court. I would allow the appeal with costs here and in the High Court and order that the registration under s. 4 of the Ordinance of the judgment obtained against the appellant on April 4, 1957, in the Transvaal Provincial Division of the Supreme Court of South Africa be set aside.

Gould JA: I agree and have nothing to add.

Windham JA: I also agree.

Appeal allowed. Registration of judgment set aside.

For the appellant:

AF Morrison

Morrison & Co, Tanga

The respondent in person.

For the respondent:

Donaldson & Wood, Tanga

Assanand and Sons (Uganda) Limited v East African Records Limited
[1959] 1 EA 360 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	27 June 1959
Case Number:	10/1959
Before:	Sir Kenneth O'Connor P, Forbes V-P and Windham JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya–Farrell, J

[1] Practice – Service outside jurisdiction – Action for balance of money for goods sold and delivered – Payment of account to be made within jurisdiction – Complaint defective in essential respect – Affidavit supporting application for service outside jurisdiction defective – Setting aside decree – Civil Procedure (Revised) Rules, 1948, O. V, r. 21 (e) and O. VII, r. 1 (1) (f) (K.).

Editor's Summary

The respondent sued the appellant, which had its registered office in Kampala, Uganda, and leave to serve summons outside the jurisdiction was granted by the court. The affidavit supporting the application for service outside the jurisdiction stated *inter alia* that the action was for goods sold and delivered by the respondent to the appellant and that the payment of the account was to be made at Nairobi within the jurisdiction of the court. Leave to serve the summons outside the jurisdiction was obtained *ex parte* and the summons was served in Kampala, judgment in default of appearance was obtained by the respondent and the decree was transferred to Kampala for execution. After the commencement of execution proceedings in Kampala the appellant applied to the Supreme Court of Kenya to set aside the *ex parte*

decree on the ground that the cause of action arose at Kampala and that no facts had been pleaded in the plaint as required by O. VII, r. 1 (1) (f) of the Civil Procedure (Revised) Rules, 1948, to show that the Kenya court had jurisdiction. It was submitted for the respondent that the failure to plead facts showing that the court had jurisdiction was cured by the assertion in the affidavit that payment of the account was to be made at Nairobi within the jurisdiction of the court. The judge dismissed the application and held that non-compliance with O. VII, r. 1 (1) (f) was no more than an irregularity which could at any time have been cured by amendment and was in itself no ground for setting aside the judgment. The judge further ruled that O. V, r. 21 (e) applied.

Held –

- (i) para. (f) of O. VII, r. 1 (1) places upon the plaintiff the obligation of pleading “the facts showing that the court has jurisdiction” and a mere assertion by the plaintiff that the court has jurisdiction is not enough; the facts showing the court has jurisdiction must be stated in the pleading;

- (ii) no facts showing that the court had jurisdiction were set out in the plaint and it was quite obviously deficient in an essential respect and this defect was not cured by the assertion in the affidavit that payment was to be made in Nairobi within the jurisdiction of the court;
- (iii) the affidavit did not contain the “alleged facts” which brought the case within O. V, r. 21 (*e*) and did not contain any facts which could justify the Supreme Court of Kenya in assuming jurisdiction in this case.

Appeal allowed. Decree set aside. Execution proceedings recalled.

Cases referred to in judgment

- (1) *Standard Goods Corporation Ltd. v. Harakhchand Nathu & Co.* (1950), 17 E.A.C.A. 99.
- (2) *Vitkovice Horni A Hutni Tezirstvo v. Korner*, [1951] 2 All E.R. 334.
- (3) *Reynolds v. Coleman* (1887), 36 Ch. D. 453.
- (4) *Hewitson and Milner v. Fabre* (1888), 21 Q.B.D. 6.
- (5) *Fry v. Moore* (1889), 23 Q.B.D. 395.
- (6) *Dickson v. Law and Davidson*, [1895] 2 Ch. 62.

June 27. The following judgments were read by direction of the court:

Judgment

Sir Kenneth O'Connor P: This is an appeal from the ruling and order issued on January 13, 1959, of the Supreme Court of Kenya refusing to set aside a judgment made in favour of the respondent, East African Records Ltd., against the appellant, Assanand & Sons (Uganda) Ltd., after service of a summons out of the jurisdiction. Leave to serve the summons was obtained *ex parte* and the summons was served in Kampala and, according to an affidavit made by a director of the appellant company resident in Nairobi, was posted to Nairobi and failed to arrive. In consequence of this failure, no appearance was entered in Nairobi and judgment was signed in default of appearance.

In more detail the history of the matter is as follows:

On November 13, 1957, a plaint was filed in the Supreme Court of Kenya by the respondent against the appellant company described as

“a limited liability company having its registered office at Kampala, Uganda”.

The appellant’s place of residence was given as “Kampala, Uganda”. The respondent’s claim was for the sum of Shs. 16,413/60, the balance of an amount alleged to be due and owing by the appellant to the respondent in respect of goods sold and delivered, particulars of which were annexed. Demand and failure to pay were alleged and the plaint continued:

“The cause of action arose at Nairobi within the jurisdiction of this honourable court”.

The respondent prayed for judgment for Shs. 16,413/60, interest and costs.

In November, 1957, an application was made to the Kenya Supreme Court for leave to serve summons on the appellant through the court at Kampala. No copy of this application was included in the record,

but there is in the record a copy of the note by a judge of the Supreme Court of Kenya as follows:

“19.11.57. Bristow for plaintiff.

“Order. Leave granted to serve summons on the defendant through the court at Kampala. Twenty-one days for entering appearance. Costs of to-day to be costs in the cause.

J.S. Templeton.”

A copy of an affidavit agreed to be the affidavit filed in support of the application for service out of the jurisdiction was handed to us during the hearing. This is

an affidavit dated November 8, 1957, by a Mr. Michael Campbell of Nairobi who swore that he was the secretary of Afcot Ltd., secretaries to East African Records Ltd., described as “the plaintiff firm” and that as such he was duly authorised to make this affidavit. Paras. 2 to 5 of the affidavit read:

- “2. That I verify believe that the defendant company is carrying on business at Kampala, Uganda, and that they are British subjects or British protected persons.
- “3. That the action is for goods sold and delivered by the plaintiff to the defendant at the defendant’s request and payment of the account was to be made at Nairobi aforesaid within the jurisdiction of this honourable court, but despite demand the defendant has failed to effect payment and has hereby given cause for the institution of this suit.
- “4. That I believe that the plaintiff has a good cause of action against the defendant.
- “5. That the facts deposed herein are true to the best of my knowledge, information and belief, and I make this affidavit in support of plaintiff’s application that service of summons on the defendant out of jurisdiction may be granted.”

According to the affidavit of the Nairobi director the appellant company already referred to, he was informed by the managing director of the appellant company in Kampala (whether in or about December, 1957, or in May, 1958, is not clear) that the summons in the Nairobi suit had been served at the registered office of the defendant company in Kampala in or about the month of December, 1957, and that that summons had been despatched to him in Nairobi by post for him to take action thereon. The Nairobi director swore that he did not receive the summons in Nairobi and therefore no appearance was entered in Nairobi: in May, 1958, he was informed by the managing director in Kampala that the respondent had filed a suit against the appellant company in Kampala claiming the same relief as in the Kenya suit and the Kampala director enquired from him what had happened to the Nairobi suit for the same claim. No application was made to cross-examine the Nairobi director on this affidavit or to challenge its correctness. I think that for purposes of these proceedings, it must be taken that this explanation of the failure to enter an appearance is true. It seems very remarkable that the Kampala director having been served with a summons and having sent it to Nairobi, took no steps to assure himself that it had arrived.

The record of the proceedings contains a note dated 20.5.58 as follows:

“Summons served on the defendant company on 6.12.57. No appearance entered. On the application of counsel for the plaintiff Co. dated May 16, I enter judgment for the plaintiff Co. as prayed.

P. Heim
Dy. Registrar”.

On April 14, 1958, the respondent issued a plaint in Uganda in the High Court of Uganda at Kampala (Civil Case No. 260 of 1958) claiming the same relief as it had claimed in the Kenya suit. Thereafter, a decree was extracted in the Kenya suit and transferred to Kampala for execution. Execution proceedings were commenced there in October, 1958. The appellant then took action. On November 20, 1958, the court in Kenya was moved by the appellant for an order that the *ex parte* decree passed on July 24, 1958, against the appellant be set aside and that the execution proceedings consequent thereon be recalled and that the appellant be permitted to enter appearance and file his defence out of time. It was in support of this application that the Nairobi director made the affidavit referred to above.

The learned judge who heard the motion delivered a written ruling refusing to set aside the *ex parte* judgment in favour of the respondent, and it is against this ruling that the appellant appeals to this court.

The appellant in support of the application to set aside the *ex parte* decree alleged that the appellant had a good defence on the merits to part of the claim amounting to Shs. 10,974/- which it said represented the value of goods sent for display and sale in an exhibition held in Kampala through the appellant company. It was said that the appellant company had never contracted to buy these and that it tried to return them, but the respondent refused to take delivery as promised. Liability for the balance of the claim amounting to Shs. 5,439/60 was admitted.

The argument mainly relied on by the appellant in its application to set aside the judgment in default of appearance was that the cause of action arose at Kampala and that no facts had been pleaded in the plaint, as required by O. VII, r. 1 (1) (f) of the Kenya Civil Procedure (Revised) Rules, 1948, to show that the Kenya court had jurisdiction. Order VII, r. 1 (1) (f) reads:

“1 (1) The plaint shall contain the following particulars:

.....

(f) The facts showing that the court has jurisdiction.”

In answer to this the respondent relied on the assertion contained in Mr. Campbell’s above-quoted affidavit to the effect that payment of the account was to be made at Nairobi within the jurisdiction of the Kenya Supreme Court. The appellant stated that the affidavit had never been served on the appellant who had had no opportunity of dealing with it.

The learned judge who heard the application to set aside the decree (not the judge who had made the order for service out of the jurisdiction) supported the respondent’s contention. He held that non-compliance with O. VII, r. 1 (1) (f) while a failure to comply with the rules of pleading which should never be regarded lightly was, in this case at any rate, no more than an irregularity which could at any time have been cured by amendment and was in itself no ground for setting aside the judgment. He held that para. (e) of r. 21 of O. V applied. That paragraph reads:

“21. Service out of the Colony of Kenya of a summons or notice of a summons may be allowed whenever—

.....

(e) the suit is one to enforce . . .

or otherwise affect a contract or to recover damages or other relief for or in respect of . . . a breach committed within the Colony of a contract wherever made . . .”

The learned judge said:

“In this case the affidavit in support of the application for leave to serve the summons out of the Colony states that payment of the account in question was to be made at Nairobi. Such an application must necessarily be made *ex parte*, and only a *prima facie* case need be established. On the material before the court, it cannot be said that the discretion to grant leave was wrongly exercised, and, that being so, it is not open to a party who has been duly served pursuant to such leave and has neglected to enter appearance, to seek to have the judgment given in default of appearance set aside on the ground that the matter was outside the jurisdiction of the court and the judgment accordingly a nullity. The proper course

would be for the defendant to enter appearance under protest, as was done in the case above cited, and thus establish if he could, that the facts were not such as to bring the case within the assumed jurisdiction of the court as set out in O. V, r. 21.

“The defendants claim to have a good defence on the merits, at any rate as regards a substantial part of the claim, and that being so I might have been disposed to listen sympathetically to a plea for the indulgence of the court on the ground that the failure to enter appearance had been occasioned by inadvertence. No such plea, however, was put forward and the defendants have chosen to take their stand solely on the ground that the judgment was nullity. As they have failed to establish this to my satisfaction, it follows that the application fails, and must be dismissed with costs, and I order accordingly.”

With respect, I think that the learned judge fell into error. Paragraph (f) of O. VII, r. 1 (1) places upon a plaintiff the obligation of pleading “the facts showing that the court has jurisdiction”. That is a matter of great importance; for, if the court has no jurisdiction, any judgment which it gives is a nullity. A mere assertion by the plaintiff that the court has jurisdiction is not enough. The rule requires the *facts* showing that the court has jurisdiction to be stated. The objects of this requirement would seem to be, first, that the court should be able to exercise some critical function and to draw a reasonable inference that if the facts alleged are established, it would appear to have jurisdiction and, second, that the defendant should know what facts were alleged and have an opportunity of controverting them, if desired. In the present case the defendant (appellant) never, from first to last, had any document served upon it which set out the facts upon which the plaintiff (respondent) relied to give the Kenya court jurisdiction over a Uganda company; and, notwithstanding that a printed heading in the plaintiff’s plaint form (no doubt taken from O. VII, r. 1 (1)) required not only that the facts constituting the cause of action, but where it arose and “facts showing jurisdiction” to be set out, no facts showing that the court had jurisdiction were set out. The plaint was quite obviously deficient in an essential respect. Was this deficiency cured, as the learned judge held, by the assertion in para. 3 of Mr. Campbell’s affidavit made in support of the application for service out of the jurisdiction, that the action was for goods sold and delivered

“and payment of the account was to be made at Nairobi aforesaid within the jurisdiction of this honourable court”?

I think not. The affidavit of Mr. Campbell was deficient in three respects. First, it did not set out the deponent’s means of knowledge or his grounds of belief regarding the matters stated on information and belief, and, secondly, did not distinguish between matters stated on information and belief and matters deposed to from the deponent’s knowledge (see O. XVIII, r. 3 (1) and *Standard Goods Corporation Ltd. v. Harakhchand Nathu & Co.* (1) (1950), 17 E.A.C.A. 99). The court should not have acted upon an affidavit so drawn. Thirdly, the assertion that payment of the account was to be made at Nairobi was a bare assertion not based on any alleged facts. There was nothing to show whether this assertion was a fact, an inference from undisclosed facts, or a conclusion of law. The requirement of r. 23 that “the grounds on which the application is made” must be stated was not complied with. If facts supporting an inference that payment should be made in Kenya had been stated, or if it had been stated that it was a term of an express agreement between the parties that payment should be made within the jurisdiction, as in the case of *Vitkovice Horni A Hutni Tezirstvo v. Korner* (2), [1951] 2 All E.R. 334, that would have been a different matter. In that case Lord Radcliffe said at p. 339 and p. 340

referring to the English R.S.C. Order 11, r. 1 and r. 4, which are the same in all material respects as Kenya O. V, r. 21 and r. 23:

“Service out of the jurisdiction is, of course, an exceptional measure. The ordinary principles of international comity are invaded by permitting it, and that quite apart from the question whether judgment will, or will not, ultimately be given against the persons served. It is only natural, therefore, that the courts should approach with circumspection any request for leave to issue a writ against such a person. Rule 1 defines the circumstances in which a judge may in his discretion allow such a writ to be served, but, if r. 1 stood alone, the judge would be left in the dilemma of choosing between asking no more of the applicant than his assertion that the action which he desires to bring involves one or more of the qualifying conditions (which would be to ask less than the language of the rule seems to require) and asking the applicant to establish beyond reasonable doubt by appropriate evidence that the necessary conditions are, in fact, fulfilled (which would be, in effect, to try the case *ex parte* before it had been heard). Neither alternative presents itself to me as reasonable, and I think that the measure of the judge’s duty must be found within the words of r. 4. This rule prescribes the procedure which is to be observed on every application under the order, and it is well to recall that the order is dealing from first to last with what must be by its nature an *ex parte* application. There must be affidavit or other evidence stating that in the belief of the deponent the plaintiff has a good cause of action. The evidence must show in what place or country the proposed defendant may be found and whether he is a British subject or not, and, finally, it must disclose the grounds on which the application is made. I cannot feel any doubt that the word ‘grounds’ is adequate to cover the alleged facts which bring the case within r. 1 as well as any additional facts which are relevant to the exercise of the court’s discretion, and this requirement by itself seems to me to show that the judge is expected to exercise some more critical function than that of merely accepting the statement on affidavit that the plaintiff is believed to have a good cause of action.

.....

“Further, a case does not sufficiently appear to be a proper case for the purposes of this order unless, on consideration of all admissible material, there remains a strong argument for the opinion that the qualifying conditions are, indeed, satisfied.”

Mr. Campbell’s affidavit did not contain the “alleged facts” which brought the case within r. 21 and did not contain “all admissible material”, and the court had no, or quite insufficient, material upon which to exercise any “critical function”. From first to last no facts have been pleaded or shown on affidavit which would justify the Kenya Supreme Court, which should approach the matter “with circumspection”, in assuming jurisdiction in this case.

I think also that the learned judge was not quite correct in saying in the last paragraph of his judgment that the defendants had chosen to take their stand solely on the ground that the judgment was a nullity. The affidavit of the Nairobi director and the recorded notes of the argument show that the defendant was also submitting as grounds for setting aside the judgment (i) that the service on the Kampala office had not come to the notice of the defendant company in Nairobi; and (ii) that the defendant had a substantial defence to part of the claim. Mr. Couldrey for the respondent argued that the failure to plead facts showing that the court had jurisdiction was cured by Mr. Campbell’s assertion that payment was to be made in Nairobi. I have already indicated that I do not think that it was. Mr. Couldrey argued that if there was anything wrong it was a mere irregularity and that the defendant/appellant had not been

diligent. He relied upon *Reynolds v. Coleman* (3) (1887), 36 Ch. D. 453; *Hewitson and Milner v. Fabre* (4)(1888), 21 Q.B.D. 6; *Fry v. Moore* (5) (1889), 23 Q.B.D. 395; and *Dickson v. Law and Davidson* (6), [1895] 2 Ch. 62.

I have examined all the cases cited by Mr. Couldrey and I think that they are all clearly distinguishable from the present case. There was undoubtedly lack of diligence on the part of the appellant's director, but not, in my view, such as to prevent the appellant from moving to set aside an order and an *ex parte* judgment made (so far as has yet been shown) without jurisdiction.

For the reasons which I have already indicated, I would allow the appeal.

The *ex parte* decree dated July 24, 1958, should be set aside and the execution proceedings taken pursuant thereto recalled. The appellant should have leave to enter appearance and file his defence within fourteen days from the date of this judgment. The appellant should have his costs of the appeal. I would not certify for two counsel. The costs below should be costs in the suit.

Forbes V-P: I agree.

Windham JA: I also agree.

Appeal allowed. Decree set aside. Execution proceedings re-called.

For the appellant:

DN Khanna and JK Winayak

Johar & Winayak, Nairobi

For the respondent:

J Couldrey

Kaplan & Stratton, Nairobi

Fabiano Bukenya v David Mutebi and another
[1959] 1 EA 366 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	8 May 1959
Case Number:	826/1958
Before:	Lewis J
Sourced by:	LawAfrica

[1] *Jurisdiction – Action in High Court for recovery of liquidated sum – Action between African parties – Whether principal court or High Court has jurisdiction – Buganda Courts Ordinance (Cap. 77), s. 7 (U.).*

Editor's Summary

The plaintiff claimed from the defendants the return of Shs. 4,200/- part payment for a motor car which the defendants failed to deliver. The first defendant did not enter appearance and judgment was entered against him in default. The second defendant by his defence pleaded, *inter alia*, that the court had no jurisdiction to try the case as the parties were Africans. It was argued for the plaintiff that this was a claim under the Sale of Goods Ordinance and therefore s. 7 of the Buganda Courts Ordinance did not apply, and that the Buganda court did not recognise claims for damages which the plaintiff had claimed.

Held – the plaintiff did not mention the Sale of Goods Ordinance and since the plaintiff did not plead or invoke a particular section of an Ordinance the case was not taken under any Ordinance of Uganda; therefore the Principal Court had jurisdiction.

Order for transfer of suit to the Principal Court.

No Cases referred to in judgment in judgment

Judgment

Lewis J: In this case the plaintiff claimed the return of Shs. 4,200/- part payment for a motor car which the defendants failed to deliver.

The first defendant did not enter appearance and judgment was given against him on February 3rd, 1959.

The second defendant by his defence pleaded, *inter alia*, that this court had no jurisdiction to try the case as the parties were Africans. The plaintiff argued that this was a claim under the Sale of Goods Ordinance and therefore s. 7 of the Buganda Courts Ordinance did not apply. He also argued that the Buganda courts did not recognise claims for damages and this was claimed by the plaintiff.

The first thing to note is that under s. 6 of the Buganda Courts Ordinance the jurisdiction of the Principal Court is limited only by its warrant or by s. 9. There is no warrant limiting jurisdiction and so one must consider what is meant by the words “taken under any Ordinance”. in s. 9 (c).

Under what circumstances is a plaintiff justified in saying that the proceedings are “taken under” this or that Ordinance or English Common Law? I think the answer is to be found in the form in which his claim is framed. The plaintiff sued the defendants for the return of Shs. 4,200/- and pleaded a written agreement embodying the contract. The Sale of Goods Ordinance is not mentioned, and so far as I can see need never be invoked. As the final court of appeal for cases from the African courts I know that many cases of this nature are tried by such courts. It is extremely difficult to say with certainty what suits are, and what suits are not, triable by African courts. The pleadings of course are a guide, but not conclusive. It depends, I think, whether a plaintiff has to plead and invoke a particular section of an Ordinance to succeed. No general rule can be laid down.

For these reasons I consider that this particular case is not taken under any of our Ordinances and the Principal Court has jurisdiction.

The case must be transferred.

Order for transfer of suit to the Principal Court.

For the plaintiff:

SV Pandit

SV Pandit, Kampala

For the second defendant:

S Sessanga

S Sessanga, Kampala

The Wakf Commissioners v The Public Trustee **[1959] 1 EA 368 (CAM)**

Division:	Court of Appeal at Mombasa
Date of judgment:	19 June 1959
Case Number:	80/1958
Before:	Forbes V-P, Gould and Windham JJA

Sourced by: LawAfrica

Appeal from: H.M. Supreme Court of Kenya–Edmonds, J

[1] *Mohamedan Law – Succession – Deceased leaving widow and no other heir – Whether Wakf Commissions entitled to residue of estate after payment to widow of her share – Wakf Commissioners Ordinance, 1951, s. 18 (K.) – Public Trustee Ordinance (Cap. 37), s. 9, s. 11 (3) (K.) – Mohamedan Marriage, Divorce and Succession Ordinance (Cap. 148), s. 4 (K.).*

Editor’s Summary

The deceased was an African Muslim of the Shafi sub-sect of the Sunni Mohamedans and died intestate, leaving a widow and no other heirs. On a petition by the public trustee for a declaration, the Supreme Court held that since there were no other heirs the widow was entitled, in addition to her one-quarter share, to the whole residue of the estate (reported sub nom. *Re Juma Sadala’s Estate*, [1958] E.A. 308 (K.)). The Wakf Commissioners appealed, claiming that under Shafi law, the widow was not entitled to the “return” nor, in contrast to the Hanafi, Ibathi and Shia schools of Mohamedan law, could equitable principles be applied in favour of the widow. They contended that they were entitled to the residue under s. 18 (1) of the Wakf Commissioners Ordinance, 1951.

Held –

- (i) by s. 4 of the Mohamedan Marriage, Divorce and Succession Ordinance, equitable principles were expressly excluded and the trial judge had erred in deviating from the Shafi law of succession in this respect.
- (ii) under Shafi law, in the absence of heirs, Islam inherits as an “agnate” for the benefit of Muslims, but the word “claim” in s. 18 (1) of the Wakf Commissioners Ordinance, 1951, was not intended to cover a claim by so universal a body as Islam.
- (iii) even if s. 18 (1) of the Wakf Commissioners Ordinance, 1951, to some extent varied the Shafi law (which would otherwise apply by virtue of s. 4 of the Mohamedan Marriage, Divorce and Succession Ordinance), the specific provisions of s. 18 (1) of the 1951 Ordinance must override the general provisions of the earlier Ordinance and the Wakf Commissioners were entitled to the residue of the estate.

Appeal allowed.

Cases referred to in judgment

- (1) *Saumu binti Uledi v. Khamis bin Songoro* (1944), 7 Z.L.R. 126.
- (2) *Commissioners for Special Purposes of Income Tax v. Pemsel*, [1891] A.C. 531.

June 19. The following judgments were read by direction of the court:

Judgment

Windham JA: The respondent, the public trustee for the Colony and Protectorate of Kenya, is the

administrator of the estate of the late Juma Sadala, who died intestate in Mombasa on August 23, 1955. It is common ground that the deceased died an African Muslim of the Shafi sub-sect of the Sunni sect of Islam, and that he left a widow but no other heirs, whether agnates or cognates, or whether sharers, residuaries or distant kindred. It is also common ground that under Shafi law (as also under the law of Hanafi, the other main sub-sect of the Sunnis) the widow, as such, was entitled to one-quarter of the deceased's estate. Doubts arose, however, as to whether the remaining

three-quarters of the estate also should go to the widow or whether it should be handed over to the appellants, the Wakf Commissioners. The respondent accordingly petitioned the Supreme Court of Kenya under s. 9 of the Public Trustee Ordinance (Cap. 37) for a decision on the point, the petition being served on the Crown and on the appellants, the latter contending that the residue should be handed over to them under and for the purposes of s. 18 (1) of the Wakf Commissioners Ordinance, 1951. The Supreme Court held that the residue should go to the widow in addition to her one-quarter share. Against this decision the Wakf Commissioners have appealed. The respondents have contended before us, as they did below, that the residue of the estate should be handed over to the widow.

The process by which the learned judge arrived at his conclusion may be considered, briefly for the moment, in three stages. First he held, and it is conceded that he rightly held, that under the centuries old Shafi law of inheritance the disputed residue of the estate, by reason of the absence of heirs other than the widow, would be payable into the ancient Bait-ul-Mal or State Treasury, thence to be distributed for the religious purposes of Islam, provided that the Bait-ul-Mal, as such or under some other name, existed in Kenya and was functioning properly. Secondly, since the Bait-ul-Mal does not exist as such today in Kenya, he considered whether it can be held to have been replaced or re-created by the Surplus Fund which is set up by s. 18 of the Wakf Commissioners Ordinance, 1951, and he concluded that it can not; he went on to hold that the residue should not therefore be handed over, under that section, to the appellants for payment into the Surplus Fund. Finally he considered what ought, in these circumstances, to be done with the residue, and turned his attention to the doctrine, under the Muslim law of inheritance, of *ra'ad* or "return". Under this doctrine, which constitutes a modification of the original and stricter Muslim rule, and which was introduced some centuries ago into both of the two main sects of Islam, the Sunnis and the Shias, the residue of an estate, after payment of their prescribed shares to sharers, and in the absence of any residuary heirs, would be allowed to "return" to the sharers to the exclusion of the Bait-ul-Mal, subject to certain differences under Shafi law which I will consider in a moment. By further and later equitable modifications and judicial decisions the sharers to whom such "return" will be allowed have been extended, in the case of the Shia sect, and of the Hanafi and Ibathi schools of the Sunni sect, to include a husband or a wife. A helpful historical review of the authorities is contained in the judgment of Gray, C.J., in the Zanzibar case of *Saumu binti Uledi v. Khamis bin Songoro* (1) (1944), 7 Z.L.R. 126, a case concerned with the Ibathi law.

Under Shafi law, however, neither a husband nor a wife, by reason of the lack of blood-relationship with the deceased, was ever included among the sharers who were entitled to "return", unless indeed he or she did happen to be a blood-relation of the deceased, in which case he or she would be entitled to it in that capacity; and under Shafi law, also, "return" was allowed only if the Bait-ul-Mal was not being properly administered. Nevertheless the learned judge, applying in favour of the widow the same equitable modification as obtained among the Shias, the Hanafis and the Ibathis, held that, there being in Kenya no Bait-ul-Mal nor any substituted equivalent of it, the residuary three-quarters of the estate should be paid to the widow.

The passage in the judgment of the learned trial judge in which he sets out the doctrine of "return", as applied respectively by the Hanafi and Shafi sub-sects and by the Shia sect, is correct in essentials and in all points touching the case now before us, and it reads as follows:

"The Shafii are a sub-sect of the Sunni Mohamedans, who belong principally to the Hanafi school of Mohamedan law since the majority of Sunnis in India are of the Hanafi sub-sect. The respective laws of

inheritance among the Hanifis and the Shafiis have differed and still differ. The former have always accepted distant kindred as heirs, and from early times accepted the doctrine of 'return' in the absence of any other heirs to the husband, through excluding the wife, the residue in the case of a surviving wife escheating to the State Treasury, the Bait-ul-Mal. Subsequently, however, the law was further modified so as to allow the residue of an estate to go to the wife. (Syed Ameer Ali on Mohommedan Law (2nd Edn.) Vol. 2, 119). Under Shafii law there was originally no place reserved for distant kindred and no return, so that in default of sharers and residuaries, the property would escheat to the Bait-ul-Mal. In the twelfth century distant kindred were admitted to the return in default of shares and residuaries 'in all cases in which public revenues are not administered conformably to the law' (Wilson (5th Edn.), 415), but the modification did not extend to the husband or the wife (Minhaj et Taliben, 247). The Shias are the other main Mohamedan sect, and, at one time, according to the Shia school, the wife was not entitled to inherit the residue by return in the absence of any other heir, though the husband was. But it was decided by the Oudh Court in *Abdul Hamid Kahn v. Peere Mirza* (1935), 10 Luck. 550; 153 I.C. 379, that a widow is entitled to take by return."

The foregoing brief exposition of the doctrine of "return" correctly states the position under the Shafi school of law, and it is unnecessary to enlarge on it at any length in view of a concession rightly made during the course of argument before us by learned counsel for the respondent, when he agreed that

"when Bait-ul-Mal fell into disuse, Shafi law allowed a 'return' to the other agnates, but not to husband or wife."

It will be convenient, however, to set out the relevant passage in Minhaj et Talibin's Manual of Muhammedan law according to the Shafi school, the leading authority on the teachings of that school, as expounded by Imam Nawawi in the 13th century A.D. The translations from the Arabic in Minhaj into English, like the other translation to which I shall refer presently, has been prepared by a kadhi of the Coast Province of Kenya and has been admitted by consent. It reads as follows:

"The primitive doctrine was that the cognates were not allowed to inherit; nor was return permitted to the prescribed sharers but the estate was for Bait-ul-Mal. Later jurists have laid down that if the Bait-ul-Mal is not properly administered, there will be a return of the surplus estate to the prescribed sharers, with the exception of the husband and wife, in accordance with their shares; if there are no prescribed sharers it will be given to the Arham (cognates). 'Cognates' means those relatives who are not prescribed sharers."

During the course of argument before us, counsel for the appellant and for the respondent also agreed on certain further propositions, and we are satisfied that they correctly state the historical and legal position. One was that the Bait-ul-Mal was the ancient administrative machinery for distribution to Islam. Another was that under Shafi law (but not under Hanafi law) Islam is considered as a true agnate and inherits as such in the absence of other heirs. The position is authoritatively stated in a number of the old commentaries on Minhaj, from which may be selected Fath-ul-Wahab, written in the 15th century, A.D., where it is stated thus:

"There are four grounds of inheritance, viz. (1) agnates, (2) marriage, (3) patronage, and (4) Islam. When Islam inherits, it does so as an asaba (agnate) and the inheritance will be administered through the Bait-ul-Mal

for religious purposes. The prophet has said-‘I inherit those who have no inheritors’. The prophet does not inherit for himself but for Muslims.”

How the property devolves under Shafi law where there is no properly constituted or administered Bait-ul-Mal, and where there are no persons entitled to take by “return”, and no cognates, is also expounded by a number of the authoritative commentators. The following is the agreed translation of the relevant passage from Tohfat-ul-Muhtaj, known as Tohfa, one of the two principal 16th century commentaries on Minhaj:

“If there are no prescribed sharers or cognates entitled to inherit as aforesaid and if the estate is not sent according to modern authorities to the Bait-ul-Mal because it is not properly administered, the person in possession or custody of the estate will give it to the Kadhi for religious purposes, and if the Kadhi lacks jurisdiction or is not just then the custodian of the estate shall use it himself for such purposes. If he does not feel competent to do so, he may give the estate to a fit and competent person for religious uses of Muslims.”

It now becomes necessary to determine whether the Surplus Fund established by s. 18 (1) of the Wakf Commissioners Ordinance, 1951, is a re-creation of the Bait-ul-Mal in Kenya, so that any estate or part thereof which would have been payable under the old Shafi law into the Bait-ul-Mal should today be paid into what now represents it. The learned trial judge, after carefully considering this question, decided that the Surplus Fund does not re-create the Bait-ul-Mal. Our task has been rendered easier than his because Mr. Inamdar for the appellant has conceded that it does not, although he contends that the Surplus Fund constitutes alternative machinery for carrying out the same objects as the Bait-ul-Mal, that is to say machinery for enabling property to be devoted to the religious uses of Islam; and from this he goes on to argue that in the present case, since the widow is not entitled to “return”, the practical result is the same as if the Surplus Fund had been a reincarnation of the Bait-ul-Mal, because under s. 18 of the Wakf Commissioners Ordinance, 1951, the unclaimed residue of the estate must be paid over by the public trustee to the Wakf Commissioners to be devoted to such purposes. It has been rightly agreed before us that s. 18 (1) overrides s. 11 (3) of the Public Trustee Ordinance (Cap. 37) wherever the two sections appear to conflict, a point which was in issue in the court below. Section 18 provides as follows:

- “18. (1) Notwithstanding anything to the contrary in the Indian Succession Act, 1865, any property of a deceased Muslim to which no claim has been established within one year from the date upon which such property vested in the administrator of the estate or in the public trustee shall be handed over to the Wakf Commissioners by the said administrator or public trustee, as the case may be, and shall, if not handed over in the form of money, be converted into money and paid by the Wakf Commissioners into a special fund created for the purpose to be known as the Surplus Fund.
- “(2) The Surplus Fund shall be utilized by the Wakf Commissioners for such benevolent or charitable purposes for the benefit of Muslims as the Wakf Commissioners may consider proper:
- “Provided that if, within twelve years from the date upon which any property of a deceased Muslim was handed over to the Wakf Commissioners pursuant to sub-s. (1) of this section any person establishes a claim thereto, the Wakf Commissioners shall pay out of the Surplus Fund aforesaid a sum equal to the amount paid into such fund in respect of the property of such deceased Muslim.”

In view of Mr. Inamdar’s concession that the learned trial judge was correct in finding that the Surplus Fund is not a re-creation of the Bait-ul-Mal, it might

appear unnecessary to do more than to express agreement on that point. Since, however, in Anderson's *Islamic Law in Africa*, 1954, at p. 95, the view is expressed that the Surplus Fund was at least intended to replace the Bait-ul-Mal, I would add that the following is the main ground on which I would hold that the legislature failed to give effect to any such intention. As was pointed out by the learned trial judge, there is nothing in s. 18 which states that the Bait-ul-Mal is being replaced or re-created by the Surplus Fund; nor indeed is there any mention of the Bait-ul-Mal in the whole of the Wakf Commissioners Ordinance, 1951. The Surplus Fund, though similar in its functions to the Bait-ul-Mal, has as its only source of income the unclaimed estates of deceased Muslims, whereas the Bait-ul-Mal had several other sources, such as taxes and alms. Moreover, the objects of the Surplus Fund are expressed by s. 18 (2) to be "benevolent or charitable purposes for the benefit of Muslims"; and it is arguable, both from the commonly accepted meanings of the words and on the authority of certain observations of Lord Bramwell in *Commissioners for Special Purposes of Income Tax v. Pemsel* (2), [1891] A.C. 531, at p. 565, that a purpose may be benevolent although not religious, and that the objects of the Surplus Fund are therefore not identical with those of the Bait-ul-Mal, which are the "religious" purposes of Islam, as also are the objects, under the Shafi law as expounded in the passage from Tohfa already set out, to be fulfilled by the "person in possession or custody of the estate" in default of heirs or of a properly administered Bait-ul-Mal. These circumstances, in my view, do not imply that the Surplus Fund is intended to re-create the Bait-ul-Mal. And in the absence of any clear implication or express provision to that effect, I do not think it is open to the court to hold that the Surplus Fund was designed to be, or is, such a re-creation of the Bait-ul-Mal.

But that is not the end of the matter. The learned trial judge, because he held that s. 18 does not re-create the Bait-ul-Mal, decided that equitable principles should be applied in the widow's favour, similar to those applied for centuries past under the Hanafi and Ibathi and Shia schools of Mohamedan law, so as to entitle her to a "return" of the residue of the estate, notwithstanding the clear pronouncements of the Shafi school that a spouse (if not at the same time an agnate) is not entitled to "return". Now it has been conceded before us by learned counsel for the respondent that, because its founder's teachings were more systematic and precise and more faithful to tradition, the Shafi school of law, unlike that of the Hanafi, does not allow the application of equitable principles, or what is known as *istihsan*, to modify its own clear rules. Certainly it would not do so in order to defeat the benefit of Islam, with which result the learned trial judge applied such equitable principles in the present case. In so applying them, he relied on a footnote in Ruxton's *Maliki Law* (1916 Edn.) at p. 389, (the Maliki being yet another sub-sect of the Sunni sect) which, after mentioning the Hanafi doctrine of "return", adds:

"The Shafi'i school only follows the Hanafi doctrine when the Bait-ul-Mal is considered to be badly administered";

he also relied on a passage from Abdur Rahim's *Muhammedan Jurisprudence*, at p. 28, in which the founder of the Shafi school is described as being "noted for his balance of judgment and moderation of views", and as a critical examiner of traditions and a user of analogy. The footnote in Ruxton, however, cannot in its context be taken to mean any more than that the Shafi school applies the general doctrine of "return" only if the Bait-ul-Mal is badly administered; it cannot be taken to mean that the Shafi doctrine of return is identical in all points with that of the Hanafis, and in particular in respect of whether return shall be allowed to a widow. And at p. 29 of Abdur Rahim, in a passage not referred to by the learned judge, it is stated that Shafi "rejected Abu Hanifa's equity of the jurist". Again, Schact, in his

Origins of Muhammedan Jurisprudence (1950), at p. 121, in dealing with the refutation of *istihsan* by Shafi, writes that according to the Shafi school:

“No one is authorised to give a judgment or a fetwa unless he bases himself on the Koran, the *sunna*, the consensus of the scholars, or a conclusion drawn by analogy from any of these, and so it follow that no one may give a judgment or fetwa based on *istihsan*.”

Conceding this, however, learned counsel for the respondent urges that what the court below was really applying in the widow’s favour, and what this court ought to apply, is not any equity or *istihsan* within the Shafi law such as has been applied in the past within other schools of Mohamedan law like the Hanafi, but the court’s own inherent equity, in order to achieve the same result. This, however, we are in my view precluded from doing, as was the court below. By s. 4 (2) of the Kenya Colony Order-in-Council, 1921, the Supreme Court is required to exercise its jurisdiction in conformity with, *inter alia*, the doctrine of equity in force in England in August, 1897, subject, however, to modifications and amendments effected by any Ordinance for the time being in force. Section 4 of the Mohamedan Marriage, Divorce and Succession Ordinance (Cap. 148) provides (*inter alia*) that the law of succession applicable to the moveable and immoveable property of a person who has (like the deceased in the present case) married in accordance with Mohamedan law and died, shall

“be in accordance with the principles of Mohamedan law, any provision of any Ordinance or rule of law to the contrary notwithstanding”;

and there follows a proviso in these terms:

“Provided that where in any sect of Mohamedans to which the deceased belonged the law of succession differs from the ordinary law of succession in accordance with the ordinary principles of Mohamedan law then the law of succession applicable to such sect shall apply.”

In view of the mandatory terms of this section I consider that the principles of equity, even if otherwise applicable, are expressly excluded, and I would therefore hold that the learned trial judge erred in deviating from the Shafi law of succession by ordering that the residue of the deceased’s estate should be paid over to his widow.

There remains the question, how does the residue devolve under the Shafi law in the absence of any persons entitled to “return” or any cognates, there being in Kenya today no Bait-ul-Mal nor any re-creation of it? The answer lies, in my view, in the ultimate provisions of the Shafi law as expounded in the passage from Tohfa which I have set out earlier, read in conjunction with s. 18 (1) of the Wakf Commissioners Ordinance, 1951, and bearing in mind that under Shafi law, as we have seen, in the absence of other heirs Islam inherits “as an agnate” for the benefit of Muslims. The passage in Tohfa provides that in the above circumstances

“the person in possession or custody of the estate will give it to the kadhi for religious purposes, and if the Kadhi lacks jurisdiction or is not just then the custodian of the estate shall use it himself for such purposes. If he does not feel competent to do so, he may give the estate to a fit and competent person for religious uses of Muslims.”

The “person in possession or custody of the estate” in the present case is the respondent, the public trustee. But s. 18 (1) of the Wakf Commissioners Ordinance, 1951, provides, as we have seen, that

“any property of a deceased Muslim to which no claim has been established within one year from the date when it vested in . . . the public trustee shall be handed over to the Wakf Commissioners”

for payment into Surplus Fund. This statutory provision operates in respect of such property whether or

not the old Bait-ul-Mal merged in the Surplus

Fund. And the residue of the estate in the present case is admitted by property to which no claim has been established within one year of its vesting in the public trustee, unless the claim of Islam, as an agnate, can be said to be an established “claim” for the purpose of the section. It seems to me, however, that whether or not Islam’s claim can be held to have been so established, the practical and legal result must be the same. For Islam, considered as an agnatic “heir”, is far too widespread a body to inherit or to benefit except through the mediumship of some person or body that may loosely be described as a trustee, appointed or established for the purpose of applying the inherited property for Islam’s religious purposes. And s. 18 (1) of the Wakf Commissioners Ordinance, 1951, has provided just such a body in the form of the Wakf Commissioners, with similar, though not identically worded, objects. From the very fact that it has done so, I think the only reasonable interpretation of the expression “property . . . to which no claim has been established” in s. 18 (1) is that it includes property to which Islam is entitled as an agnatic “heir”, and that the word “claim” was not intended to cover, and does not cover, the entitlement of so universal a body as Islam.

Under Shafi law such person or body is required to be a kadhi (if he has jurisdiction) or person in possession or custody of the estate himself, or some other fit and competent person. But by s. 18 (1) of the Wakf Commissioners Ordinance, 1951, unclaimed Muslim property, if in the hands of an administrator or of the public trustee, shall be handed by him, not to a kadhi or other person at his discretion, but to the Wakf Commissioners as there provided. Section 18 (1) thus varies somewhat the Shafi law regarding the trusteeship for Islam, though it still leaves Islam as the beneficiary. In so far as it does so vary the Shafi law, it might appear to conflict with the requirement of s. 4 of the Mohamedan Marriage, Divorce and Succession Ordinance (Cap. 148) that the principles of the relevant Mohamedan law of succession shall be applied

“any provision of any Ordinance or rule of law to the contrary notwithstanding.”

This provision, however, can only be held to refer to Ordinances already in existence in 1920, when the Mohamedan Marriage, Divorce and Succession Ordinance was enacted, since no legislature can bind its successors; and to the extent that s. 18 (1) of the Wakf Commissioners Ordinance, 1951, varies the Mohamedan law by specific provision as aforesaid, it must over-ride the general provision of the earlier Ordinance that the principles of Mohamedan law shall be applied.

In the result, then, and because the widow of the deceased is not entitled to any “return”, the position with regard to the residue of the estate will be the same as if the Surplus Fund had been held to be a re-creation of the Bait-ul-Mal. I would allow this appeal, and would vary the judgment of the court below by ordering that the deceased’s widow be paid only her one-quarter share in the estate, and that the residue of the estate be handed over by the respondent to the appellants as required by s. 18 of the Wakf Commissioners Ordinance, 1951. Counsel have agreed that there should be no order for costs of this appeal.

Forbes V-P: I agree and have nothing to add. The appeal will be allowed and an order made in the terms proposed by the learned Justice of Appeal.

Gould JA: I also agree.

Appeal allowed.

For the appellants:

TJ Inamdar QC and IT Inamdar

Inamdar & Inamdar, Mombasa

For the respondent:

KC Brookes (Crown Counsel, Kenya)

The Attorney-General, Kenya

**The Attorney-General of Kenya v M R Shah trading as Tanga Trading
Company**
[1959] 1 EA 375 (CAM)

Division:	Court of Appeal at Mombasa
Date of judgment:	19 June 1959
Case Number:	104/1958
Before:	Forbes V-P, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya–Edmonds J

[1] Crown – Proceedings against – Appeal from decision of Minister – Whether Attorney-General should be joined as respondent – Wheat Industry Ordinance, 1952, s. 7, s. 8, s. 9, s. 10, s. 11, s. 12, s. 13 (K.)–Wheat Board (Procedure) Rules, 1954, (K.) – Wheat Industry (Licences and Permits) Rules, 1953 (K.) – Crown Proceedings Ordinance, 1956, s. 2, s. 12, s. 19 (K.) – Civil Procedure Ordinance (Cap. 5), (K.) – Civil Procedure (Revised) Rules, 1948, O. LI (K.) – Supreme Court of Judicature (Consolidation) Act, 1925 – Rules of the Supreme Court, O. 1A., r. 1 (b).

Editor’s Summary

The respondent applied to the Minister under s. 9 of the Wheat Industry Ordinance, 1952, for permission to put additional machinery in his mill and, under s. 13 for a consequential additional quota of wheat. These applications were refused by the Minister, whereupon the respondent appealed, under s. 12, to the Supreme Court, making the Attorney-General respondent. The Attorney-General then moved to be struck out of the proceedings on the ground that he had been improperly joined as respondent. This motion was dismissed with costs. On appeal it was argued for the Attorney-General that there was nothing in the Crown Proceedings Ordinance, 1956, enabling the respondent to join the appellant as a party, since the appeal did not constitute an action or civil proceedings “against” anybody.

Held – an appeal under s. 12 of the Wheat Industry Ordinance, 1952, is not “against” the Minister but against his decision and accordingly the appeal to the Supreme Court was not an action or proceeding “against” the Crown within s. 19 (2) (b) of the Crown Proceedings Ordinance, 1956.

Appeal allowed.

Cases referred to in judgment

- (1) *Dyson v. Attorney-General*, [1911] 1 K.B. 410.
- (2) *Commissioner of Stamps, Straits Settlements v. Oei Tjong Swan*, [1933] A.C. 378.
- (3) *Re an application by Keshavlal Punja Parbat Shah* (1955), 22 E.A.C.A. 381.
- (4) *Keshavlal Punja Parbat Shah v. Attorney-General of Kenya* (1955), 22 E.A.C.A. 216.

June 19. The following judgments were read by direction of the court:

Judgment

Gould JA: In this appeal the appellant is the Attorney-General of Kenya and the respondent is Meghji Rupa Shah trading as “Tanga Trading Company”. The respondent had applied to the Minister under s. 9 of the Wheat Industry Ordinance, 1952 (as amended by Ordinance 46 of 1956) for permission to put additional machinery in the respondent’s mill and had also made an application under s. 13, the exact nature of which is not clear from

the record, but which would appear to have related to a consequential additional quota of wheat. Section 11 in fact seems more appropriate for this purpose but nothing turns upon this. These applications were refused by the Minister and the respondent sought to avail himself of the provisions of s. 12 of the Ordinance above mentioned, by filing an appeal in the Supreme Court of Kenya within the prescribed period of thirty days. The present appellant was named as respondent and before any other step was taken he moved the Supreme Court that his name be struck out of the proceedings on the ground that he had been improperly joined as respondent. This motion was dismissed with costs and from that dismissal the present appeal has been brought. The Wheat Industry Ordinance, 1952, was not examined in any detail in argument before this court but I think it is necessary to give some attention to its provisions. It is designed to regulate the sale and distribution and the import and export of wheat, flour and wheat feed; by s. 3 (1) the control of marketing and distribution is vested in the Minister

“so, however, that the Minister shall obtain the advice of the Wheat Board in relation thereto.”

By s. 3 (2) the control of import and export is vested in the Minister subject to compliance with a proviso which is not here relevant. By s. 4 the Wheat Board is constituted and given the function of advising the Minister

“on all matters relating to the exercise of his powers and the performance of his functions”

under the Ordinance. The board is to take decision by a majority of votes and has power to regulate its own proceedings. The Wheat Board (Procedure) Rules, 1954, relate purely to matters of constitution and procedure without any reference to any of the particular matters upon which the board may be called upon to advise.

Section 7 deals with licences to construct mills; applications are to be in “the prescribed form” and sub-s. (2) is as follows:

“7 (2) On receiving an application for a permit to acquire or to construct or equip premises as a mill the Minister shall, after obtaining the advice of the Wheat Board thereon, in his discretion either grant or refuse the application.”

Section 8 deals with millers’ licences application for which is also to be made on a prescribed form. Section 9 (1) prohibits addition to, replacement or substitution of any machinery in a mill without prior permission in writing from the Minister. Sub-s. (2) is as follows:

“9 (2) Any application under sub-s. (1) of this section for permission to make any addition to or replacement or substitution of any machinery as is mentioned in that sub-section shall be made in the prescribed form to the Minister who, after obtaining the advice of the Wheat Board, shall in his discretion either grant or refuse permission.”

Section 10 imposes a requirement for a permit from the Minister before a licensed miller may acquire further mill premises and, once again, the Minister has a discretion to grant or refuse the application after obtaining the advice of the Wheat Board.

The foregoing references are sufficient to illustrate the design and intent of the Ordinance so far as licensing is concerned. The relevant forms are prescribed by the Wheat Industry (Licences and Permits) Rules, 1953: the form of application under s. 9 calls for full reasons to be given for the proposed addition, replacement or substitution, but otherwise is purely formal. Certain

regulations have been made under the Ordinance but none has any bearing on the matter now in question and in particular none has any reference to the right of appeal created by s. 12 of the Ordinance. That section is as follows:

- “12. Any person aggrieved by the refusal of the Minister to grant a licence under s. 6 or 13 of this Ordinance or to grant any permission required under s. 7, s. 9 or s. 10 of this Ordinance may within thirty days of the date of such refusal appeal to the Supreme Court.”

Before proceeding to the merits of the matter I feel impelled to comment in passing upon this provision. The Supreme Court is called upon to entertain appeals from an administrative authority upon questions with which it is that authority's particular province to be familiar. This, of itself, presents the court with a difficult task. It is rendered none the less difficult by the absence of guidance as to procedure, of any intimation as to the material to be considered and of any specific limitation upon the scope of the appeal. The matter is further complicated by the fact that decisions to be taken under some of the sections from which appeal lies are to be taken at the Minister's discretion, which he must exercise after receiving the advice of the Wheat Board and, no doubt, in the light of economic circumstances affecting the three major East African territories. Finally, there is no indication of the powers to be exercised by the court on appeal—they must presumably be drawn by implication from the fact that a right of appeal has been created. This section, in my opinion, merits further consideration either by the legislature or by the provision of specific rules.

The question whether the Attorney-General was rightly joined as respondent to an appeal brought under s. 12 must be resolved with reference to the Crown Proceedings Ordinance, 1956, which was obviously enacted for purposes similar to those of the Crown Proceedings Act, 1947, (Imperial) and which is intitled:

- “An Ordinance to amend the law relating to the civil liabilities and rights of the Crown and to civil proceedings by and against the Crown: to amend the law relating to the civil liabilities of persons other than the Crown in certain cases involving the affairs or property of the Crown: and for purposes incidental to and connected with the matters aforesaid”.

I will refer to these two enactments for convenience as “the Ordinance” and “the Act” respectively.

Part II of the Ordinance made certain changes in the substantive law as to the liability of the Crown, particularly as to actions in tort. Part III abolished various forms of proceedings against the Crown and provided that all civil proceedings by or against the Crown in the Supreme Court should be instituted and proceeded with in accordance with rules of court. Section 12 (1) is as follows:

- “12(1) Subject to the provisions of any other written law, civil proceedings by or against the Crown shall be instituted by or against the Attorney-General, as the case may be.”

Section 19, upon the construction of which counsel are agreed that the matter in issue depends, places a limitation upon the scope of references in Part III to “civil proceedings by the Crown” and “civil proceedings against the Crown”; it is sufficient to set out sub-s. (2):

- “19(2) Subject to the provisions of this section, any reference in this Part of this Ordinance to civil proceedings against the Crown shall be construed as a reference to the following proceedings only:
- (a) proceedings for the enforcement or vindication of any right or the obtaining of any relief which, if this Ordinance had not been enacted,

might have been enforced or vindicated or obtained by any such proceedings as are mentioned in para. 2 of the First Schedule to this Ordinance;

- (b) proceedings for the enforcement or vindication of any right or the obtaining of any relief which, if this Ordinance had not been enacted, might have been enforced or vindicated or obtained by an action against the Attorney-General, any Government department, or any officer of the Crown as such; and
- (c) all such proceedings as any person is entitled to bring against the Crown by virtue of this Ordinance,

and expression 'civil proceedings by or against the Crown' shall be construed accordingly."

Parts IV and V of the Ordinance have no particular bearing upon the question to be resolved.

Sections 19 (2) (a) and (c) have no connection with the type of proceeding now in contemplation and the judgment of the learned judge in the court below turned upon the meaning of s. 19 (2) (b) with particular reference to the meaning to be attached to the word "action". He refused to attach any limited meaning thereto and held that it was the intention of the legislature that the Attorney-General

"should replace the Ministers in all actions and in all types of civil proceedings taken against the Crown and its officers".

"Officer", in relation to the Crown includes, by virtue of s. 2, a Minister.

Before this court counsel for the appellant did not dispute that the word "action" as used in the section had a wide meaning and could include all civil proceedings except a step in an action. He placed however, great emphasis upon the word "against", in the sub-section, and submitted that the appeal given by s. 12 of the Wheat Industry Ordinance, 1952, did not constitute civil proceedings "against" anybody. The Minister, counsel contended, could not have been sued; there was no cause of action against him for doing what he had done; an action "against" someone pre-supposes a cause of action; here a right of appeal had been enacted which created a right to have a higher tribunal decide upon a matter which had been considered by a lower tribunal.

The word "action" is not defined in either the Ordinance or the Act. There is no definition of it in the Kenya Civil Procedure Ordinance (or the rules made thereunder) and though it is defined in England by the Supreme Court of Judicature (Consolidation) Act, 1925, as a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of court, that definition does not extend beyond the purposes of those enactments.

Rule 1 (b) of O. 1A of the Rules of the Supreme Court relating to "Civil Proceedings Against the Crown" (O. LI of the Kenya Civil Procedure (Revised) Rules, 1948 is in corresponding terms) indicates that such civil proceedings shall take the form of an action commenced by writ of summons "if no special form is applicable". So far as form is concerned then, the impression is given that though an action commenced by writ of summons (in Kenya a plaint) would be the normal course, other forms of procedure are not excluded. This rule of course relates to "civil proceedings" and therefore gives little assistance as to the meaning of the word "action" in s. 19 (2) (b) of the Ordinance, which is only one of six sub-sections by reference to which the words "civil proceedings by or against the Crown" are to be construed. However, counsel for the appellant has conceded, that apart from such significance or limitation as may attach from the use of the word "against" which follows it, "action" in s. 19 2 (b) should be given its wide common law meaning.

A short description of the common law term is given in the opening paragraph of Halsbury's Laws of England (3rd Edn.) Vol. 1, p. 2 as follows:

"An 'action', according to the legal meaning of the term, is a proceeding by which one party seeks in a court of justice to enforce some right against, or to restrain the commission of some wrong by, another party. More concisely it may be said to be 'the legal demand of a right', or 'the mode of pursuing a right to judgment'. It implies the existence of parties, of an alleged right, of an alleged infringement thereof (either actual or threatened), and of a court having power to enforce such a right."

The right which is pursued in the present case is the right to a permit to which the respondent alleges he is entitled; the Minister's decision that he was not so entitled, he says, was wrong, and s. 12 of the Wheat Industry Ordinance, 1952, indicates the way in which he may pursue his right to judgment in a civil court. The appellant, on the other hand, says that the respondent's right is to have the Minister's decision reconsidered by the court and reviewed or overridden if thought fit: although, if the Ordinance had not been passed, the exercise of the right of appeal under s. 12 of the Wheat Industry Ordinance, 1952, would have resulted in civil proceedings (and therefore in an action in the wider sense of the term) the civil proceedings would not have been "against" the Minister, though related to or brought in respect of his decision.

I find this question one of some difficulty, and study of the Act, and comparison of it with the Ordinance, have provided little assistance. There is one matter which, so far as it goes, is in favour of the argument of counsel for the appellant. Section 23 (2) of the Act, which limits the meaning of the expression "civil proceedings against the Crown" has three sub-sections, and any proceeding which does not fall within one of them, is excluded from the scope of the Act. Sub-s. (2) (a) is in terms limited to proceedings formerly brought by way of petition of right or *monstrans de droit*. Sub-s. (2) (b) is the one with which we are now particularly concerned and sub-s. (2) (c) embraces

"all such proceedings as any person is entitled to bring against the Crown by virtue of this Act".

The question is whether the actions which could, prior to the passing of the Act, have been brought under the numerous enactments repealed in part or in whole in the Second Schedule, fall within sub-s. (2) (b) or sub-s. (2) (c). In one sense they would, after the passing of the Act, be brought "by virtue of this Act" for by s. 1 it is specifically provided that such claims may be enforced as of right. On the other hand proceedings for which the petition of right was previously appropriate fall also within s. 1 and they are dealt with separately by sub-s. (2) (a) of s. 23. I incline to the view that sub-s. (2) (c) is intended to cover such proceedings as could not, prior to the Act, have been brought at all—in other words proceedings, such as those in tort, which were authorised for the first time. If that is the correct view then the actions which might have been brought under the enactments repealed must have been intended to fall within the purview of sub-s. (2) (b). Another form of proceeding which comes to mind as naturally falling within that sub-section is the suit against the Attorney-General for a declaration which might affect the interests of the Crown (*Dyson v. Attorney-General* (1), [1911] 1 K.B. 410). If my view on this subject is correct there is something of a guide to the type of proceedings at least primarily contemplated by sub-s. (2) (b). It is not necessary to refer to the enactments in detail but they are described in Halsbury's Laws of England (3rd Edn.) Vol. 11, p. 10, para. 14 as follows:

"The statutory provisions referred to are enactments which provided that a Minister or a Government department might be sued. The provisions

were merely procedural, and Ministers and departments sued in accordance with them enjoyed the same immunities and privileges as the Crown itself.”

Inasmuch as these provisions differ substantially in nature from that giving a right of appeal from a ministerial decision I find some support for the argument that sub-s. (2) (b) was not intended to include the latter. In Kenya the Schedule of Acts repealed by the Ordinance makes reference to only five enactments, but this, I assume, is because the other enactments mentioned in the Second Schedule to the Act are not in force in Kenya.

There is a difference between the Act and the Ordinance which, at first sight might be thought to have relevance. By s. 38 (2) of the Act the expression “civil proceedings” is defined so as to exclude the proceedings on the Crown side of the King’s Bench Division. In the corresponding provision of the Ordinance (s. 2 (1)) the definition, otherwise the same, makes no such exclusion. In s. 25 (i) of the Act, on the other hand, dealing with the method of satisfying orders made against the Crown, a Government Department or an officer of the Crown as such, orders made in proceedings on the Crown side of the King’s Bench Division are specifically included; there is no reference to such proceedings in s. 21 (1) of the Ordinance. If it were justifiable to make this difference a basis for the interpretation of the Ordinance, it would seem that the legislature in Kenya in adapting the Act, manifested an intention that proceedings of the kind referred to above, should in appropriate cases fall within the scope of the Ordinance; the elimination of their exclusion from the definition of “civil proceedings” clearly rendered unnecessary the inclusion in s. 21 (1) of the Ordinance of the exceptional reference to such proceedings made in s. 25 (1) of the Act. Upon that interpretation of the Ordinance it would be easier to accept that an appeal under s. 12 of the Wheat Industry Ordinance, 1952, would also fall within its scope as if, for example, certiorari would be regarded as an “action against” a Minister there is no reason to say that an appeal should not.

I do not, however, feel that it is in fact justifiable in the present case to resort to this expedient of comparison as a guide to the interpretation of the Ordinance. In *Commissioner of Stamps, Straits Settlements v. Oei Tjong Swan* (2), [1933] A.C. 378, at p. 389, their Lordships of the Privy Council said:

“The difficulty in which the learned judges find themselves in accounting for the terms of s. 73, sub-s. (2) and sub-s. (3), consistently with their decision is entirely occasioned by their approach to the problem of construction which the case presents. Instead of first considering the terms of the Ordinance itself, they have at once entered upon an elaborate comparison of its provisions with those of the (Imperial) Finance Act of 1894, and proceeded to draw inferences from the variations between the Ordinance and the Imperial statute. This is a perilous course to adopt and one which certainly does not commend itself to their Lordships. Decisions of the Imperial Courts on statutes dealing with the same subject-matter may often be useful in the interpretation of similar provisions in colonial measures, and a comparison between similar measures of the Imperial and the Colonial Legislatures may on occasion be helpful: cf. *Alcock, Ashdown & Co. v. Chief Revenue Authority, Bombay*. But it is quite a different thing to institute a textual comparison such as has there been made and to rely on conjectures as to the intention of the draftsman in selecting some and rejecting other provisions of his presumed model.”

Though, as is indicated in that passage, comparison between Imperial and Colonial Legislation may be helpful on occasion, I think that in the present case I should be guided by the warning conveyed in the last sentence. Apart from general principles, there are two minor factors which influence me towards that decision. The first is that r. 3 (2) of O. LIII of the Civil Procedure (Revised)

Rules, 1948 (which order deals with applications for orders of Mandamus, Prohibition and Certiorari) provides that the notice of motion shall be served (*inter alia*) on all persons directly affected, which would include, in such a case as the present, if the proceedings were certiorari, instead of appeal, the Minister concerned. One would expect to find some qualification of the rule if, by reason of s. 12 (1) of the Ordinance, the Attorney-General was automatically to be made a party in such a case. The second consideration is that only in 1955 (after previous decisions of this court to the contrary) was it finally settled in *Re an Application by Keshavlal Punja Parbat Shah* (3) (1955), 22 E.A.C.A. 381 followed by *Keshavlal Punja Parbat Shah v. Attorney-General of Kenya* (4) (1955), 22 E.A.C.A. 216, that the Supreme Court of Kenya had, in its civil jurisdiction, power to issue the prerogative writs. Though the Ordinance was not enacted until the following year it cannot be said with certainty that the view obtaining until 1955 had no influence on its drafting.

Approaching then the question of interpretation of the Ordinance without reference to the Act I find myself in agreement with the submission made by counsel for the appellant. I think that an appeal under s. 12 of the Wheat Industry Ordinance, 1952, is a proceeding not “against” the Minister but against his decision. It is a narrow distinction and I differ from the learned judge in the court below with hesitation. If it were conceivable that the respondent wished to assert a legal right to a permit or licence his appropriate proceeding would be by action—the Attorney-General would properly be made the defendant because the respondent would be seeking to establish that the Crown was under a legal liability through its Minister, to issue the permit or licence. That action would clearly be “against” the Crown. But in fact the only legal rights enjoyed by the respondent are to have his application considered by the Minister and, if he is aggrieved by the result, to have the decision reviewed by the court. The first of these rights was not refused him; he does not come to the court to enforce it; he comes in the hope of showing that the Minister’s decision was not a correct one. An appeal is given against a decision—not against the person making it. If s. 12 of the Wheat Industry Ordinance, 1952, were to be amplified in this respect, it would undoubtedly be by the addition of the words “against such refusal”.

If this approach is correct it does not appear to me to make any difference whether the decision of the Minister was administrative or quasi-judicial. The fact that the Minister had to consider the reasons advanced by the respondent in support of his applications and to take the advice of the Wheat Board might be urged in favour of regarding his duty as quasi-judicial. On the other hand he had no doubt also to consider important questions of policy which is an administrative matter. It is not necessary to consider whether certiorari would lie in such a case because the actual matter in question is an appeal which lies irrespective of the nature of the proceedings which led to the Minister’s decision. The particular procedure which he may be enjoined by law to follow in arriving at his decision renders the appeal no more or less an appeal against the decision and does not touch the question whether the appeal should also be regarded as an “action against” the Crown.

No assistance is to be derived from corresponding English provisions owing to the fact that in England under s. 17 of the Act civil proceedings against the Crown are to be instituted against “the appropriate authorised Government department” and a list of such departments is to be published by the treasury. Rules are provided in O. 55 (*b*) (*inter alia*) of the Rules of the Supreme Court, 1883, touching applications in respect of and appeals from the decisions of Ministers under various Acts and generally it is provided that the appropriate Minister shall be served with notice or be made a respondent. (See r. 3, r. 74 and r. 77). As, however, the various ministries are included in the list of authorised departments under s. 17 of the Act these rules are equally consistent

with such proceedings being regarded as within or without the scope of the Act. Had the English system been adopted in Kenya it is unlikely that the parties would have incurred the expense of this litigation.

As stated above I am of opinion that an appeal under s. 12 of the Wheat Industry Ordinance, 1952, does not fall within the meaning of s. 19 (2) (b) of the Ordinance and that consequently the Attorney-General should not have been made a party to the proceedings. I would allow the appeal with costs here and in the court below, set aside the order of the learned judge, and make an order in terms of the notice of motion of July 28, 1958.

Forbes V-P: I agree and have nothing to add. The appeal will be allowed and an order made in the terms proposed by the learned Justice of Appeal.

Windham JA: I agree, though with some hesitation.

Appeal allowed.

For the appellant:

JF Marnan QC and KC Brookes (Crown Counsel, Kenya)

The Attorney-General, Kenya

For the respondent:

RP Cleasby and CK Kanji

AB Patel & Patel, Mombasa

The Katikiro of Buganda v The Attorney-General of Uganda [1959] 1 EA 382 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	9 May 1959
Case Number:	11/1959
Before:	Sir Kenneth O'Connor P, Forbes V-P and Gould JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda–Bennett, J

[1] *Constitutional law – Protectorate – Interpretation of agreement with Crown – Schedules to agreement but not agreement itself given force of law by proclamation – Whether agreement an Act of State – Whether rules for interpretation of legislation or of contracts applicable – Buganda Agreement, 1955 – Buganda Agreement, 1955, Order-in-Council, 1955, s. 2 (1), s. 2 (2) – Buganda Agreement, 1894 – Buganda Agreement, 1900 – Uganda Order-in-Council, 1902, s. 12, s. 15 – Uganda Order-in-Council, 1920, s. 7, s. 8, s. 9, s. 13 – Uganda (Amendment) Order-in-Council, 1953, s. 4 – Uganda (Electoral Provisions) Order-in-Council, 1957 – Uganda (Amendment) Order-in-Council, 1958 – Interpretation*

and General Clauses Ordinance (Cap. 1), s. 2 (1) (U.) – Evidence Ordinance (Cap. 9), s. 9, s. 55, s. 90, s. 91, s. 94, s. 95 (U.) – Indian Evidence Act, 1872, s. 57 – Extradition Act, 1870.

[2] Jurisdiction – Act of State – Jurisdiction of municipal courts to entertain claim against the Crown – Eastern African Court of Appeal Order-in-Council, 1950, s. 16 – Suits By or Against the Government Ordinance (Cap. 7), s. 3, s. 4 (U.) – Uganda Civil Procedure Rules, O. 7, r. 11 – English Rules of the Supreme Court, O. 25, r. 5 – Kenya Civil Procedure (Revised) Rules, 1948, O. II, r. 7 – Uganda Order-in-Council, 1902, s. 15 (2).

Editor's Summary

The plaintiff, as Chief Minister of Buganda, sought declarations (1) that the Legislative Council of the Uganda Protectorate (as constituted at the time the action was begun), was not the Legislative Council referred to in the Second

Schedule to the Buganda Agreement, 1955, (2) that the plaintiff was not bound or entitled to take the steps laid down in the Second Schedule for the purpose of the election to the Legislative Council of Uganda of members representative of Buganda and (3) that until the Legislative Council is reconstituted so as to be the same as in the Buganda Agreement, 1955, there is no procedure for electing representative members thereto. The Buganda Agreement, 1955, was made between the Governor on behalf of H.M. the Queen and the Kabaka on behalf of the Kabaka, chiefs and people of Buganda and provided, *inter alia*, for the administration of Buganda in accordance with the Constitution set out in the First Schedule thereto. The Second Schedule provided for the election of persons for recommendation to the Governor as representatives of Buganda in the Legislative Council of Uganda. The Agreement also provided, *inter alia*, for the review in 1957 of the system of such representation and that there should be no major changes in the constitution set out in the First Schedule for six years, i.e. the Constitution of Buganda. By proclamation the Governor later declared that the First and Second Schedules to the Agreement (but not the Agreement itself) should have the force of law. In 1957 and 1958, by Order-in-Council and Additional Royal Instructions, changes were made in the composition of the Legislative Council of the Uganda Protectorate, by which provision was made for a Speaker to be appointed to preside over the Council; that the Speaker should have no vote in the Council and that the Governor, if present, should then preside but should no longer have any vote. In the High Court, which dismissed the action with costs, the argument proceeded on the basis that the matter sounded in contract. On appeal it was common ground that the matter did not so sound. It was then contended for the appellant that by the changes made the Crown, in effect, withdrew from the Legislative Council, that the Crown's presence in the law-making authority of a protectorate is the visible embodiment of the protection the Crown had agreed to give to the protectorate, that the basis for the 1955 Agreement was that there should be no major changes before 1961, that the practical result was that major changes had been made in the constitutional arrangements of the Uganda Protectorate, and that there had been a breach of faith which relieved the plaintiff of his obligation to comply with the Agreement. The appellant also contended that the 1955 Agreement was a treaty and the canons of instruction adopted by international tribunals were applicable.

Held –

- (i) in construing the words of the Second Schedule to the 1955 Agreement, which had been given the force of law, the rules of construction applicable are the rules for construction of public enactments and not the rules applicable to contracts or private Ordinances.
- (ii) there is nothing in the 1955 Agreement or the Second Schedule which lays down that no major changes in the constitution of the Legislative Council of the Protectorate shall be made before 1961; had that been the intention one would have expected it to be stated, particularly since there was such a statement relative to Buganda.
- (iii) the words “the Legislative Council of the Protectorate” in the Second Schedule included the Legislative Council after the changes made in 1958, notwithstanding that such changes were made within six years.
- (iv) the 1955 Agreement and the Additional Royal Instructions of 1957 were Acts of State and as such were beyond the control of municipal law, and even if there had been a breach of faith (which the court did not accept) the matter was outside the purview of the High Court of Uganda, or of the Court of Appeal which only has the jurisdiction conferred by s. 16 of the Eastern African Court of Appeal Order-in-Council, 1950.

Appeal dismissed.

Cases referred to in judgment

- (1) *Dyson, v. Attorney-General* [1911] 1 K.B. 410.
- (2) *Stoeck v. Public Trustee*, [1921] 2 Ch. 67.
- (3) *Charrington & Co. Ltd. v. Woode*, [1914] A.C. 71.
- (4) *Great Western Rly. and Midland Rly. Co. v. Bristol Corporation* (1918), 87 L.J. Ch. 414.
- (5) *Reigate v. Union Manufacturing Co. (Ramsbottom) Ltd.*, [1918] 1 K.B. 592.
- (6) *R. v. Raojibhai Patel*, Kenya Supreme Court Criminal Appeal No. 2 of 1956 (unreported).
- (7) *Catterall v. Sweetman* (1845), 1 Rob. Eccl. 304; 163 E.R. 1047.
- (8) *Railton v. Wood* (1890), 15 App. Cas. 363.
- (9) *Sussex Peerage case* (1844), 11 Cl. & Fin. 85; 8 E.R. 1034.
- (10) *Argos, The (Cargo ex)* (1872), L.R. 5 P.C. 134.
- (11) *Phillips v. Phillips* (1866), L.R. 1 P. and D., 169.
- (12) *Hawkins v. Gathercole* (1855), 6 De G.M. and G.; 43 E.R. 1129.
- (13) *Stradling v. Morgan* (1560), 1 Plowd. 201.
- (14) *Rhondda's (Viscountess) Claim*, [1922] 2 A. C. 339.
- (15) *River Wear Commissioners v. Adamson* (1877), 2 App. Cas. 743.
- (16) *Thomson v. Clanmorris*, [1900] 1 Ch. 718.
- (17) *R. v. Paddington and St. Marylebone Rent Tribunal*, [1947] 1 All E. R. 448.
- (18) *Powell v. Kempton Park Racecourse Co.*, [1899] A.C. 143.
- (19) *Rustomji v. R.* (1876), 2 Q.B.D. 69.
- (20) *Salaman v. Secretary of State for India*, [1906] 1 K.B. 613.
- (21) *R. v. Governor of Brixton Prison, Ex parte Minervini*, [1958] 3 All E.R. 318.
- (22) *Eastman Photographic Co. v. Controller-General of Patents*, [1898] A.C. 571.
- (23) *Assam Railways and Trading Co. Ltd. v. Inland Revenue Commissioners*, [1934] All E.R. Rep. 646; [1935] A.C. 445.

May 9. The following judgments were read by direction of the court:

Judgment

Sir Kenneth O'Connor P: This is an appeal from a decree of the High Court of Uganda dated November 25, 1958, dismissing with costs a suit by the Katikiro (Chief Minister) of the Kingdom of Buganda against the Attorney-General of the Uganda Protectorate of which Buganda forms a part. The suit, which was commenced in June, 1958, prayed for three declarations which will be referred to later.

In July, 1958, an application was made by motion by the defendant that the plaint be rejected on the grounds (1) that it disclosed no cause of action; and (2) that the suit was barred by s. 4 of the suits by or against the Government Ordinance. That section requires notice to be given two months before a suit against the Government is instituted. The motion came on for argument under O. 7, r. 11 (*a*) and (*d*) of the Uganda Civil Procedure Rules. On May 6, 1958, Sheridan, J., ruled that the motion raised points of law which should not be decided in a summary way but should be pleaded and dealt with at the trial and he dismissed the motion with costs. Pleas that the court had no jurisdiction to hear the suit in view of the provisions of the suits by or against the Government Ordinance and that the plaintiff had failed to comply with the provisions of s. 4 of that Ordinance were made in the defence which was filed in August, 1958.

At the hearing of the suit before the trial judge, learned counsel for the defendant said:

“I take no point that the court has no jurisdiction. I accept the contention that defendant can waive the point of notice and it has been waived.”

He expressly abandoned the relevant pleas in the defence. The learned trial judge then recorded:

“Am satisfied that the court has jurisdiction to hear suit and to grant relief prayed.”

Against that finding there is no appeal. On the contrary, learned counsel for the respondent stated categorically before us:

“There remains no point of jurisdiction with which the court need deal. All such points are abandoned.”

Since, however, neither acquiescence nor express consent of the parties could confer jurisdiction on the court, if, by reason of any limitation imposed by statute, it was without jurisdiction, I must briefly examine the provisions of the suits by or against the Government Ordinance. Without going into the matter in detail, I am of opinion that the notice required by s. 4 can be waived, and that there is nothing in the Ordinance which would prevent the Attorney-General on behalf of the Government being sued for a declaration. Such a suit would, in my opinion lie apart from s. 3 of the Ordinance, and it is not rendered incompetent by that section. Notwithstanding that there seems to be nothing in the Uganda Civil Procedure Rules corresponding to O. 25, r. 5 of the Rules of the Supreme Court in England and O. 2, r. 7 of the Kenya Civil Procedure Code (Revised) Rules, 1948, it was stated by the learned judge who heard the motion that declaratory judgments are frequently asked for and made in Uganda. Before O.25, r.5 of the English Rules of the Supreme Court was made, the Court of Chancery had a limited jurisdiction under s. 50 of 15 and 16 Vict. c. 86 to grant declaratory decrees: *Attorney-General v. Dyson* (1), [1911] 1 K.B. 410 at p. 417; and the practice of the Chancery Division in this respect would have been imported into Uganda by s. 15 (2) of the Uganda Order-in-Council, 1902. It seems that, apart from s. 3 of the Suits By or Against the Government Ordinance, there would have been power under the Chancery practice before 1902 to make a declaration in a suit against the Attorney-General as representing the Crown: *Attorney-General v. Dyson* (1) at p. 417. *Prima facie*, therefore, but subject to what is said later as to Acts of State, there would be jurisdiction in the court below and in this court to grant the relief claimed, if the court were to reach a conclusion that it should be granted. In view of this and of the facts that the finding of the learned judge that he had jurisdiction is not challenged and that the parties have clearly submitted to the jurisdiction, I will not pursue the question of jurisdiction further except in regard to Acts of State.

The declarations which the Katikiro sought were as follows:

- “(1) A declaration that the Legislative Council of the Uganda Protectorate as at present constituted is not the Legislative Council referred to in the Second Schedule to the Buganda Agreement, 1955.
- (2) A declaration that the Katikiro is not bound or entitled to take the steps laid down in the said Schedule for the purpose of electing representative members to represent Buganda in the Legislative Council of the Uganda Protectorate as at present constituted.
- (3) A declaration that unless and until the Legislative Council of the Uganda Protectorate is reconstituted so as to be the same as the Legislative Council referred to in the Buganda Agreement, 1955, and contemplated at the time thereof there is no procedure for electing representative members thereto.”

In this judgment I will refer to the Buganda Agreement, 1955 (Legal Notice No. 190 of 1955), as “the 1955 Agreement” and to its Second Schedule as “the Second Schedule”.

The First and Second Schedules to the 1955 Agreement were given the force of law by a proclamation (Legal Notice No. 188 of 1955) made under s. 2 (2) of the Buganda Agreement, 1955, Order-in-Council, 1955 (Legal Notice No. 140 of 1955). The Second Schedule is ancillary to art. 7 of the 1955 Agreement, and contains regulations for the election of persons for recommendation to the Governor for appointment as representative members from Buganda of the Legislative Council of the Uganda Protectorate. These regulations provide for the setting up of an electoral college, and require the Katikiro to submit to the Governor the names of persons who have been elected by the electoral college whenever there is occasion to appoint a representative member or members to represent Buganda in the Legislative Council.

As the Second Schedule has been given the force of law, the court is entitled to look at, and to construe, that Schedule. If authority is needed for this proposition, it will be found in *Stoeck v. Public Trustee* (2), [1921] 2 Ch. 67.

Paragraph 5 of the Second Schedule is as follows:

- “5. Whenever there is occasion to appoint a representative member or members to represent Buganda in the Legislative Council of the Protectorate the Governor shall by notice in writing request the Katikiro to submit names to him for that purpose and the Katikiro shall submit to him the names of persons who have been elected in that behalf by the electoral college in accordance with these regulations.”

In brief, counsel for the Katikiro contended in the court below and here that “the Legislative Council of the Protectorate” in the Second Schedule is the same as “the Legislative Council” referred to in the body of the 1955 Agreement and means the Legislative Council as it was constituted when the 1955 Agreement was signed. The appellant says that that was the Legislative Council contemplated by the parties to the 1955 Agreement and not the Legislative Council as constituted when the plaint was filed. He says that major changes were effected in the constitution of the Legislative Council since the 1955 Agreement was signed, so that it became a fundamentally different body and he asks for the above-mentioned declarations. The 1955 Agreement itself has not been given the force of law and whether the court can take it into consideration or not when construing its Second Schedule will be discussed later.

The Second Schedule is legislation and must be construed. If the words of an enactment are clear, effect must be given to them according to their ordinary and grammatical meaning. If, however, there is ambiguity, it is permissible for the court, for the purpose of ascertaining the intention of the legislative authority, to consider the history of the enactment and the surrounding circumstances when it was passed. I return to this subject later.

The history of the legislation, so far as material, is as follows:

In June, 1894 (following an agreement made in 1893), Uganda was placed “under the Protectorate of H.M. Queen Victoria” and, by the Buganda Agreement, 1894, made on himself to certain conditions.

By the Buganda Agreement, 1900 (Laws Vol. VI, p. 12) made on behalf of Her Majesty and on behalf of the Kabaka, the relationship between Her Majesty’s Government and the Kabaka, chiefs and people of Buganda was further defined. This Agreement was extended by various supplementary agreements.

By the Uganda Order-in-Council, 1902, s. 12, the Governor was made the Legislative authority for the Uganda Protectorate. By s. 15 the High Court of the Uganda Protectorate was constituted.

By s. 7 of the Uganda Order-in-Council, 1920 (Vol. VI, p. 99) a Legislative Council was constituted for the Protectorate consisting of the Governor and such persons as His Majesty might direct by any instructions under His Sign Manual and Signet. Legislative powers (subject to veto by the Governor and assent by the Governor on behalf of His Majesty to Bills) were given to the Legislative Council (s. 8), without prejudice to the power of the Crown to disallow Ordinances and to legislate by Order-in-Council (s. 9). By s. 13, the Legislative Council was bound to observe Royal Instructions.

Royal Instructions were issued in 1920 (Vol. VI, p. 104). Under cl. XV, the Legislative Council was to consist of the Governor, ex officio members, and such official and unofficial members as the Governor might from time to time appoint pursuant to Royal Instructions. By cl. XXV the Governor was required to attend and preside at all meetings unless prevented by illness or other grave cause. By cl. XXVI, all questions were to be decided by majority vote, and the Governor or member presiding was given an original vote and a casting vote if upon any question the votes should be equal.

Thus the position was that from 1902 to 1920 the Governor was the legislative authority for the Protectorate. In 1920 a Legislative Council was constituted, presided over by the Governor and in which he was given an original and a casting vote.

In December, 1953 (L.N. 314 of 1953), the Royal Instructions of 1920 were amended. A new clause was substituted for cl. XV which provided that the Legislative Council of the Protectorate should consist of (i) the Governor; (ii) ex officio members; (iii) nominated members; and (iv) representative members. A new cl. XVA set out who the ex officio members were to be. By a new cl. XVB the nominated members were to be (a) such persons holding office in the public service; and (b) such person not holding such office

“who the Governor is satisfied will support Government Policy in the Legislative Council when called upon to do so”;

as the Governor in pursuance of Royal Instructions might appoint. The representative members were to be such persons (not official members and not nominated members) as the Governor might in pursuance of Royal Instructions from time to time appoint.

In December, 1953, by s. 4 of the Uganda (Amendment) Order-in-Council, 1953 (L.N. 317 of 1953), s. 8 of the Uganda Order-in-Council, 1920, was replaced, the Legislative Authority now being made “the Governor with the advice and consent of the said Legislative Council”.

We were informed from the Bar that the representative members were not appointed to represent geographical constituencies but were appointed on a racial or community basis, as follows: 14 Africans, 6 Europeans and 8 Asians, a total of 28 representative members—the Africans being balanced by the Europeans and Asians.

We were also informed from the Bar that it was stated by the Governor in opening the Legislative Council thus constituted that the life of each Legislative Council would be four years.

The Uganda (Amendment) Order-in-Council, 1953, also introduced a new s. VIIIA in the Uganda Order-in-Council, 1920 (in the usual form of such sections) giving the Governor reserved powers to legislate in the interests of public order, public faith or good government, notwithstanding failure by the Legislative Council to pass the relevant bill or motion, subject to report to, and revocation by, the

Secretary of State.

I think that we can take judicial notice of the facts that before November, 1954 (which is the next material date), H.M. Government had withdrawn recognition from H.H. the Kabaka and he had left Uganda. A suit had been filed in the High Court to test the validity of the action of H.M. Government, judgment had been given and an appeal was pending. A conference, presided over by a constitutional expert from England had deliberated at Namirembe near Kampala and had made constitutional proposals relating *inter alia* to the continued participation of Buganda in the Protectorate, a constitution for Buganda and the representation of Buganda in the Legislative Council of the Protectorate. Most of these matters, apart from being matters of notoriety in Uganda, are set out in a White Paper (Cmd. 9320) presented by the Secretary of State for the Colonies to Parliament by command of Her Majesty in November, 1954. (I will refer to this hereinafter as “the White Paper”). The White Paper was by consent made part of the record in the present case. Mr. MacKenna for the respondent said that he had no objection to the court seeing it, though he contended that it was irrelevant to the decision of the case. The question of its relevance will be considered later. Mr. Quass for the appellant relied on the White Paper. He pointed to *inter alia* (i) a recommendation by the Governor (para. 7 of Appendix B) to the effect that provided that the Great Lukiko (the Legislative body of Buganda) agreed to participate fully in the Legislative Council of the Protectorate through members elected by whatever method should be decided to be appropriate, he would recommend that the number of Buganda representative members in the Legislative Council should be increased; (ii) a statement by the Governor in para. 8 of Appendix B:

“In order that a period of stability may be secured for the country, I would propose that no major changes in the above constitutional arrangements should be made for six years from the date of the introduction of these arrangements if approved by H.M. Government; and that assuming that these arrangements are introduced in 1955, the position should be reviewed early in 1961, with a view to introducing any changes that are then agreed at the beginning of the life of the new Legislative Council which will come into being early in 1962”;

(iii) a recommendation by the Namirembe Conference (art. 48 of Appendix A) that there should be no major changes in the recommended constitutional arrangements for Buganda (which included the representation of Buganda on the Legislative Council of the Protectorate) for a period of six years after their introduction; and (iv) acceptance of these recommendations by Her Majesty’s Government (para. 6 of the White Paper); and Mr. Quass cited para. 4:

“In the light of the Governor’s recommendations the Buganda Constitutional Committee have agreed to recommend to the Lukiko that Buganda members should be elected to the Protectorate Legislative Council by the Lukiko”;

and para. 16 which made the return of H.H. the Kabaka (should this be the choice of the Lukiko) conditional upon *inter alia* the agreed recommendations of the Namirembe Conference being “accepted as a whole” by the Great Lukiko. Mr. Quass contended that, after the Great Lukiko and Her Majesty’s Government had accepted the recommendations as a whole, to fail to observe an important recommendation of the Governor that there should be no major change in the constitutional arrangements for a period of six years would be a breach of faith. He complained that a major change in the Legislative Council (introduction of a Speaker to preside and the loss of the Governor’s votes) had been made within that period, that is on January 1, 1958. This will be referred to later.

I should here observe that the recommendation of the Governor was that there should be “no major changes in the *above* constitutional arrangements” that is to say in his new proposals set out in Appendix B to the White Paper. These included the introduction of a ministerial system and re-organisation of the Executive Council. The Governor’s proposals for the Legislative Council of the Protectorate were concerned with increased representation and reallocation of seats. Nothing was said as to the Governor continuing to preside in the Legislative Council or as to the Governor’s votes. On a strict construction, it was only to the arrangements set out in his statement that his proposal of no major change for six years applied. Since, however, the object was to secure a period of stability, there may be an implication that he was proposing no major change of any kind for that period.

The following steps were taken to implement the recommendations of the Namirembe Conference and the Governor’s constitutional recommendations.

On May 19, 1955 (L.N. 122 of 1955) the Royal Instructions of 1920 (as amended in 1953) were again amended. A new clause was substituted for cl. XV under which the members of the Legislative Council were to be (a) the Governor; (b) three ex officio members; (c) the nominated members; and (d) the representative members. A new clause was substituted for cl. XXV which provided *inter alia*:

“The Governor shall, so far as is practicable, preside at meetings of the Legislative Council.”

There followed certain transitional instruments covering the period until H.H. the Kabaka should have returned to Buganda and should execute a further agreement.

On July 29, 1955, the Buganda Agreement, 1955, Order-in-Council, 1955, (L.N. 140 of 1955) was made. This was to come into force on a day to be appointed by the Governor. It recited that it was proposed that an Agreement to be entitled the Buganda Agreement, 1955, should be made between Her Majesty and the Kabaka, chiefs and people of Buganda for a new constitution for Buganda and for certain other matters, and provided that when the 1955 Agreement had been executed it should be published in the *Gazette* and it empowered the Governor to give the force of law to any part of the 1955 Agreement.

On October 18, 1955 (L.N. 190 of 1955), the 1955 Agreement was entered into between the Governor on behalf of Her Majesty the Queen and the Kabaka on behalf of the Kabaka, chiefs and people of Buganda. This provided *inter alia* for the administration of Buganda in accordance with the Constitution set out in the First Schedule and that those provisions should have effect from the date when the Agreement was executed. Article 7 of the 1955 Agreement reads as follows:

- “7. *Representation of Buganda in Legislative Council.*—(1) At all times when provision has been made for at least three-fifths of all the representative members of the Legislative Council of the Uganda Protectorate to be Africans and for such number of Africans to be appointed as nominated members of the Council as will bring the total number of Africans who are members of the Council up to at least one-half of all the members of the Council, excluding the president of the Council, then Buganda shall be represented in the Legislative Council of the Uganda Protectorate, and for that purpose at least one quarter of the representative members of the Council who are African shall be persons who represent Buganda.
- “(2) The Katikiro shall submit to Her Majesty’s Representative, that is to say the Governor, the names of the candidates for appointment as the representative members of the Legislative Council to represent Buganda,

that is to say the persons who have been elected for that purpose in accordance with the provisions of the Second Schedule to this Agreement.

- “(3) Notwithstanding the provisions of para. (2) of this article a system of direct elections for the representative members of the Legislative Council who represent Buganda shall be introduced in the year 1961 if such system has not been introduced earlier.
- “(4) Her Majesty’s Government shall during the year 1957 arrange for a review by representatives of the Protectorate Government and of the Kabaka’s Government of the system of election of representative members of the Legislative Council who represent Buganda. In such review consideration will be given to any scheme submitted by the Kabaka’s Government for the election of such representative members based upon the recommendation contained in the Sixth Schedule to this Agreement. Every effort will be made to give effect to the recommendations resulting from such review in time for the election of the representative members of the Legislative Council who represent Buganda when the Legislative Council is generally reconstituted after the general vacation of seats in the Council next following the coming into force of this Agreement.”

Article 11 reads:

- “11. *Review of Constitution.*—No major changes shall be made to the Constitution set out in the First Schedule to this Agreement for a period of six years after the coming into force of this Agreement, but at the end of that period the provisions of the said Constitution shall be reviewed.”

The “Constitution set out in the First Schedule to this Agreement” is the Constitution of Buganda, not the Constitution of the Uganda Protectorate.

The Second Schedule consists (as already mentioned) of regulations for the election of persons for recommendation to the Governor for appointment as representative members from Buganda of the Legislative Council of the Uganda Protectorate. It provides for the establishment of an electoral college for the election of representative members to represent Buganda in the Protectorate Legislative Council. Paragraph 5 of this Schedule has already been cited.

The Sixth Schedule to the 1955 Agreement (referred to in art. 7 *supra*) reads:

“Sixth Schedule

Extract from the report of the sub-committee of the Lukiko set up to examine the recommendations made by the Hancock Committee.

“ ‘The Hancock Committee’ [i.e. the Namirembe Committee] ‘proposed that the Buganda representatives should be elected by the Lukiko itself. We think, after very careful consideration that they should be directly elected by the people—whom they will represent’.”

By Proclamation dated October 18, 1955 (L.N. 188 of 1955), the Governor, in exercise of the powers conferred on him by the Buganda Agreement, 1955, Order-in-Council, 1955, declared that the First and Second Schedules of the 1955 Agreement should have the force of law.

A further amendment to the Royal Instructions was made on April 13, 1956 (L.N. 88 of 1956). Clause XXV was again replaced and it was provided that the Governor should preside at the sittings of the Legislative Council and, in his absence, a member appointed as indicated.

On August 23, 1957 (L.N. 174 of 1957), the Uganda (Electoral Provisions) Order-in-Council was made apparently in order to implement art. 7 and the Sixth Schedule to the 1955 Agreement. This came into force on August 30, 1957, and recited among other things that

“there is established and constituted a Legislative Council for the Uganda Protectorate, consisting of the Governor, ex officio members, nominated members and appointed representative members”,

and that it was proposed that certain of the appointed representative members should be replaced by elected representative members

“and that there should be established for the Protectorate a Legislative Council (hereinafter referred to as ‘the proposed Legislative Council’) which shall be so constituted as to give effect to such proposals”

and it was further recited that it was expedient that the

“existing legislature of the Protectorate should be empowered to make provision for the election of members to the proposed Legislative Council notwithstanding that the same has not yet been established by order of Her Majesty in Council or constituted in pursuance of instructions under Her Majesty’s Sign Manual and Signet.”

It was provided *inter alia* that provision might be made by any law enacted under the existing orders and in pursuance of the existing instructions for the Governor to declare electoral districts for the purpose of returning members of the proposed Legislative Council to represent such districts; but that no election of members to the proposed Legislative Council should be held until provision should have been made by Order-in-Council and Royal Instructions “for the establishment and constitution of the proposed Legislative Council.” It is plain that the establishment of a new Legislative Council for the Protectorate was then contemplated.

On December 17, 1957, changes were foreshadowed which Mr. Quass alleges to have been major changes and of which he complains. On this date Additional Royal Instructions were issued (L.N. 272 of 1957). These came into operation on January 1, 1958 (L.N. 271 of 1957). By these, cl. XV of the Royal Instructions was amended by providing that the Legislative Council should consist of a Speaker, as well as the Governor and the ex officio, nominated and representative members. A new cl. XVA was inserted reading as follows:

“XVA. *The Speaker.*—(1) The Speaker shall be a person who is not an ex officio, nominated or representative member of the Legislative Council and shall be appointed by the Governor by Instrument under the Public Seal.

“(2) The Speaker shall hold office during Her Majesty’s pleasure, and, subject thereto, for such period as may be specified in the Instrument by which he is appointed, and shall not vacate his office by reason of a dissolution of the Legislative Council.”

There follow provisos which are not material to the present case.

Clause XXV and cl. XXVI of the Royal Instructions were revoked and new clauses substituted which, so far as material, read:

“XXV. *Presiding in the Legislative Council.*—(1) The Speaker shall preside at the sittings of the Legislative Council, and in the absence of the Speaker such member of the Council as the Governor may appoint, or if there is no member so appointed, or the member so appointed is absent, the senior ex officio member present shall preside:

“Provided that if the Governor should have occasion to be present at any sitting he shall preside at such sitting.

.....

“XXVI. *Voting.*—(1) All questions proposed for decision in the Legislative Council shall be determined by a majority of the votes of the members present and voting, and if upon any question before the Legislative Council the votes of the members are equally divided, the motion shall be lost.

“(2) (a) Neither the Governor nor the Speaker shall have an original or casting vote; and

“(b) any other person shall, when presiding in the Legislative Council, have an original vote but no casting vote.”

It seems to have been the intention that the Legislative Council should normally be presided over by a Speaker who had no vote instead of by the Governor who also now had no vote but who had previously had an original and a casting vote. Mr. Quass contended that the practical effect of this was that the Crown withdrew from the Legislative Council of the Protectorate and he said that this was a major change in the constitutional arrangements for the Protectorate. Mr. Quass argued that protected persons are not subjects of the Crown and do not owe allegiance to the Crown: the Crown extends protection in exchange for those persons giving up some of their independence: if that protection goes they are entitled to say that the treaty has gone: the presence of the Crown’s representative in the law-making authority for the Protectorate is the visible embodiment of the protection which the Crown has contracted to give; and that had now been withdrawn—a matter which the people of Buganda regarded as of first rate importance; a Speaker, he said, was quite a different person from the Governor; he could not give the Crown’s protection. Moreover, by the withdrawal of the Governor from the Legislature members had lost the opportunity of convincing the Crown’s representative in debate, so that bills and motions might be amended before they are passed. Power to refuse assent was not equivalent: that could only be exercised *ex post facto*. Reserved powers to legislate were not a substitute: the exercise of these was hedged about with restrictions. On the question of voting, Mr. Quass pointed out that whereas previously the Governor had had an original and a casting vote, now neither he nor the Speaker had a vote: the fact that there were two more nominated members with votes was not equivalent: the fact that the Governor might have been satisfied when these members were appointed

“that they would support Government policy in the Legislative Council when requested by him to do so”

(cl. XVB of the Royal Instructions, 1953, (Laws p. 514) referred to above) would not ensure that they would support, or be requested to support, the Government’s policy on all occasions: the balance of voting in the Legislative Council had gone. Accordingly, so Mr. Quass argued, the Legislative Council after the January, 1958, changes was not the same body as was contemplated by the 1955 Agreement, and he was entitled to the declarations sought.

The plaint in the present suit was filed on June 25, 1958, and we must look at the constitutional position as at that date. I should, however, mention that before the suit was decided, that is on September 11, 1958, there was made and issued a further Order-in-Council—the Uganda (Amendment) Order-in-Council, 1958 (L.N. 246 of 1958)—and Royal Instructions (L.N. 247 of 1958). This Order-in-Council (which came into operation on September 27, 1958 (L.N. 245 of 1958)) revoked art. VII of the Uganda Order-in-Council, 1920, and established a Legislative Council for the Protectorate which was to be constituted and to perform its functions in accordance with Royal Instructions. The Royal Instructions then issued, which replaced previous Royal Instructions, contained in cl. 17 (1) provisions for representative members of the Legislative Council

to be (a) persons appointed by the Governor, and (b) persons directly elected to represent electoral districts.

I have traced the history of the matter in some detail in order that it should not be thought that any aspect of it has been overlooked. The Constitution of the Uganda Protectorate has advanced along the now stereotyped lines for British Colonial and Protected Territories. Since 1920 the Legislative Council has changed from a small body consisting of ex officio and official members appointed by the Governor to a much larger body including some representative members directly elected to represent constituencies. On January 1, 1958, the (by no means unusual) step of virtually removing the Governor from the Legislative Council (while retaining his right to attend on occasion and preside) and of putting in a Speaker who would normally preside was put into force. That this was not an unusual step may be seen from the fact that a Speaker now normally presides over the Legislatures (to mention some only) of Tanganyika, Kenya, Northern Rhodesia, Trinidad, and the Federation of Malaya. Halsbury (3rd Edn.) Vol. 5, p. 603 et seq. At the same time the Governor's two votes were removed and two Government back-bench members appointed in lieu. The short point in this case is whether these changes (which I will call "the January, 1958, changes") so altered the Legislative Council as to make it no longer "the Legislative Council of the Protectorate" referred to in para. 5 and other paragraphs of the Second Schedule, and to absolve the Katikiro from any obligations under that Schedule.

In the court below the matter seems to have been treated by the learned judge, (and by learned counsel on both sides) as a matter sounding in contract. A considerable part of the argument and the judgment was taken up with a discussion whether the evidence of a Mr. Sempa, who took part in the negotiations which led up to the signing of the 1955 Agreement in London and was a member of the drafting committee, and the White Paper already referred to could be admitted for the purpose of establishing under s. 9 of the Uganda Evidence Ordinance, the identity of the "Legislative Council" referred to in s. 5 of the Second Schedule, or whether such evidence would be excluded by s. 90 and s. 91 of the Evidence Ordinance. The learned judge held that s. 9, s. 94 and s. 95 of the Evidence Ordinance added nothing to the English law on the subject. Relying on a passage from *Charrington & Co. Ltd. v. Wooder* (3), [1914] A.C. 71 at p. 77, to the effect that if a contract has a plain and unambiguous meaning, parol evidence is not admissible to show that the parties meant something different from what they have said; a passage from *G.W.R. and M.R. v. Bristol Corporation* (4) (1918), 87 L.J. Ch. 414 at p. 429 to the effect that evidence is not admissible to put a particular meaning upon plain and unambiguous words; and the well-known passage from *Reigate v. Union Manufacturing Co. (Ramsbottom) Ltd.* (5), [1918] 1 K.B. 592 as to when a term can be implied into a contract, the learned judge rejected the proffered evidence. With respect, I think that this was a wrong approach. The matter did not sound in contract and s. 90 and s. 91 of the Evidence Ordinance and the English law relied upon had no application to the matter in hand.

I will return to this subject later. The learned judge saw no ambiguity in the expression "the Legislative Council of the Uganda Protectorate" because at no time had there been more than one Legislative Council in existence. He felt it unnecessary to express an opinion as to whether or not the January, 1958, changes were major changes since

"however far-reaching they may be, they do not, in my judgment, affect the identity of the Legislative Council as a body having a permanent existence."

In this court Mr. Quass summarised his case in the following seven propositions:

- (1) Major changes have been made in the Legislative Council since 1955.
- (2) The basis for there being any Agreement at all in 1955 was that there should be no major changes in the Legislative Council before 1961.
- (3) The agreement of the Buganda having been obtained on that basis, the Protectorate Government cannot now ignore it.
- (4) The court will not lend its assistance to such a breach of faith.
- (5) In any event, it was a condition precedent to there being any duties put upon the Katikiro that there should be no such changes.
- (6) Where a provision, obligation or promise is either expressly or by implication conditional, if the condition is not fulfilled, the promisor will be excused.
- (7) In the light of the circumstances which the parties must have had in mind when the treaty of 1955 was signed, the term "Legislative Council" must be construed as being a legislative council substantially the same as that then existing, subject to the qualifications expressly set out in s. 7 (1) of the Buganda Agreement, 1955.

If the matter were treated simply as a matter of contract, Mr. Quass said that he would rely upon there being an implied term as well as a condition precedent that there should be no major changes before 1961 other than those mentioned in the White Paper. He pointed out, however, that the treatment of the matter in the court below as purely a matter of contract was erroneous, and with this Mr. MacKenna for the respondent agreed. Mr. Quass submitted that the 1955 Agreement was a treaty and he asked us to apply the canons of construction adopted by international tribunals in the construction of treaties. He relied upon a passage in Oppenheim (7th Edn.) Vol. 1, p. 862 and p. 863 and in particular upon a statement in note 1 on p. 863:

"English, and in particular, American courts do not hesitate to resort to preparatory work for the purpose of interpreting treaties. See Lauterpacht in H.L.R. 48 (1935) pp. 562–571."

He urged us to treat the White Paper as relevant, as being part of the "preparatory work" leading up to a treaty, namely the 1955 Agreement. He challenged the learned judge's finding that the provisions of the Evidence Ordinance relating to the exclusion of oral, by written evidence, had the same effect as in English law, and pointed to s. 98 of the Evidence Ordinance; arguing that the Katikiro was not a party to the document in question or a representative in interest of a party.

What has to be decided in this appeal is whether or not the Katikiro was entitled to the declarations which he sought or any of them.

The first declaration sought is a declaration that the Legislative Council of the Uganda Protectorate as at present constituted (that is to say as constituted on June 25, 1958, the date of filing the plaint) is not the Legislative Council referred to in the Second Schedule to the Buganda Agreement, 1955. The Legislative Council as constituted on October 18, 1955, consisted, as has been shown, of the Governor, ex officio members, nominated and representative members. It was presided over by the Governor who had an original and a casting vote. The Legislative Council as constituted on June 25, 1958, consisted of the Governor (who had no vote), a Speaker who had no vote, ex officio, nominated and representative members and was presided over by the Speaker. I agree with Mr. MacKenna who argued for the respondent that the first declaration asked for raises a pure question of construction—whether the words "the Legislative Council of the Protectorate" in the Second Schedule include a Legislative Council presided over by a Speaker in which neither the Governor nor the Speaker has a vote.

What has to be construed are the words of a Schedule which has been given the force of law and the rules of construction applicable to it are the rules for construction of general public enactments and not the rules which merely apply to contract or to private Acts or Ordinances which may be analogous to contracts. Accordingly, s. 90 and s. 91 of the Uganda Evidence Ordinance, which apply to contracts, grants or other dispositions of property, have no application. Neither have the rules for implying terms in contracts. Nor, in my opinion, are the rules of construction employed by international tribunals in the interpretation of treaties, applicable. It is correct that the 1955 Agreement is a treaty; but this court is not an international tribunal and the part of the treaty which we are interpreting has been given the force of law and must be construed according to the rules for the construction of laws. The rest of the 1955 Agreement only falls to be construed to the extent that it would be admissible to consider it under the rules for the construction of laws. I cannot agree with Mr. MacKenna's proposition that the Uganda Evidence Ordinance is an exhaustive statement of what is admissible. The Uganda Evidence Ordinance is taken from the Indian Evidence Act and that is not exhaustive. It binds all courts so far as it goes and in questions relating to matters expressly provided for in the Ordinance it is intended to be a complete code of the Law of Evidence: Sarkar's Law of Evidence (9th Edn.) p. 2; but "evidence" as defined by s. 3 is not exhaustive of matters which a court may have before it and take into consideration: see e.g. Sarkar Law of Evidence (9th Edn.) p. 24; Woodroffe & Amir Ali (9th Edn.) p. 113 and p. 114; *R. v. Raojibhai Patel* (6), Kenya Supreme Court Criminal Appeal No. 2 of 1956 (unreported). So far as I am aware, there is no provision in the Uganda Evidence Ordinance expressly dealing with construction of Statutes or Ordinances and what may or may not be taken into consideration for that purpose. Some of the general provisions of the Evidence Ordinance may be applicable, but, in the main, construction of legislation is a matter which is governed by the English common law and the practice of the English courts applied to Uganda by s. 15 (2) of the Uganda Order-in-Council, 1902.

"The legislation of Colonies and other territories where the English common law in whole or part prevails is governed by the same rules of construction as apply in England."

Halsbury's Laws of England (3rd Edn.) Vol. 5, p. 585; *Catterall v. Sweetman* (7), 163 E.R. 1047; and see *Railton v. Wood* (8) (1890), 15 App. Cas. 363.

It is trite law that if the words of an enactment are themselves precise and unambiguous, then no more is necessary than to expound those words in their ordinary and natural sense.

"The words themselves alone do, in such a case, best declare the intention of the lawgiver":

Sussex Peerage case (9) (1844), 11 Cl. and Fin. 85 at p. 143 accepted by the judicial committee in *Cargo ex Argos* (10) (1872), L.R. 5 P.C. 134 at p. 153. But where the meaning is not plain, a court of justice is still bound to construe it and, as far as it can, make it available for carrying out the objects of the Legislature, and for doing justice between the parties: *Phillips v. Phillips* (11) (1866), L.R. 1 P. and D. 169 at p. 173, cited in Craies on Statute Law (5th Edn.) at p. 90. The words of s. 5 of the Second Schedule appear, at first sight, to be plain; but there is a latent ambiguity in that "Legislative Council of the Protectorate" may mean the Legislative Council of the Protectorate as then constituted, or the Legislative Council of the Protectorate as established or constituted for the time being. When the words of an enactment are not clear, it is permissible to go to certain sources of information outside the enactment for the purpose of throwing light upon its meaning. "In construing

Acts of Parliament”, said Turner, L.J., in *Hawkins v. Gathercole* (12) (1855), 6 De G. M. and G. 1 at p. 20 and p. 21 citing *Stradling v. Morgan* (13) (1560), 1 Plowd. 201,

“the words which are used are not alone to be regarded. Regard must also be had to the intent and meaning of the Legislature . . . In determining the question before us we have therefore to consider not merely the words of this Act of Parliament but the intent of the Legislature, to be collected from the cause and necessity of the Act being made, from a comparison of its several parts and from foreign (meaning extraneous) circumstances so far as they can justly be considered to throw light upon the subject.”

This passage was cited with approval by Lord Birkenhead, L.C., in *Viscountess Rhondda’s Claim* (14), [1922] 2 A.C. 339, 370. Lord Blackburn said in *River Wear Commissioners v. Adamson* (15) (1877), 2 App. Cas. 743 at p. 763,

“In all cases the object is to say what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view, for the meaning of words varies according to the circumstances with respect to which they are used.”

In *Thomson v. Clanmorris* (16), [1900] 1 Ch. 718 at p. 725, Lord Lindley, M.R., said:

“In construing . . . any . . . enactment regard must be had not only to the words used but to the history of the Act and the reasons which led to its being passed. You must look at the mischief which had to be cured as well as to the cure provided.”

This rule was followed and approved by a strong divisional court in *R. v. Paddington and St. Marylebone Rent Tribunal* (17), [1947] 1 All E.R. 448. And see *Powell v. Kempton Park Racecourse Co.* (18), [1899] A.C. 143 at p. 157.

We are here dealing with a Schedule, which has been given the force of law, to an Agreement which has not been given the force of law. I think that for the purpose of construing and resolving an ambiguity in the Schedule we must be entitled to endeavour to ascertain the meaning of the words used by considering the surrounding circumstances, including the whole Agreement. The Second Schedule depends upon s. 7 (2) of the 1955 Agreement and that must be relevant. Mr. MacKenna submitted that we were entitled to look only at s. 7. It would not be in accordance with ordinary canons of construction to take into consideration one section only of a document while ignoring other portions which might assist the interpretation—the document should be considered as a whole. I think that the court is entitled to look at the whole Agreement. Moreover, the 1955 Agreement was directed, by s. 2 (1) of the Buganda Agreement Order-in-Council, 1955, to be published in the *Uganda Gazette* and it was so published. I think that on that ground we could take judicial notice of it: see the commentary on s. 57 of the Indian Evidence Act (from which s. 55 of the Uganda Evidence Ordinance is taken) in Woodroffe & Amir Ali’s *Law of Evidence* (9th Edn.) at p. 489 and Phipson on Evidence (9th Edn.) at p. 23 and p. 349. Moreover, the 1955 Agreement was an Act of State on a constitutional matter. In *Rustomji v. R.* (19) (1876), 2 Q.B.D. 69, a petition of right was brought by a British subject to obtain payment of moneys due to him by a Chinese merchant, out of a sum of 3,000,000 dollars paid by the Emperor of China to the British Government in pursuance of a treaty to defray debts due to British subjects from Chinese merchants. The treaty, being an Act of State, was referred to, both in the court below and in the Court

of Appeal, to ascertain the exact words upon which the supposed obligation had arisen. In *Salaman v. Secretary of State for India* (20), [1906] 1 K.B. 613, 616, the whole of the treaty under which the alleged obligation arose was referred to. In *R. v. Governor of Brixton Prison, Ex parte Minervini* (21), [1958] 3 All E.R. 318 the court referred to and construed a treaty to which the provisions of the Extradition Act, 1870, had been applied by Order-in-Council. For all these reasons, I think that we are entitled to refer to the whole of the 1955 Agreement for the purpose of assisting in the construction of ambiguous words in its Second Schedule to which the force of law has been given.

As to the White Paper, I have not been able to find, and Mr. Quass did not cite, any judicial authority for his proposition (supported by the above-mentioned note in Oppenheim) that for the purpose of interpreting treaties English courts do not hesitate to resort to preparatory work. In any event, what we are here interpreting is legislation. Under the ordinary rules for the construction of statutes the reports of commissioners are not admissible for the purposes of directly ascertaining the intention of the Legislature, though they may perhaps be looked at as part of the surrounding circumstances for the purpose of seeing what was the evil or defect which the Act under construction was designed to remedy: see the speech of Lord Halsbury, L.C., in *Eastman Photographic Co. v. Controller-General of Patents* (22), [1898] A.C. 571 at pp. 573–576; as explained by Lord Wright in *Assam Railways and Trading Co. Ltd. v. Inland Revenue Commissioners* (23), [1935] A.C. 445 at p. 458 (P.C.). I assume that this rule would apply also to the report and recommendations of a conference such as the Namirembe Conference.

The statement of the objects and reasons for a bill is not admissible to aid in its construction; neither may reference be made to the proceedings of the Legislature which resulted in its passing. By analogy it would seem that H.M. Government's statement of intended policy presented to Parliament in the form of a White Paper would be equally inadmissible as an aid to construction of the resulting legislation.

Lord Wright said in *Assam Railways and Trading Co. Ltd. v. Inland Revenue Commissioners* (23):

“It is clear that the language of a Minister of the Crown in proposing in Parliament a measure which eventually becomes law is inadmissible and the report of commissioners is even more removed from value as evidence of intention, because it does not follow that their recommendations were accepted.”

By analogy, although the recommendations of the Namirembe Conference and of the Governor as set out in the Appendices to the White Paper were accepted by H.M. Government in, or prior to, November, 1954, when the White Paper was presented to Parliament, there is no evidence to show whether the Governor's proposal that there should be no major changes in his recommended constitutional arrangements for six years was accepted by Parliament and, if so, whether the proposal remained unchanged during the eleven months which elapsed before the 1955 Agreement was made and the Second Schedule given the force of law. Since, during that time, there was the change mentioned in the Sixth Schedule, it is clear that the recommendations contained in the White Paper were not immutable. I incline to the view that the White Paper is inadmissible for the purpose of construing the Second Schedule to the 1955 Agreement.

I proceed, therefore, to construe the words “Legislative Council of the Protectorate” in para. 5 and elsewhere in the Second Schedule taking into consideration the 1955 Agreement, but not the White Paper. On this basis I think that the meaning of the expression “the Legislative Council of the Protectorate” would not be confined to the Legislative Council of the Protectorate as constituted

at the date that the Second Schedule was given the force of law or the date when the 1955 Agreement was signed. Article 7 (3) of the 1955 Agreement shows that the expression “Legislative Council” in s. 7 included the Legislative Council before and after 1961, notwithstanding that a major change—direct election of representative members—would be inaugurated in 1961 and might be inaugurated sooner, a change which, as we have seen, involved the establishment of a new Legislative Council. I think that “the Legislative Council of the Uganda Protectorate” in s. 7 means the Legislative Council as established and constituted at the relevant time. There is nothing in the 1955 Agreement or the Schedule which lays down that no major change in the constitution of the Legislative Council of the Protectorate (other than that mentioned) shall be made before 1961. One would expect that if that had been the intention it would have been stated, particularly having regard to the fact that there was such a statement relating to Buganda (art. 11). The expression “the Legislative Council” in the Second Schedule must bear the same meaning as in s. 7 upon which that Schedule depends. In my opinion, as a matter of construction, the words “the Legislative Council of the Protectorate” in para. 5 of the Second Schedule and the words “the Legislative Council” elsewhere in that Schedule include the Legislative Council of the Protectorate after the January, 1958, changes, notwithstanding that such changes were made within six years.

I should have come to the same conclusion, as a matter of construction, if I had confined myself to the Second Schedule and had not taken the 1955 Agreement itself into consideration. If I had been construing para. 5 and other paragraphs of the Second Schedule without reference to the rest of the 1955 Agreement, I should have construed “the Legislative Council of the Protectorate” as the Legislative Council of the Protectorate for the time being however it might be constituted. I think this would be the ordinary meaning. For instance, a provision in an Act that rules made by a Minister are to be laid before “Parliament” would not be held to refer only to Parliament as then constituted, but would continue to be operative if that Parliament had since been dissolved or had undergone some major constitutional change. The point was not taken, but it seems that the definition of “Legislative Council” in s. 2 (1) of the Interpretation and General Clauses Ordinance may apply to the regulations constituting the Second Schedule and would support the same view.

In case I am wrong in excluding consideration of the White Paper when construing the words “Legislative Council of the Protectorate” in the Second Schedule, I had better state what my conclusions would be if I felt at liberty to take it into consideration for that purpose. It does appear that there was a recommendation, agreed to by all parties before November, 1954, when the White Paper was presented to Parliament, that there should be no major changes in the constitutional arrangements then proposed for Uganda (which proposals did not include the January, 1958, changes) for six years from 1955. But, as already stated, even if it be assumed that that recommendation applied to the January, 1958, changes (a doubtful assumption), there is no evidence to show whether that recommendation was endorsed by Parliament, or whether it was or was not varied or abandoned by consent of the high-contracting parties in the eleven months which elapsed before the 1955 Agreement was signed. Accordingly, the White Paper, even if admissible, would be of little or no assistance in construing the meaning of “the Legislative Council of the Protectorate” in the Second Schedule. The fact that in such a formal document as the 1955 Agreement, there is no stipulation precluding major changes to the Constitution of Uganda for six years, whereas there is such a stipulation relating to the Constitution of Buganda, does not support the contention that there was any such agreement remaining at the date of the treaty with regard to the Legislative Council of the Protectorate.

In my opinion the appellant is not entitled to the first of the declarations claimed.

The second declaration asked for is (as already stated) a declaration that the Katikiro is not bound or entitled to take the steps laid down in the Second Schedule for the purpose of electing representative members to represent Buganda in the Legislative Council of the Uganda Protectorate as at present constituted. The argument in favour of this declaration also depends to a great extent on the proposition that the Legislative Council after the January, 1958, changes was not the Legislative Council referred to in the Second Schedule. To that proposition I am not prepared to accede. As already stated, Mr. Quass also argued that the stipulation that there should be no major changes (other than those then agreed to) in the Uganda constitutional arrangements before 1961 was a condition precedent to there being any duties for the Katikiro to perform, and he contended that, the condition not having been fulfilled, the Katikiro was discharged from his obligations under para. 5 and other paragraphs of the Second Schedule, and that the court should so declare. Mr. Quass argued that the stipulation was an implied term.

Since the obligations attached in 1955, I cannot see how the condition alleged could be a condition precedent, though, if the matter sounded in contract and if it were proved, it might be a condition subsequent. As to the alleged implied term, terms can only be implied in contracts if they are necessary in the business sense to give efficacy to the contract and are such as would certainly have been accepted by all parties as a matter of course. *Reigate v. Manufacturing Co. (Ramsbottom) Ltd.* (5). Neither circumstance obtains here. As already pointed out, the Governor's proposal read strictly referred only to the recommendations which he was then making. There is no evidence, and it seems inherently improbable, that had the question been then raised, either H.M. Government or the Protectorate Government would have agreed as a matter of course to restrict themselves from introducing the January, 1958, changes.

But I believe the whole argument based on contract to be a misconception of the position and of the court's powers. That argument treats the matter as though the 1955 Agreement were a contract between subjects capable of being discharged by non-performance of a condition precedent or subsequent upon which the court would have jurisdiction to pronounce. But the 1955 Agreement and the Additional Royal Instructions of December 17, 1957, were Acts of State. In *Rustomji v. R.* (19), Lord Coleridge, C.J., said at p. 74:

"She [Her Majesty Queen Victoria] acted throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority; and, as in making the treaty, so in performing the treaty, she is beyond control of municipal law and her acts are not to be examined in her own court."

It is true that the plaintiff in that case was a British subject, but the fact that a plaintiff might not be a British subject would not enable a municipal court constituted in a British Protectorate by an Order-in-Council of the Sovereign to pronounce upon the performance of a treaty by Her Majesty or her representatives or to say that changes in the Legislative Council of the Protectorate effected by Royal Instructions from Her Majesty did or did not constitute a breach of faith. Even if I felt that an allegation of breach of faith could be supported (which I do not) that matter is quite outside the purview of the High Court, or this court which only has the jurisdiction conferred upon it by s. 16 of the Eastern African Court of Appeal Order-in-Council, 1950.

I do not say that municipal courts may not in certain circumstances adjudicate upon the rights of individuals accruing from an Act of State: *Salaman v. Secretary of State for India* (20), [1906] 1 K.B. 613 at p. 640; but where the

Crown has done an Act of State in such circumstances as to negative any intention to give contractual rights, municipal courts have no jurisdiction to question the validity of those Acts or to entertain any claim in respect thereof by an individual against the Crown: *Salaman's* case (20). To my mind art. 7 (2) of the 1955 Agreement did not confer upon the Katikiro any contractual right and the obligations which are laid upon him by para. 5 and other paragraphs of the Second Schedule were obligations laid upon him by law which would not be discharged, whether the 1955 Agreement was performed according to its tenor or not. For these reasons, I think that the claim for the second declaration fails.

It follows that the prayer for the third declaration must also be refused.

In the view which I take it is unnecessary to decide whether the January, 1958, changes were major changes or not. In constitutional theory they might be, but the question does not arise.

The learned judge, besides refusing the declarations asked for, found that the Katikiro was under a legal duty to take the steps required of him by the Second Schedule. Mr. Quass attacked this finding strongly on the grounds that such a finding was not asked for, and that it was not correct, because the provisions of the Second Schedule were unworkable and, at the date when the judgment was delivered (though not at the date when the suit was filed), other provisions for the election of representative members had been brought into force. I think it is not to be wondered at that the learned judge, having found himself unable to declare as prayed that the Katikiro was not under a legal duty to take the steps laid down in the Second Schedule, should find the converse. Nevertheless, the converse was not necessarily correct. I think that this finding was superfluous and the decision should have been confined to refusing the declarations claimed.

I would dismiss the appeal. The decree of the High Court should be affirmed. The appellant should pay the respondent's costs of the appeal.

Forbes V-P: I agree and have nothing to add.

Gould JA: I concur in the reasoning and conclusions expressed in the judgment of the learned president and have nothing to add. I agree that the appeal should be dismissed with costs.

Appeal dismissed.

For the appellant:

Phineas Quass QC (of the English Bar) and *GL Binaisa*

GL Binaisa, Kampala

For the respondent:

BJM MacKenna QC (of the English Bar) and *MJ Starforth* (Crown Counsel, Uganda)

The Attorney-General, Uganda

Re Ghusalal Dharamshi-Debtor [1959] 1 EA 401 (HCU)

Division: HM High Court of Uganda at Kampala

Date of judgment: 3 April 1959

Case Number: 3/1956
Before: Sheridan J
Sourced by: LawAfrica

[1] Bankruptcy – Bankrupt’s salary of income – Application for order for monthly payments to trustee – Bankrupt a broker without fixed salary or income – Whether earnings as broker are salary or income within s. 54 (2) of the Bankruptcy Ordinance (Cap. 29) (U.).

Editor’s Summary

The bankrupt was a broker dealing in real property and second-hand motor cars. The bankrupt had no fixed salary or income and his monthly income fluctuated considerably. The Official Receiver as trustee in bankruptcy of the estate of the bankrupt applied to the court under s. 54 (2) of the Bankruptcy Ordinance for an order for payment by the bankrupt of Shs. 1,000/- per month for the benefit of his creditors.

Held –

- (i) salary or income within the meaning of s. 54 (2) of the Bankruptcy Ordinance is remuneration paid at stated times under a binding obligation to make payment, and not earnings of an irregular character however large;
- (ii) there is uncertainty in the earnings of a broker and the money to be “income” must be some definite annual amount which is coming to the bankrupt and not form part of his earnings in his business.

Application dismissed.

Cases referred to in judgment

- (1) *Re Huggins, Ex parte Huggins* (1882), 21 Ch. D. 85.
- (2) *Re Tennant’s Application*, [1956] 2 All E.R. 753.
- (3) *Re Hutton, Ex parte Benwell* (1884), 14 Q.B.D. 301.

Judgment

Sheridan J: This is an application by the Official Receiver as trustee in bankruptcy of the estate of Ghusalal Dharamshi under s. 54 (2) of the Bankruptcy Ordinance (Cap. 29) for the payment of part of the salary or income received by him for the benefit of his creditors.

The section provides as follows:

“Where a bankrupt is in receipt of a salary or income other than as aforesaid, the court, on the application of the trustee, shall from time to time make such order as it thinks just for the payment of the salary or income, or of any part thereof, to the trustee, to be applied by him in such manner as the court may direct.”

The bankrupt is a broker dealing in the purchase and sale of real property and of second-hand motor cars.

He has no fixed salary or income. He reported to the Official Receiver that in three months of last year his average monthly gross income was Shs. 2,625/- whereas during the present year it has dropped to Shs. 350/- per month due to the recession in trade. He has a large family to maintain and other expenses to meet but the Official Receiver has applied for an order for the payment by him of Shs. 1,000/- per month. This sum is calculated on the months when he may earn large amounts and I am assured that no steps would be taken to enforce the order in those months in which his earnings fell short. Even if I had power to make the order I am

not satisfied that I could do more than order him to pay to the Official Receiver a certain percentage of his net monthly profits.

If the matter were *res integra* I would be inclined to say that a bankrupt who earns a fluctuating income should not be in a more privileged position than a bankrupt who earns a fixed salary or income but as far as s. 54 (2) of the Ordinance is concerned that does not seem to be so on the authorities. The Bankruptcy Ordinance is modelled on the Bankruptcy Act, 1914, and the section corresponding to our s. 54 (2) is s. 51 (2). The vesting provisions of the Ordinance as contained in s. 20 (1) and s. 42 are to the effect that, upon adjudication, all the property of the debtor—and it is widely defined in s. 2—becomes divisible amongst the creditors and vests in the trustee in bankruptcy. These sections are modified and controlled by s. 51 (2) so that a person in receipt of a salary or income who becomes bankrupt is not necessarily to be left to starve but a discretion is given to the court to fix how much of his salary or income is to be made available for the payment of his creditors: see *Re Huggins, Ex parte Huggins* (1) (1882), 21 Ch. D. 85 referred to by Lord Evershed, M.R., in *Re Tennant's Application* (2), All E.R. 753 at p. 759. The question “what is salary or income” must be answered within the framework of the Bankruptcy Ordinance and although I have no doubt that the bankrupt would have insuperable difficulties in trying to convince the income tax authorities that his brokerage fees were not income within the meaning of the income tax legislation the authorities seem to establish that salary or income within the meaning of s. 54 (2) of the Ordinance is remuneration paid at stated times under a binding obligation to make the payment, and not earnings of an irregular character, however large. Potter's *Principles of Bankruptcy* (2nd Edn.) 235. The leading case is *Re Hutton, Ex parte Benwell* (3) (1884), 14 Q.B.D. 301 where it was held that the section contemplated not only a remuneration fixed by contract but also that there must be some certainty of its continuance and regularity. The court decided that the word “income” must be read *eiusdem generis* with the word “salary” and that the section did not enable a court to set aside for the benefit of the creditors of a professional man, who was an undischarged bankrupt, any part of his prospective and contingent earnings in the exercise of his personal skill and knowledge.

“His income is perfectly precarious, it depends on the number of persons who come to him as patients. There is nothing in it of the nature of a provision or salary; there is an element of uncertainty in it. We are asked to impound a portion of his future earnings for the benefit of his creditors. It is obvious that he could defeat the order by declining to see any patients. Whether it would or would not be for his interest to do so is immaterial,”

per Lindley, L.J., at p. 309. The position of a broker is analogous. The money to be income must be some definite annual amount which is coming to the bankrupt and not from part of his earnings in his business.

Although it was not argued, it appears to me that this application may have been misconceived as under s. 42 of the Ordinance, the property of the bankrupt which passes to the trustee and is divisible among his creditors comprises all such property as belonged to him at the commencement of the bankruptcy or is acquired by him before his discharge and on the definition of “property” in s. 2 of the Ordinance, would seem to include all his personal earnings between those two stated periods save only what is necessary for the support of the bankrupt and his family. For the reasons which I have given the present application is dismissed with costs.

Application dismissed.

For the applicant:

B Batchelor (Official Receiver, Uganda)

The Official Receiver, Uganda

For a creditor:

CD Patel

CD Patel, Kampala

**The Dar-Es-Salaam Motor Transport Co Ltd v The Transport Licensing
Authority of Tanganyika and another**
[1959] 1 EA 403 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	11 June 1959
Case Number:	33/1959
Before:	Sir Kenneth O'Connor P, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika–Law, J

[1] *Certiorari – Practice – Application for extension of time after expiry of period of limitation – English Rules of the Supreme Court, O.59, r. 4 (2) – Tanganyika Order-in-Council, 1920, s. 17 (2) (T.) – English Crown Office Rules, 1906, r. 21, r. 30 – Indian Code of Civil Procedure, 1908, s. 151 – Indian Acts (Application) Ordinance (Cap. 2), s. 2 (T.).*

Editor's Summary

The appellant applied to the High Court for leave to extend the time for filing an application for certiorari to quash a decision of the transport licensing authority. The application was refused on the ground that such an application should have been made with reasonable despatch, not later than six months from the making of the order objected to. The court also held that the fact that an appeal was pending was not a good reason for deferring an application for certiorari. The court and both the parties proceeded on the basis that the matter was governed by O. 59, r. 4 (2) of the Rules of the Supreme Court of England which was made in 1938 and provides that leave to apply for an order of certiorari shall not be granted unless the application is made within "six months after the date of the proceeding . . ."

Held –

- (i) the English practice and procedure imported into Tanganyika by the Tanganyika Order-in-Council, 1920, were the practice and procedure obtaining in England on July 22, 1920, and the governing rules on that date were the Crown Office Rules, 1906, and not O. 59 of the English Rules of the Supreme Court which was only made in 1938.
- (ii) the application could and should have been made within the six months allowed; power to adjourn an application for certiorari until an appeal is determined where the proceeding is subject to appeal, exists in Tanganyika by virtue of s. 151 of the Indian Code of Civil Procedure applied by s.

17 (2) of the Tanganyika Order-in-Council, 1920, and by s. 2 of the Indian Acts (Application) Ordinance.

- (iii) though the trial judge had been wrong in applying O. 59, r. 4 the basis upon which he had exercised his discretion was correct and the court would not interfere with his discretion which had been exercised judicially.

Appeal dismissed.

June 11. The following judgment was read by direction of the court:

Judgment

Sir Kenneth O'Connor P: This was an appeal by the Dar-es-Salaam Motor Transport Co. Ltd. from a refusal of the High Court of Tanganyika to extend time to apply for certiorari to quash a decision of the transport licensing authority of Tanganyika. The decision objected to, which was dated June 11, 1958, was a decision to grant a licence to the second

respondent, a competitor of the appellant, to operate a third-class road service between Dar-es-Salaam and Morogoro. The grounds of the application for certiorari were that the members of the licensing authority (in addition to hearing the applicant (second respondent) and the appellant) had themselves conducted an investigation, in the absence of the parties, into conditions on the road in question and had based their decision, in part at least, on that investigation. We are not concerned with the question whether these would, or would not, have been sufficient grounds for granting certiorari, but purely with the question whether or not the High Court should have extended the time to make an application for certiorari. On May 20, 1959, we dismissed the appeal with costs, and now give our reasons.

The relevant dates were as follows:

June 11, 1958. Decision of licensing authority made.

June 13, 1958. Decision of the licensing authority announced.

September 2, 1958. Reasons of licensing authority given.

September 24, 1958. Appeal heard by the Appeal Tribunal. (Transport Licensing Ordinance (Cap. 373), s. 28).

October 11, 1958. Appeal Tribunal dismissed the appeal.

December 23, 1958. The appellant learned that the Appeal Tribunal had dismissed the appeal. No notification of the result had hitherto been given to the appellant notwithstanding repeated applications.

January 23, 1959. Application for extension of time lodged.

It was agreed by both parties in the High Court and accepted by the learned judge that the matter was governed by para. (2) of r. 4 of O. 59 of the Rules of the Supreme Court in England which reads as follows:

“(2) Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding . . . ; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”

The learned judge held that an application for certiorari should be made with reasonable despatch, not later than six months from the making of the order objected to, and that the fact that an appeal was pending is not a good reason for deferring an application for certiorari.

It was not correct to apply O. 59. That order was only made in 1938. The English practice and procedure which was imported into Tanganyika by s. 17 (2) of the Tanganyika Order-in-Council, 1920, was the practice and procedure obtaining in England at the date of the Order-in-Council, that is to say July 22, 1920. Rule 21 and r. 30 of the Crown Office Rules of 1906, set out in Short and Mellor Practice of the Crown Office (2nd Edn.) at p. 50 and p. 66, were then the governing rules. We were satisfied that there is nothing in the Civil Procedure Code of India dealing with certiorari which would oust their application. The relevant parts of those rules read:

“Rule 21. No writ of certiorari shall be granted, issued or allowed to remove any judgment, order, conviction, or other proceeding had or made by or before any justice or justices of the peace of any county, city, borough, town corporate, or liberty, or the respective general or quarter sessions thereof, unless such writ of certiorari be applied for within six

calendar months next after such judgment, order, conviction, or other proceeding shall be so had or made, . . .”

“Rule 30. The provisions of the foregoing r. 20, r. 21, r. 22, r. 23, r. 24 and r. 27, as far as they may be applicable, shall apply to the removal of all other orders and proceedings, which may be subject to removal by certiorari into the King’s Bench Division for the purpose of being quashed.”

The appellants could and should have made their application for certiorari within the six months allowed, if the result of the appeal was not then known. The power to adjourn an application for certiorari until an appeal is determined where the proceeding is subject to appeal, exists in Tanganyika by virtue of s. 151 of the Indian Civil Procedure Code applied by s. 17 (2) of the Tanganyika Order-in-Council, 1920, and by s. 2 of the Indian Acts (Application) Ordinance (Cap. 2), and this course would, no doubt, have been taken by the court. Accordingly, though we thought that the learned judge had been wrong in applying O. 59, r. 4, the basis upon which he had exercised his discretion was correct. We were not persuaded that we should interfere with the learned judge’s discretion, which had been exercised judicially. Accordingly we dismissed the appeal with costs.

Appeal dismissed.

For the appellants:

WD Fraser Murray

Fraser Murray, Thornton & Co, Dar-es-Salaam

For the first respondent:

D Childs-Clarke

Atkinsons & Master, Dar-es-Salaam

For the second respondent:

GM Pillai

Al Noor Kassam & Co, Dar-es-Salaam

Mohamed Jaffer v Dalip Singh Gupta [1959] 1 EA 406 (HCT)

Division:	HM High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	20 May 1959
Case Number:	11/1959
Before:	Simmons J
Sourced by:	LawAfrica

[1] *Practice – Revision – Application for revision against order refusing payment of decretal amount by instalments – Procedure to be adopted – Indian Code of Civil Procedure, 1908, O. 47, r. 1.*

Editor's Summary

This was an application for revision by a judgment debtor against the resident magistrate who had refused to order that the decretal amount should be paid by instalments.

Held – the procedure which an applicant should adopt is to apply *ex parte* for a rule nisi; if a rule nisi is granted a hearing inter partes will follow; this procedure is just because it is not fair that a successful party should be put to the trouble and expense of being heard on an application for revision, unless the applicant first shows that there is a case to answer.

Order that a rule nisi do issue.

No Cases referred to in judgment in judgment

Judgment

Simmons J: The applicant is a judgment debtor in a decree passed on March 15, 1959. The learned resident magistrate refused to order that the decretal amount should be paid by instalments and the applicant requests this court to revise his order.

Procedure for revision on the application of parties is, I take it, within the discretion of the court, but I see no reason to depart from that which seems to have been followed by the courts of India in relation to review and probably to revision. According to Woodroffe and Ameer Ali (2nd Edn.) in their commentary on O. 47, r. 1 (p. 1363) proceedings to obtain a review pass through three stages: first, *ex parte* application for a rule nisi; secondly (if the application is granted) a hearing inter partes upon which the other side shows cause and the rule is made absolute or discharged; finally (if the rule is made absolute) a revisional order by the court. This procedure is just. It is not fair that the successful party should be put to the trouble and expense of being heard unless the applicant shows first that there is a case to answer.

Upon hearing counsel for the applicant in this case I order that a rule nisi issue.

Order that rule nisi issue.

For the applicant: (*ex parte*)

MS Chaddah

MS Chaddah, Dar-es-Salaam

Tadeo Oyee s/o Duru v R [1959] 1 EA 407 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	13 April 1959
Case Number:	23/1959
Before:	Sir Kenneth O'Connor P, Forbes V-P and Windham JA
Sourced by:	LawAfrica

Appeal from: H.M. High Court of Uganda–Lyon, J

[1] *Criminal law – Insanity – Accused a high – grade mental defective – Meaning of “disease affecting the mind” – Penal Code, s. 11, s. 12 (U.) – Trial of Lunatics Act, 1883 – Criminal Procedure Code, s. 166 (U.).*

Editor’s Summary

The appellant was convicted of murder by the High Court. At the trial evidence was given that the appellant was a high-grade mental defective but a medical witness was unable to suggest any disease of the mind from which the appellant was suffering. The trial judge rejected the defence of insanity holding that this defence was not open to the accused because s. 12 of the Penal Code uses the words “he is through any disease affecting his mind incapable of understanding what he is doing . . .” On appeal it was argued that the appellant was at the time of the incident a high-grade mental defective, and for this reason and also because he had had some drinks when he attacked the deceased, he was incapable of knowing that what he was doing was wrong.

Held –

- (i) high-grade mental deficiency may be a “disease affecting the mind” within s. 12 of the Penal Code. *R. v. Kemp*, [1957] 1 Q.B. 399 and *R. v. Retief* (1941), 8 E.A.C.A. 71 applied.
- (ii) the trial judge took too restricted a view of the meaning of “disease” in s. 12 and was not correct in ruling that the defence of insanity was not open to the appellant; there was evidence of insanity which should have been considered and upon which, if believed, a special finding under s. 166 of the Criminal Procedure Code might have been recorded.

Appeal allowed. New trial ordered.

Cases referred to in judgment

- (1) *R. v. Kemp*, [1957] 1 Q.B. 399.
- (2) *R. v. Retief* (1941), 8 E.A.C.A. 71.

April 13. The following judgment was read by direction of the court:

Judgment

The appellant was convicted on January 7, 1959, by the High Court of Uganda, of the murder on or about February 20, 1958, of one Pyerepaulo Okumu and was sentenced to death. Against this conviction and sentence he appeals.

An extract from the judgment of the learned trial judge is as follows:

“The facts are simple. Accused and other people, including the deceased, were at a beer party about mid-day on February 20, 1958. They were all drinking beer at about 2 p.m. Accused kicked over the bottle of beer which deceased had bought. The beer was spilt. There was a fight between accused and deceased, at first with fists and later wrestling. They were separated; and everyone seemed to think the trouble was over. Accused left the party and went to his home some two or three hundred

yards away. Deceased remained drinking beer with his friends, sitting on a stool. Accused returned with the terrible weapon produced (exhibit 2), walked up to deceased from behind and hit him on the head with the axe and continued to hit him with the axe with great force nine times. The medical evidence is that death was instantaneous, the cause of death being a wound which penetrated into the brain. In summing up to the assessors I directed them upon provocation and told them it was open to them to consider whether accused's loss of control still existed at 6 p.m., because of the previous fight. One assessor so found; but the second assessor, with whom I agree, found that his passion had had time to cool. In my opinion that is quite obvious. In the period of four hours when accused was at his home alone, there was ample time for his passion to cool. The injuries he received were trivial; and I therefore find that this is a case of murder and not manslaughter. I hold there is no sufficient evidence to reduce this offence from murder to manslaughter. The onus remained upon the prosecution throughout and they have negated provocation at 6 p.m. Further, the nature of the wounds inflicted makes it quite clear that accused intended to kill Okumu. This was a savage and brutal killing. The question did the accused know he was doing wrong at the time must be answered in the affirmative for two reasons, one, because he ran away and, two, that on February 25 at Gulu police station, accused made this statement. 'I did not kill Okumu intentionally, but I beat him because I had received injuries and severe pain and I was being chased by many people.' Here accused is attempting to give a logical excuse for his wrongful act."

Two points are raised in the memorandum of appeal. The first is that the learned trial judge was wrong in holding that there had been sufficient time for the appellant's anger to cool. We think that there is nothing in this point.

The second point raised in the memorandum of appeal is that the appellant was at the time of the incident a high-grade mental defective and that for this reason and because he had had some drinks when he attacked the deceased, he was incapable of knowing that what he was doing was wrong.

The learned judge came to the conclusion, and so directed the assessors, that the defence of insanity was not open to the accused because s. 12 of the Penal Code which deals with the defence of insanity uses the words "he is through any disease affecting his mind incapable etc. . . ." and Dr. Bosa, the acting medical superintendent at Mulago Mental Hospital, while testifying that the accused was a high-grade mental defective was unable to suggest any disease of the mind from which he was suffering.

With respect, we think that the learned judge put too narrow a construction on the words "disease" as used in s. 12. That section reads:

"Insanity. 12. A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission.

"But a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above-mentioned in reference to that act or omission."

This section follows s. 11 which reads:

"Presumption of Sanity. Every person is presumed to be of sound mind at any time which comes in question, until the contrary is proved."

The language of s. 12 is not the same as that used in the M’Naghten Rules:

“labouring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong . . .”

thought it resembles it closely. In particular s. 12 does not contain the words “defect of reason”. Notwithstanding this omission, in our opinion, a defect in the reasoning faculty of an accused person affecting his understanding is the origin of, and the basic reason for, the exemption of an accused person from criminal responsibility, and this applies no less under s. 12 of the Uganda Penal Code than in England under the M’Naghten Rules.

As was pointed out by Devlin, J., in *R. v. Kemp* (1), [1957] 1 Q.B. 399, in the eyes of the common law if a man is not responsible for his actions, he is entitled to be acquitted by the ordinary form of acquittal and it matters not whether his lack of responsibility was due to insanity or any other cause. That position was altered by the Trial of Lunatics Act, 1883, which introduced a qualified form of acquittal, the special verdict of guilty but insane, in cases where evidence of insanity has been given and it appears to the trial court that the accused was insane when he did the act. The provisions of the 1883 Act are substantially reproduced in s. 166 of the Uganda Criminal Procedure Code. Those provisions are procedural and lay down what is to be done with the accused if he is found to have done the act, but to have been insane when he did it. Where a defence of insanity is set up, the criminal responsibility of the accused—insane or not—has first to be determined under s. 11 and s. 12 of the Penal Code.

What is the meaning of the word “disease” as used in s. 12? The Shorter Oxford English Dictionary gives, as the primary meaning of “disease”, “absence of ease”; and as the secondary meaning

“A condition of the body or of some part of the body, in which its functions are disturbed or deranged.”

As was pointed out in *R. v. Kemp* (1), there is no distinction, for purposes of ascertaining criminal responsibility, between disease which have a mental and those which have a physical origin. The point to be ascertained is whether the deranged condition affects the mind so as to render the accused incapable of understanding what he is doing or of knowing that he ought not to do the act or make the omission. Professor Glanville Williams in his *Treatise on the Criminal Law* at p. 291 says that the words “defect of reason from disease of the mind” must be taken to include not only insanity proper but mental deficiency, though he adds a foot-note to the effect that this is regarded as doubtful by the British Medical Association. The learned editor of the 16th Edn. of Kenny’s *Outlines of Criminal Law* at p. 70 speaks in this connection of the criminal responsibility of a “person suffering from a mental defect” as compared with that of the ordinary man. In *R. v. Retief* (2) (1941), 8 E.A.C.A. 71 at p. 74, this court said “The law takes no note of the cause of insanity”: if intoxication was such as to produce insanity so that the accused did not know the nature of his act or that it was wrongful, his act would be excusable on the ground of insanity and a verdict of “guilty of the act charged, but insane when he did the act” should follow. We think that this would apply equally when the insanity was derangement of the required degree caused by mental deficiency.

In our opinion, high-grade mental deficiency may be a “disease affecting the mind” within the meaning of that phrase as used in s. 12. We see nothing in *R. v. Kemp* (1) or in any of the other authorities cited to us or which we have consulted which conflicts with this view—a view which appears to us to give its

basic, though not perhaps its colloquial or medical, meaning to the word “disease”.

“It does not matter, for the purposes of the law, whether the defect of reason is due to a degeneration of the brain or to some other form of mental derangement. That may be of importance medically, but it is of no importance to the law, which merely has to consider the state of mind in which the accused now is, not how he got there.”

(per Devlin, J., in *R. v. Kemp* (1) at p. 407).

We think, therefore, that the learned trial judge took an understandable but, with respect, too restricted a view of the meaning of “disease” in s. 12, and that he was not correct in ruling that the defence of insanity was not open to the appellant. There was evidence of insanity which should have been considered and upon which, if believed, a special finding under s. 166 of the Criminal Procedure Code might have been recorded.

There must be a new trial before another judge when, if a defence of insanity is put forward, the question of the criminal responsibility of the accused for his acts must be considered. The evidence in chief of Dr. Bosa (somewhat modified in cross-examination) was that the appellant would not be able to judge that what he was doing was wrong. Whether the facts that the appellant ran away and said that he had beaten the deceased because he had received severe pain and was being chased by many people necessarily shows that the appellant knew when he attacked the deceased that he was doing wrong will be a question to be considered by the judge at the new trial in the light of any new medical evidence which may be available. We note that, at the time of the trial, the accused had only been examined twice, for about half an hour on each occasion, by the acting medical superintendent of the mental hospital. We think that he should be further examined before the new trial, and a sufficient examination should be made to enable a reliable opinion to be given as to the sanity of the accused.

Appeal allowed. New trial ordered.

The appellant in person.

For the respondent:

KT Fuad (Crown Counsel, Uganda)

The Attorney-General, Uganda

William Sebugenyi v R
[1959] 1 EA 411 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	29 June 1959
Case Number:	159/1959
Before:	Bennett J
Sourced by:	LawAfrica

[1] *Criminal law – “Watching or besetting” – What constitutes “watching” – Penal Code, s. 76 A (1) (U.).*

[2] *Criminal law – Charge – Amendment of charge by trial magistrate after close of prosecution and defence cases – Whether injustice caused to accused – Criminal Procedure Code, s. 213 (U.).*

Editor’s Summary

The appellant was convicted by a magistrate of watching or besetting the shop of one Leonardo Odeke with a view to preventing him from selling goods contrary to s. 76 A (1) of the Penal Code. The magistrate accepted the evidence of the prosecution witnesses and found that the appellant did in fact stand on the road fronting Odeke’s shop at a position about fifteen yards from the shop and that he called together a crowd of people and requested them or such of them as were Muganda by tribe, not to buy goods from his shop. The magistrate also found that the appellant stayed outside the shop premises for no more than two or three minutes, and that during the meeting the accused uttered words to the effect that if Odeke did not return to his home in Teso he, Odeke, would be in trouble. The magistrate held that the appellant’s conduct amounted to “watching” and that it was his intention to endeavour by means of threats to prevent Odeke from carrying on business as a shopkeeper. On appeal, it was contended on behalf of the appellant that in view of the magistrate’s finding that the appellant stood outside Odeke’s shop for only two or three minutes, he was wrong in holding that the appellant “watched” the shop, and that the magistrate had erred in amending the charge after the close of the prosecution and defence cases.

Held –

- (i) the appellant did not stand outside Odeke’s shop for the purpose of threatening Odeke, but stood there with a view to persuading Odeke’s customers or potential customers not to deal with him, the threat being incidental.
- (ii) the appellant’s conduct came within the ambit of s. 76 A (1) quite apart from any threats which he may have uttered to Odeke.
- (iii) persistence in “watching” is not a necessary constituent of the offence created by the section.
- (iv) as the magistrate had strictly complied with s. 213 of the Criminal Procedure Code when amending the charge, it could not be said that any injustice had been caused to the appellant.

Appeal dismissed. Decision affirmed on different grounds.

Cases referred to in judgment

- (1) *J. Lyons & Sons v. Wilkins*, [1896] 1 Ch. 811.
- (2) *R. v. Wall*, 21 Cox C.C. 401.
- (3) *Charnock v. Court*, [1899] 2 Ch. 35.

Judgment

Bennett Ag CJ: The appellant was convicted of watching or besetting the shop of Leonardo Odeke with a view to preventing Odeke from selling goods which Odeke had a legal right to do, contrary to s. 76 A (1) of the Penal Code. He was sentenced to three months imprisonment with hard labour and appeals against his conviction and sentence.

The facts as found by the learned magistrate were, to quote from the judgment:

“I am therefore accepting the evidence of the prosecution witnesses, and find that accused did in fact stand on the road fronting Odeke’s shop at a position about fifteen yards from the shop on the evening of April 10, 1959, at about 8 o’clock. The accused called together a crowd of people and requested them or such of them as were Muganda by tribe, not to buy goods from Odeke’s shop.”

The learned magistrate found that the accused stayed outside the premises for no more than two or three minutes. He also found that during the meeting the accused uttered words to the effect that if Odeke did not return home he, Odeke, would be in trouble, and that when the accused uttered these words he intended them to be understood by Odeke as meaning that Odeke should return to Teso, his district of origin.

There was ample evidence to support these findings of fact, and they have not been attacked on appeal.

The learned magistrate held that the accused’s conduct amounted to “watching” within the meaning of the section and that it was the appellant’s intention to endeavour by means of threats to prevent Odeke from carrying on business as a shopkeeper.

The learned magistrate based his decision upon this threat to Odeke, but in my opinion this was too slender a thread by which to hang a conviction. The inference which I draw from the evidence is that the appellant did not stand outside Odeke’s shop for the purpose of threatening Odeke, but that he stood there with a view to persuading Odeke’s customers or potential customers not to deal with him. The threat to Odeke was incidental and would probably never have been uttered had Odeke not joined the crowd which was listening to the appellant. The learned magistrate might have derived assistance from the decision of the Court of Appeal in *J. Lyons & Sons v. Wilkins* (1), [1896] 1 Ch. 811, from which it appears that a person may be prevented from carrying on business by watching or besetting his place of business and persuading his employees not to work for him. To quote from the judgment of Lindley, L.J.,

“with regard to picketing what the defendants have been doing was not in dispute. They had been placing a few men about the plaintiff’s works, and telling them to accost workpeople and to show them certain cards. The consequence of these proceedings is that the trade union are in effect preventing Messrs. J. Lyons & Co. from carrying on their business upon such terms as they may choose to arrange with people who come to an agreement with them.”

Applying that principle to the case of a shopkeeper, a person who endeavours to persuade a shopkeeper’s customers not to deal with him is endeavouring to prevent the shopkeeper from carrying on his business. That is precisely what the appellant did in the instant case and, in my view, the appellant’s conduct came within the ambit of the section quite apart from any threats which he may have uttered to Odeke.

On behalf of the appellant, it is contended that in view of the magistrate’s finding that the appellant only stood outside Odeke’s shop two or three minutes, the learned magistrate was wrong in holding that

the appellant “watched” the shop. Reliance was placed upon *R. v. Wall* (2), 21 Cox C.C. 401. That was

a prosecution under s. 7 of the Conspiracy and Protection of Property Act, 1875, which makes it an offence, *inter alia*, to watch or beset a house or place of business with a view to compel a person to do or abstain from doing any act which such person has a legal right to do. In the course of his charge to the jury Palles, C.B., said: "Watching involves persistent watching". The case was tried on the Munster circuit.

On the other hand in *Charnock v. Court* (3), [1899] 2 Ch. 35, a contrary view of the meaning of the word "watching" in s. 7 of the Conspiracy and Protection of Property Act, 1875, was taken. Stirling, J., said:

"There is nothing in the statute which defines the duration of the watching. It may be, it seems to me, for a short time . . ."

Citrine on Trade Union Law, p. 403 says:

"The duration of 'watching' is a matter of degree and entirely a question for the jury."

The authority cited for this proposition is a modern Irish case no report of which is available in Kampala. In my judgment persistence is not a necessary constituent of the offence created by s. 76 A (1) of the Uganda Penal Code. The section does not say "Any person who persistently watches or besets"; it says "Any person who watches or besets."

There can be no doubt, on the evidence accepted by the learned magistrate, that the appellant's purpose in holding a meeting outside Odeke's shop rather than elsewhere was to enable him to communicate with Odeke's customers or potential customers; he was in fact picketing the shop if only for a brief period.

In *J. Lyons & Sons v. Wilkins* (1), the words "watching or besetting" appear to have been construed as being synonymous with "picketing".

In my judgment there was ample evidence upon which the learned magistrate could find that the appellant watched Odeke's shop with a view to preventing Odeke from selling goods, which Odeke had a legal right to do.

The second point raised on behalf of the appellant was that the learned magistrate erred in amending the charge after the close of the prosecution and defence cases.

The charge as originally drafted alleged a "besetting" only and the learned magistrate amended the charge so as to charge the appellant with "watching or besetting", thus following the words of the section. Learned Crown Counsel submitted that s. 76 A (1) creates only one offence and that watching or besetting as the case may be, are different modes of committing it. I agree with him.

The cases of *J. Lyons & Sons v. Wilkins* (1), and *Charnock v. Court* (3), lend support to that view. It follows that unless the magistrate was constrained by authority not to amend the charge it was his duty to do so if he considered, as indeed he did, that the conduct of the appellant did not amount to besetting but did constitute watching.

It is said that owing to the late stage at which the charge was amended injustice was caused to the appellant. In my opinion, s. 213 of the Criminal Procedure Code permits a court to amend the charge at any stage of the proceedings before judgment subject to conditions therein set out. This is to be implied from the words "at any stage of a trial" which occur in sub-s. (1).

In the instant case the requirements of s. 213 were strictly complied with. The appellant was called

upon to plead to the amended charge. An adjournment was granted to enable his advocate to consider the implications of the amendment. After the adjournment the appellant's advocate stated that he did not wish any of the witnesses to be recalled and that he did not wish to call any additional witnesses. In these circumstances I fail to see how it could be said that any injustice was caused to the appellant.

I can see no merits in this appeal in so far as it relates to conviction. I do not regard the sentence as being unreasonably severe in all the circumstances. The appeal is dismissed.

Appeal dismissed.

For the appellant:

GL Binaisa

GL Binaisa, Kampala

For the respondent:

J Hopkinson (Crown Counsel, Uganda)

The Attorney-General, Uganda

R v Donald Jacob
[1959] 1 EA 414 (HCT)

Division:	HM High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	8 June 1959
Case Number:	180/1959
Before:	Simmons J
Sourced by:	LawAfrica

[1] Street traffic – Windscreen and mudguard missing on vehicle – Whether vehicle in good mechanical repair – Traffic Ordinance and Rules (Cap. 168), r. 45 (T.).

Editor's Summary

The accused was convicted on his own plea of failing to keep a vehicle (which lacked a windscreen and mudguard) in good mechanical repair. On revision the question was whether the charge disclosed an offence. Another point was that the charge did not allege that the vehicle was a public service, heavy duty or commercial vehicle.

Held –

- (i) the lack of a windscreen and mudguard were not matters of mechanical repair; and further,
- (ii) the charge was defective in that the vehicle was not alleged to be a public service, heavy duty or commercial vehicle.

Conviction quashed.

No Cases referred to in judgment in judgment

Judgment

Simmons J: The accused was on March 28, 1959, convicted of five offences contrary to the Traffic Ordinance and Rules (Cap. 168) on his own pleas, and was ordered to pay a fine on each.

The fifth charge purports to be one of an offence against what was then r. 45 of the Traffic Rules as amended by the rules of 1955:

“45. It shall be the duty of every owner and driver of a public service, heavy duty or commercial vehicle at all such times as it is in use to keep such vehicle in good mechanical repair.”

The alleged mechanical disrepair was a missing windscreen and mudguard.

“Mechanical” is thus defined by the Concise Oxford Dictionary:

Of machines or mechanism.

And “machine” thus:

Apparatus for applying mechanical power . . .

And “mechanism” thus:

Structure, adaptation of parts, of machine . . .

In my opinion the lack of a windscreen and mudguard are not matters of mechanical repair, so that no offence is disclosed. (Another defect in the charge is that the vehicle is not alleged to be a public service, heavy duty or commercial vehicle).

The conviction under count 5 is not supported by the learned Attorney-General and it is quashed.

Conviction quashed.

For the Crown:

The Attorney-General, Tanganyika

R v Mwalimu s/o Saidi NOTE
[1959] 1 EA 415 (HCT)

Division:	HM High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	9 June 1959
Case Number:	183/1959
Before:	Simmons J
Sourced by:	LawAfrica

[1] Firearms – Loan of firearm to friend – Whether loan is a “transfer” within the Arms and Ammunition Ordinance (Cap. 223), s. 14 (T.).

Editor’s Summary

The accused was on April 24, 1959, recorded as having pleaded guilty to an offence against s. 14 of the Arms and Ammunition Ordinance and was fined Shs. 100/- with two months’ imprisonment in default.

No Cases referred to in judgment in judgment

Judgment

Per **Simmons J:** in revision: He admitted having lent the firearm to a friend, but a loan is not in my opinion a transfer within the meaning of s. 14. The learned Attorney-General, who does not support the conviction, suggests that it might have been more to the point if the friend had been charged under s. 13. The conviction is quashed.

Conviction quashed.

For the Crown:

Re the Estate of the Late Ramji Javer
[1959] 1 EA 416 (SCK)

Division: HM Supreme Court of Kenya at Nairobi
Date of judgment: 17 June 1959
Case Number: 173/1958
Before: MacDuff J
Sourced by: LawAfrica

[1] Probate – Application to dispense with surety required for applicant’s administration bond – Whether court has power to grant such application – Indian Succession Act, 1865, s. 256 – Indian Probate and Administration Act, 1881, s. 78 – Indian Succession Act, 1925, s. 291 – English Supreme Court of Judicature (Consolidation) Act, 1925, s. 167 – English Non – Contentious Probate Rules, 1954, r. 38 (2) – English Court of Probate Act, 1857, s. 81.

Editor’s Summary

The applicants, who were applicants for a grant of letters of administration of the estate of the deceased, applied to the Supreme Court for an order dispensing with the surety required for the applicants’ administration bond.

Held – the court has no power under either the Indian Probate and Administration Act, 1881, or the Indian Succession Act, 1865, to dispense with the requirement of sureties.

Application refused.

Cases referred to in judgment

- (1) *Cleverly v. Gladdish* (1862), 2 Sw. and Tr. 337; 164 E.R. 1025.
- (2) *Jackson v. Jackson* (1865), 13 L.T. 336.

Judgment

MacDuff J: The applicants, being the two applicants for a grant of letters of administration of the estate of the deceased apply for an order that the surety required for the applicants administration bond be dispensed with. I have asked whether this court has power so to do.

Section 78 of the Indian Probate and Administration Act, 1881, provides:

- “78. Every person to whom any grant of letters of administration is committed, and, if the judge so direct, any person to whom probate is granted, shall give a bond to the judge of the district court, to enure for the benefit of the judge for the time being, with one or more surety or sureties engaging for the due

collection, getting in, and administering the estate of the deceased which bond shall be in such form as the judge from time to time by any general or special order directs.”

The wording of this section would appear mandatory and in Kinney’s commentary on this section of the Act (2nd Edn. 1908) at pp. 145–148 I cannot find any indication that sureties can be dispensed with.

Section 256 of the Indian Succession Act, 1865, provides:

“256. (Every person to whom any grant of letters of administration) (other than a grant under s. 212) is committed shall give a bond to the judge of the district court to enure for the benefit of the judge for the time being, with one or more surety or sureties, engaging for the due collection, getting in, and administering the estate of the deceased which bond shall be in such form as the judge shall, from time to time by any general or special order direct.”

Henderson on Testamentary Succession (3rd Edn.), 1909, in his commentary on this section says:

“The court will dispense with sureties altogether, taking only the bond of the principal upon sufficient ground being shown.”

There are two cases quoted as authority for this statement—(1) *Cleverly v. Gladdish* (1) (1862), 2 Sw. and Tr. 337; 164 E.R. 1025 in which appears the statement

“the court had power to dispense with sureties under the 81st section of the Probate Act”;

I have been unable at the moment to check this section but it would appear that there was statutory authority to dispense with sureties and *Jackson v. Jackson* (2) (1865), 13 L.T. 336, which in my view is authority for no more than, if it is authority for so much as, the previous case. I can find no authority in the Indian Probate and Administration Act, 1881, giving power to dispense with sureties from which it would appear that the statement in Henderson is not based on authority.

Paruck on the Indian Succession Act, 1925 (3rd Edn.), commenting on sub-s. (1) of s. 291, which replaces, and is in similar terms to, s. 256 of the 1865 Act, says at p. 492:

“The court may dispense with sureties altogether taking only the bond from the administrator upon sufficient ground being shown, (see Coote’s Probate Practice (16th Edn.) p. 154).”

I have been unable to obtain a copy of the edition of Coote’s Probate Practice on which the learned author has relied. Referring to Tristram and Coote’s Probate Practice (20th Edn.) at p. 854, the position would appear to be that s. 167 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, is in similar terms to s. 256 of the Indian Succession Act, 1865, but it is to be noted that sub-s. 7 of that section specifically provides:

“(7) Probate rules and orders may be made for providing that sureties to administration bonds shall not be required when the grant is made to a trust corporation or to two or more individuals or in any other proper case.”

Under that sub-section r. 38 (2) of the Non-Contentious Probate Rules, 1954, has been made, which provides for the instances where sureties can be dispensed with. Previous to that Act the matter was covered by s. 81 of the Court of Probate Act, 1857, which provided:

“81. Every person to whom any grant of administration shall be committed shall give bond to the judge of the court of probate to enure for the benefit of the judge for the time being, and, if the court of probate or (in the case of a grant from the district registry) the district registrar shall require, with one or more surety or sureties, conditioned for duly collecting, getting in, and administering the personal estate of the deceased . . .”

I think it safe to assume, therefore, that the statement in Coote’s Probate Practice, relied on by Paruck, was founded on a specific power to dispense with sureties and that this again would be no authority for a similar statement in respect of the Indian Acts where no such specific power exists.

There have been instances of decisions in both directions by different judges in these courts. I am, however, satisfied that the statements in both Henderson

and Paruck are based on authorities not applicable to the Indian Probate and Administration Act, 1881 nor to the Indian Succession Act, 1865. In my view there is no power under either of those Acts to dispense with sureties. The present application is refused.

Application refused.

For the applicants:

A Ishani

Ishani & Ishani, Nairobi

Mohamed Abdulla Saleh v R
[1959] 1 EA 418 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	5 May 1959
Case Number:	793/1959
Before:	Sir Ronald Sinclair CJ and Templeton J
Sourced by:	LawAfrica

[1] Customs – False declaration – Watches imported by traveller including watch worn by him not declared – Whether watch worn by traveller is within the term “personal effects” and exempt from duty – East African Customs Management Act, 1952, s. 149, s. 160 (1), s. 162 (2) – Item 144 of the First Schedule to the Customs Tariff Ordinance, 1958, (No. 27 of 1958).

Editor’s Summary

The appellant was convicted on two counts of making a false declaration contrary to s. 149 (b) of the East African Customs Management Act, 1952. He appealed against the conviction and sentence on each count but at the hearing he abandoned the appeal in respect of the first count. The second count charged the appellant with making a false declaration in that he failed to declare certain articles on a baggage declaration form. The appellant had arrived at Nairobi Airport from Aden and on arrival was given a baggage declaration form to complete. He declared two watches valued at Shs. 160/-, a radio, two bottles of lotion and “other small articles” which were not specified. The words “other small articles” were later erased and the word “scarves” substituted. When this baggage was examined other dutiable articles were found, including two more watches. He was asked by a customs officer if he had any more watches and said “no” but on his wrist there was a new watch valued at £400. The appellant was convicted by the trial magistrate in respect of the dutiable articles which he had not declared including the watch he was wearing. The magistrate found that the failure to enter this watch in the declaration form was a deliberate omission. The sole ground of appeal was that the magistrate was wrong in convicting the appellant in respect of the £400 watch since he was not under a duty to declare it. Paragraph 2 (1) of the “Warning to

Passengers” (which appears on the reverse of the baggage declaration form) and which represents the law as contained in Item 144 of the First Schedule to the Customs Tariff Ordinance, 1958, reads as follows:

- “(1) The following goods, which are the bona fide baggage and property of the passenger and are in such quantities and of such kind as are, in the opinion of the proper officer, appropriate to the passenger, but do not include goods for sale, are admitted free of duty as passenger’s baggage:
 - (a) wearing apparel and personal effects . . .”

The trial magistrate did not consider whether the watch was dutiable and, accordingly, whether the appellant was under any duty to declare it.

Held –

- (i) the appellant was not under any duty to declare in the passenger's baggage declaration form a watch which was his personal property and formed part of his personal effects and which he was wearing on his wrist; therefore.
- (ii) the appellant did not make a false declaration in respect of the watch which he was wearing.
- (iii) there was no authority for the proposition that whilst a person is entitled to bring in one watch without duty, if the concession is abused all watches brought in by that person are dutiable.

Finding set aside that the appellant made a false declaration in respect of the watch worn by him. Subject thereto appeal dismissed.

No Cases referred to in judgment in judgment

Judgment

Sir Ronald Sinclair CJ: read the following judgment of the court: The appellant was convicted on two counts of making a false declaration relating to the Customs, contrary to s. 149 (b) of the East African Customs Management Act, 1952, and was sentenced on the first count to a fine of Shs. 200/- or imprisonment for two weeks in default of payment, and on the second count to a fine of Shs. 1,500/- or imprisonment for three months in default of payment. In his memorandum of appeal the appellant appealed against the conviction and sentence on each count, but at the hearing the appeal against conviction and sentence on the first count was abandoned.

The particulars of the offence charged in the second count were as follows:

“Mohamed Abdulla Saleh, on the 10th day of July, 1958, at about 8 p.m. at Nairobi Airport within the Nairobi Extra Provincial District, made, in a matter relating to the Customs, a false declaration on a baggage declaration form in that he failed to declare certain articles thereon.”

The facts were that the appellant arrived at Nairobi Airport on July 10, 1958, on an Alitalia flight from Aden. On arrival he was given a baggage declaration form to complete. In the form he declared two watches valued at Shs. 160/-, a radio, two bottles of lotion and “other small articles” which were not specified. The words “other small articles” were later erased and the word “scarves” substituted. His baggage was examined and in it was found a large quantity of dutiable articles, including two more watches. He was asked by Mr. Millar, a Customs officer, if he had any more watches and said “no”, but on his wrist there was a new watch valued at £400.

The trial magistrate convicted the appellant on the second count in respect of the dutiable articles which he had not declared, including the £400 watch he was wearing on his wrist. He found that the failure to enter this watch in the declaration form was a deliberate omission by the appellant. The sole ground of appeal which was argued was that the magistrate was wrong in convicting the appellant in respect of the £400 watch since he was not under any duty to declare it.

Section 149 of the East African Customs Management Act, 1952, provides, *inter alia*, that any goods

in respect of which an offence contrary to the section has been committed

“shall, unless such offence was committed contrary to the provisions of paras. (a), (b) or (c) of this section and the act which gave rise to the offence was not committed knowingly, be liable to forfeiture.”

Section 160 (1) reads:

“Where any person is prosecuted for any offence against this Act and any thing is liable to forfeiture by reason of the commission of such offence, then the conviction of such person of such offence shall, without further order, have effect as a condemnation of such thing.”

Section 162 (2) (c) provides:

“(2) where any thing is condemned under the provisions of this Act, then:

- (c) such condemnation shall, subject to any appeal in any proceedings which resulted in such condemnation, be final and save as provided in s. 163, no application or proceedings for restoration shall lie.”

The appellant was convicted of an offence contrary to para. (b) of s. 149, but as the magistrate found, in effect, that the appellant knowingly failed to declare the watch, there was by virtue of the provisions of s. 160 (1) an automatic forfeiture of the watch. The appellant clearly has the automatic forfeiture in mind when he seeks to attack the finding of the learned magistrate in respect of the watch.

In support of his submission that the appellant was not under any duty to declare the watch, Mr. O'Donovan referred us to the passenger's baggage declaration form which is Form C 19 of the Schedule to the East African Customs Regulations, 1954. That was the form completed by the appellant. The first part of the declaration in the form reads:

“I hereby declare that I have read and fully understand the Customs Warning to Passengers overleaf and that I have in my possession no articles on which Customs duty is payable and no articles enumerated in para. 4 of the warning except those declared below:”

Paragraph 2 of the “Warning to Passengers” is as follows:

- “(1) The following goods, which are the bona fide baggage and property of the passenger and are in such quantities and of such kind as are, in the opinion of the proper officer, appropriate to the passenger, but do not include goods for sale, are admitted free of duty as passenger's baggage:
 - (a) wearing apparel and personal effects;
 - (b) binoculars, cameras, sports requisites, portable typewriters, toys and articles for household use (such as sewing machines, perambulators, furniture, carpets, pictures, glassware, linen, cutlery, crockery and plate) which are shown to the satisfaction of the Commissioner to have been in the personal or household use of the passenger;
 - (c) photographic films and plates;
 - (d) instruments and tools for the personal use of the passenger in his profession or trade.
- “(2) All other goods, whether imported for personal use or for sale, and whether new or second-hand, including goods brought out for residents in East Africa, are liable to duty and must be declared on this form.
- “(3) Bona fide baggage does not include the following goods:

Arms, ammunition, bicycles, motor vehicles, cine projectors, sound recording machines, wireless apparatus, gramophones, gramophone records, musical instruments (unless provided for in (1) (d) above), piece goods, provisions, cheroots, cigarillos, cigarettes, snuff or tobacco, wines, saddlery or any trade goods.”

Paragraph 2 (1) represents the law as contained in Item 144 of the First Schedule to the Customs Tariff Ordinance, 1958 (Ordinance No. 27 of 1958).

It is clear that a passenger is under a duty to declare only articles which are dutiable or which are enumerated in paras. 3 and 4 of the Warning to Passengers. Paragraphs 3 and 4 are not relevant to this appeal. The trial magistrate did not consider whether the watch was dutiable and, accordingly, whether the appellant was under any duty to declare it. If the appellant was not under any duty to declare it, he did not, of course, make a false declaration in respect of the watch.

Our view of the law is that the wearing apparel and personal effects of a passenger which are his bona fide baggage and property are *prima facie* not dutiable and need not be declared in the passenger's baggage declaration form. But if and when the proper officer decides that the wearing apparel or personal effects are in such quantities and of such kind as to be inappropriate to the passenger, then such part of the wearing apparel or personal effects as he considers inappropriate become dutiable.

In the present case there was evidence that the watch in question had been given to the appellant as a present and that it was his personal property; he was wearing it on his wrist and it must, therefore, be included in his "personal effects". Mr. Millar, who described himself as a "proper officer under the Act", gave evidence that a person is entitled to bring in one watch without duty, but added that if the concession is abused, all are dutiable. We can find no authority for that statement. Mr. Millar did not say that the watch was inappropriate to the appellant. In our view the appellant was not under any duty to declare in the passenger's baggage declaration form a watch which was his personal property and formed part of his personal effects and which he was wearing on his wrist. In our opinion, therefore, the appellant did not make a false declaration in respect of the watch which he was wearing.

The finding that the appellant made a false declaration in respect of the watch which he was wearing (exhibit 5) is accordingly set aside. Subject to that variation of the conviction, the appeal is dismissed.

Finding set aside that appellant made false declaration in respect of the watch worn by him. Subject thereto appeal dismissed.

For the appellant:

B O'Donovan QC and SM Akram

SM Akram, Nairobi

For the respondent:

JC Summerfield (Senior Assistant Legal Secretary, East Africa High Commission)

The Legal Secretary, East Africa High Commission

Dar-Es-Salaam Municipal Council v Prince Aly Khan
[1959] 1 EA 422 (HCT)

Division: HM High Court of Tanganyika at Dar-Es-Salaam

Date of judgment: 20 May 1959

Case Number: 12/1959

Before: Crawshaw J
Sourced by: LawAfrica

[1] *Rates – Exemption – Land owned privately used exclusively by vehicles and members of the public – Whether land entitled to exemption from rates – Local Government (Rating) Ordinance, (Cap. 317), s. 3 (9) (T).*

Editor's Summary

The valuation court at Dar-es-Salaam had exempted from rates a piece of land belonging to Prince Aly Khan. The magistrate held that though the land was privately owned it was used exclusively as a track over which vehicles and the public passed and was therefore entitled to exemption from rates. He further held that there was nothing in the Local Government (Rating) Ordinance to suggest that land must be dedicated as a road or be in the ownership of some public authority in order to come within the exceptions to rateable property defined in s. 3. The Municipal Council appealed and it was contended on its behalf that the public must have a permanent right of user for the land to come within the exceptions while for the respondent it was submitted that this was not so and that the words "public roads" in sub-s. (9) of s. 3 should not be strictly interpreted.

Held – the respondent so far as was known had done no act in relation to the land which recognised its use as a road, although he may have silently acquiesced in the passage of cars over it; therefore, it could not be said that the land was exclusively used as a public road within the meaning of exemption (g) of s. 3 of the Ordinance.

Appeal allowed.

Cases referred to in judgment

- (1) *Lambeth Parish Churchwardens and Overseers v. London County Council*, [1897] A.C. 625.
- (2) *London Playing Fields Society v. Assessment Committee for South West Area of Essex* (1931), 144 T.L.R. 233.
- (3) *Dar-es-Salaam Municipal Council v. Commissioner of Transport, Tanganyika High Court Miscellaneous Civil Application, No. 13 of 1958* (unreported).

Judgment

Crawshaw J: This is an appeal by the Municipal Council of Dar-es-Salaam against a decision of the valuation court exempting from rates a piece of land belonging to the Aly Khan.

It is not in dispute that public traffic passes and is allowed to pass across the piece of land in question. The piece of land is grassland with a rough track across it. The learned magistrate held:

"This land is used exclusively as a track over which vehicles and the public pass, although it is privately owned land. I can find nothing in the Local Government (Rating) Ordinance to suggest that land must be dedicated as a road or in the ownership of some public authority in order to come within the exception to rateable property defined in s. 3 of the Ordinance.

“If the land is ‘used exclusively for the purposes of any public road’ it is entitled to rating exemption. I cannot in the circumstances do other than exempt this land as such. I would add however that if the owner exercised his right and closed the track, this land would of course immediately become rateable.”

The question is whether the land can be said to be used exclusively for the purposes of a public road within the meaning of exemption (g) under the definition of “rateable property” in s. 3 of the Local Government (Rating) Ordinance, Cap. 317, which reads:

“(g) land used exclusively for the purposes of any public road, public park, or public recreation ground”;

Mr. Hamlyn for the appellant submits that the public must have a permanent right of user for the land to come within the exemption, whilst Mr. Walker for the respondent submits that this is not so and that the words “public road” should not be strictly interpreted, and that the words “for the purposes of” would be meaningless if they did not cover a situation such as the present. Mr. Hamlyn has cited the following two cases. In the *Lambeth Parish Churchwardens and Overseers v. London County Council* (1), [1897] A.C. 625, it was held,

“that the County Council were not rateable to the Poor Rate in respect of the park both because the park thus dedicated by statute to the use of the public had no rateable value, and also because the County Council were not occupiers of the part for rating purposes.”

In *London Playing Fields Society v. Assessment Committee for South West Area of Essex* (2) (1931), 144 L.T.R. 233, the question was whether there was beneficial occupation and whether the lands (to be used as playing fields) were so “struck with sterility” as to have no rateable value. The lands were held to be rateable for (to quote from the headnote),

“Here the restrictions were not under a statute, but by the voluntary act of the persons concerned, and the restrictions were voluntary, partial and might be transitory, i.e., the society had power to sell this land. There was beneficial occupation by the society.”

But with due respect these cases are not really relevant, as there was no such statutory exemption as that now under consideration.

Under the English Rating and Valuation (Miscellaneous Provisions) Act, 1955, playing fields are given certain relief under s. 8 if “used mainly or exclusively for the purposes” of games and occupied “for the purposes” of a club. No case has been cited to me on the construction of these provisions, and those I have seen reference to in the Current Year Law Book are not really helpful. They have been decided on one or other of the ingredients necessary for exemption other than the length of user. This is I think because s. 8 (1) of the Act applies only to clubs and other organisations charitable and otherwise, and being organisations they presumably normally have some measure of permanence, whilst the rules or other conditions governing the organisation would presumably prescribe or at least indicate the use or purposes to which the land and premises are to be put.

In the instant case it has not been suggested that the Aly Khan is not the “owner” (as defined in the Ordinance) for the purpose of liability for rates under s. 29 of the Ordinance, nor that there is any legal obligation on him to permit the continued use of the land as a road, nor that he has done anything to construct or maintain the road (assuming it can be described as a road); the only question is whether he can claim exemption from rates for such period

as the land is exclusively used for this purpose. Simmons, J., in an interlocutory judgment in *Dar-es-Salaam Municipal Council v. Commissioner of Transport, Tanganyika High Court* (3), Miscellaneous Civil Appeal No. 13 of 1958, (unreported) in which an exemption under para. (g) in respect of land alleged to be used for recreational purposes was under consideration, said,

“Certainly, it is necessary that the ground should in fact be ‘used’ as such, but there must also be an express or inferable right in the public to use the land, . . . the land must exist for the purpose of recreation; it must not merely be a piece of land which is not for the time being used for anything also and which the public use for recreation simply because no one stops them.”

With respect I agree. In the instant case the respondent so far as is known has done no act in relation to the land which recognises its use as a road, although he may silently have acquiesced in the passage of cars over it; there is of course nothing to prevent him putting it to some entirely different use at any time. Each case must be decided in the light of its own circumstances. If the respondent’s argument was accepted, how long a user would be required to claim the exemption? The day of the application? The previous rating period? There is of course no evidence how long the land has been used by the public as a road. In my view, although I may be wrong, it cannot be said that within the meaning of exemption (g) the land is exclusively used as a public road, and I allow the appeal with costs to the appellant.

Appeal allowed.

For the appellant:

OT Hamlyn

OT Hamlyn, Dar-es-Salaam

For the respondent:

HC Walker

HC Walker, Dar-es-Salaam

Souza Figuerido & Co Ltd v Moorings Hotel Co Ltd [1959] 1 EA 425 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	19 June 1959
Case Number:	26/1959
Before:	Sir Kenneth O’Connor P, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda–Bennett, J

[1] *Practice – Leave to defend – Affidavit of defendant showing triable issues – Whether defences raised “tenuous” – Offer by appellant to pay sum claimed by instalments – Whether leave to defend*

unconditionally should be given.

Editor's Summary

The respondent company had sued the appellant company for Shs. 50,199/96 for arrears of rent, interests and costs resulting from the alleged termination by the appellant company of an agreement between the parties for the sub-letting of certain premises. The appellant company did not file a defence but its managing director filed an affidavit in which he denied the indebtedness and set up four defences. The High Court, considering that the defences foreshadowed were tenuous, gave leave to defend only upon condition that the appellant company should pay into court the full amount of the claim. Later, the judge having had his attention drawn to the fact that some doubt had been cast upon the case of *Churanjilal & Co. v. Adam* (1950), 17 E.A.C.A. 92 by the subsequent case of *Kundanlal Restaurant v. Devshi & Co.* (1952), 19 E.A.C.A. 77, granted leave to appeal against his order. On appeal the respondent contended that, despite the general rule that a defendant who can show by affidavit that there is a bona fide triable issue should have unconditional leave to defend, an offer made by the appellant company to pay the amount claimed by instalments was a special fact which justified the court in granting conditional leave only.

Held –

- (i) there were clearly triable issues raised by the affidavit; the trial judge had not said, nor was the court prepared to say that all the defences set up were sham defences; accordingly, the appellant should have been allowed unconditional leave to defend, *Kundanlal Restaurant v. Devshi & Co.* (1952), 19 E.A.C.A. 77 followed.
- (ii) it does not follow that because a defendant offers to pay a sum by instalments, he has no legal defence to an action for recovery of that sum.

Appeal allowed.

Cases referred to in judgment

- (1) *Churanjilal & Co. v. Adam* (1950), 17 E.A.C.A. 92.
- (2) *Kundanlal Restaurant v. Devshi & Co.* (1952), 19 E.A.C.A. 77.

Judgment

Sir Kenneth O'Connor P: read the following judgment of the court: The appellant and the respondent are limited companies incorporated in Uganda.

The appellant is the registered proprietor of a sub-lease of premises known as the Black Cat Club, Kampala. By an agreement in writing dated April, 16, 1956, the respondent agreed to sub-let those premises to the appellant for the term and at the rent set out in the agreement. It was alleged in a plaint filed by the respondent on November 18, 1958, that the appellant had taken possession of the premises and used the furniture and fittings therein until September 15, 1958, when the appellant purported to terminate the agreement

and handed back the keys, which keys had been accepted under protest and without prejudice. The respondent claimed Shs. 50,199.96 for arrears of rent, interest and costs.

The appellant did not file a defence, but its managing director filed an affidavit dated December 5, 1958, in which he set up the following defences:

- (a) a denial of indebtedness;
- (b) an alleged defence under the Business Names Registration Ordinance;
- (c) an alleged defence under the Liquor Ordinance;
- (d) a defence that the agreement operated as a present demise and required registration and, not having been registered, was ineffectual to create any estate or to create and enforceable obligation to pay rent;
- (e) an allegation that the respondent company had no registered title to the premises at the date on which they made the agreement and were incompetent to pass any leasehold interest to the appellant, by reason of which and of the respondent's delay in getting a registered title, the appellant had rightfully terminated whatever arrangement existed between them by moving out of the premises and handing back the keys;

and the appellant counterclaimed Shs. 194,520.04 for the value of improvements made to the premises and lost, and for loss in trade.

On January 15, 1959, a judge of the High Court of Uganda granted the appellant leave to defend but, taking the view that the defences foreshadowed were "tenuous", gave leave to defend only upon condition that the defendant should pay into court the full amount of the claim. Later, the learned judge, having had his attention drawn to the fact that some doubt had been cast upon the decision of this court in *Churanjilal & Co. v. Adam* (1) (1950), 17 E.A.C.A. 92, by the subsequent case of *Kundanlal Restaurant v. Devshi & Co.* (2) (1952), 19 E.A.C.A. 77, gave leave to appeal to this court against his order imposing the above-mentioned condition.

We allowed the appeal with costs on June 16, 1959, and now give our reasons.

We were of opinion that the extract from the Annual Practice of 1951 set out and adopted by this court at p. 79 of the report of the *Kundanlal Restaurant* case (2) correctly stated the law. That extract reads:

"The principle on which the court acts is that where the defendant can show by affidavit that there is a bona fide triable issue, he is to be allowed to defend as to that issue without condition (*Jacobs v. Booth's Distillery Co.* (1901) 85 L.T. 262 H.L.) . . . A condition of payment into court ought not to be imposed where a reasonable ground of defence is set up . . . Since *Jacobs v. Booth's Distillery Co.* (*supra*) the condition of payment into court, or giving security, is seldom imposed, and only in cases where the defendant consents, or there is good ground in the evidence for believing that the defence set up is a sham defence and the master 'is prepared very nearly to give judgment for the plaintiff' in which case only the discretionary power given by this rule may be exercised (*Wing v. Thurlow* 10 T.L.R. 53, 151). It should not be applied where there is a fair probability of a defence (*Ward v. Plumley* 6 T.L.R. 198; *Bowes v. Caustic Soda Co.* 9 T.L.R. 328) nor where the practical result of applying it would be unjustly to deprive the defendant of his defence."

We thought that *Churanjilal v. Adam* (1) was a decision which should be confined to the facts of that case.

In the present case, it is clear that the matters set out in paras. (a) to (e) above, or some of them, raise substantial triable issues of law or fact; and we

were not prepared to say that they were put forward mala fide and there was no finding of the judge to that effect. Mr. Phadke, for the respondent, said that he could not deny that there were triable issues. He contended, however, that there was a special fact which took this case out of the general rule, namely an offer by the appellant to pay by instalments. It does not, however, follow that because a defendant offers to pay a sum by instalments, he has no legal defence to an action for recovery of the amount.

It seemed to us that there were clearly triable issues; the judge had not said, and we were not prepared to say, that all the defence set up were sham defences; accordingly the defendant should have been allowed unconditional leave to defend.

As already mentioned, we allowed the appeal with costs. We set aside the Order of January 15, 1959, and gave unconditional leave to defend. We directed that the parties should have liberty to apply to the High Court to fix a time for filing the defence, unless they were able to agree upon a time, and that the costs of the application in the High Court should be costs in the cause.

Appeal allowed.

For the appellant:

DN Khanna and SA Pinto

SA Pinto, Kampala

For the respondent:

YV Phadke and RH Patel

Patel & Patel, Kampala

Mohamed Haji Abdulla and another v Ghela Manek Shah and others [1959] 1 EA 427 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	17 April 1959
Case Number:	34/1954
Before:	Forbes V-P
Sourced by:	LawAfrica

[1] *Costs – Fee paid to court for certified copy of judgment – Whether necessary item in party and party bill of costs.*

[2] *Costs – Instruction fee – Party succeeding on appeal and cross – appeal – Quantum allowed on taxation – Eastern African Court of Appeal Rules, 1954, Third Schedule, para. 24.*

Editor's Summary

The taxing officer had allowed the successful respondents a sum of Shs. 65/- representing court charges for one certified copy of the judgment which they claimed was necessary to enable the order in the appeal to be drawn up. The appellants objected that such a charge was not provided for, that a certified copy of the judgment was not “necessary or proper for the attainment of justice” as required by para. 6 of the Third Schedule to the Court of Appeal Rules, and referred the matter for the decision of a judge in chambers. The respondents who were aggrieved by the reduction made by the taxing officer in the amount of their instructions fee on the appeal and cross-appeal as claimed also objected and on the reference contended that, *inter alia*, the fee allowed was so manifestly inadequate as to show that the taxing officer must have acted on a wrong principle.

Held –

- (i) the taxing officer’s opinion that a copy of the judgment was necessary to draw up the order was correct.

- (ii) the drawing of the order was an essential step in the proceedings “for the attainment of justice” and a fee as provided for in Scale A, item 16, to the Third Schedule of the Court of Appeal Rules was properly allowed in the bill of costs.
- (iii) though the taxing officer had not broken down the fee allowed between the different items specified in the bill of costs, it was clear that he had in mind each of the items making up the composite instructions fee claimed; nor was the amount allowed so inadequate as to indicate of itself that the taxing officer could not have taken into account all the relevant factors.

Both references disallowed. No order as to costs.

Cases referred to in judgment

(1) *Jones v. Stott*, [1910] 1 K.B. 893.

(2) *Khatijabhai Jiwa Hasham v. Zanab d/o Chandu Nansi*, [1957] E.A. 255 (C.A.).

Judgment

Forbes V-P: Two decisions of the registrar as taxing officer upon the respondents’ bill of costs in the above appeal have been referred to me under r. 6 (2) of the Eastern African Court of Appeal Rules, 1954 (hereafter referred to as the Appeal Rules).

The first reference is by the appellants, and concerns an item of Shs. 65/- in respect of “court fee one certified copy of judgment” which was allowed by the registrar. The appellants contend that this item should not be allowed.

The second reference is by the respondents, and concerns the instructions fee. The respondents claimed Shs. 16,750/- but Shs. 12,750/- of this was taxed off. The respondents claim that the registrar acted on wrong principles in taxing off this amount.

On the first reference the appellants’ argument is that the cost of a certified copy of the judgment of the court upon the appeal is not a proper party and party charge; that Scale A to the Third Schedule to the Appeal Rules (hereafter referred to respectively as Scale A and the Third Schedule) does not provide for such a charge, but does provide for a charge in respect of attendance in court to hear judgment (item 26); that it is counsel’s duty to make a sufficient note of the judgment when it is read; that a certified copy of the judgment is not “necessary or proper for the attainment of justice” as required by para. 6 of the Third Schedule, but is rather a cost

“incurred . . . through . . . extravagance, over caution, . . . or by other unusual expenses”

(para. 6 of the Third Schedule).

In his ruling the registrar did not deal specifically with the item questioned, but when he read the ruling counsel for the appellants raised the point. The registrar’s note then reads as follows:

“Mr. Khanna observes no reference in ruling to fee paid for copy judgment.

“T.O. I did not consider it necessary—in my view it is obvious that the order could not have been drawn up without it—judgment 34 pages—impossible to draw it from notes.”

In the absence of any authority (and none was cited to me that had any particular relevance) I am not

prepared to say that in no circumstances should the cost of a copy of the judgment be allowed. It seems to me that the matter

is largely one of degree. Counsel for the appellants argued that counsel must be taken to be competent to secure an adequate note of the judgment. I would agree that counsel must be taken to be normally competent and that in the majority of cases it could not be said that a copy of the judgment was other than an unnecessary extravagance. I do not think, however, that counsel can be expected to be superhuman or a shorthand expert. In the instant case the registrar was clearly of opinion that a copy of the judgment was essential to enable the order to be drawn. Having seen the judgment and the order, I am in full agreement. It appears to me, as it evidently did to the registrar, that counsel in court to hear judgment could not have been expected to take a note adequate for the preparation of the order, which, as finally settled, comprises some five pages of close type. The drawing of the order was an essential step in the proceedings “for the attainment of justice” and a fee therefor is provided for in Scale A—item 16—and was duly allowed in the bill of costs—item 26. If a copy of the judgment was necessary to enable the order to be drawn, it seems to me that the cost was properly allowed as party and party costs.

Accordingly, I disallow the appellants’ objection.

On the second reference, counsel for the respondents argued that the registrar had acted on a wrong principle; that the instructions fee comprised at least three items which should have been assessed separately; that in particular the appeal and the cross-appeal were entirely separate and distinct; that the cross-appeal had, in fact, been the more substantial matter, but that the registrar’s approach had been to regard the cross-appeal and the other items as being merely subsidiary to the appeal; that accordingly he had made no proper allowance for the cross-appeal at least; and that the fee allowed was so manifestly inadequate as to show that the registrar must have acted on a wrong principle.

The bill of costs taxed by the registrar was the second bill submitted by the respondents. The original bill submitted had been rejected upon objection taken by counsel for the appellants. One of the objections taken was to “the inclusion of no less than five sets of fees for instructions”. In rejecting the bill the registrar said,

“I am of opinion that as a matter of practice it is more convenient for only one fee for instructions to be claimed. This appears to accord with Scale A and does not prevent brief particulars of the work done being set out in separate paragraphs where more than one matter is involved in the same proceedings, e.g. as in this case where the advocate is both opposing the appeal and proceeding himself by way of cross-appeal”.

The ruling rejecting the original bill was accepted by the respondents, who, in the second bill submitted, proceeded in the manner suggested by the registrar and claimed a composite fee covering the five items originally claimed separately, the five items being detailed in separate paragraphs.

In the circumstances counsel for the respondents could not, and did not, object to the fee having been dealt with on a composite basis by the registrar. Nor did he object to the fact that the composite fee of Shs. 4,000/- allowed had not been broken down between the different items. But he submitted that both the quantum allowed, and the ruling showed that the registrar had approached the matter on a wrong basis and had failed to make proper allowance for the cross-appeal.

Counsel for the respondents referred to the Annual Practice, 1958, p. 1674, where it is said

“Appeal and cross-appeal are generally to be treated as separate proceedings for the purpose of taxation if they raise distinct issues”,

and the case on which that statement is based, *Jones v. Stott* (1), [1910] 1 K.B. 893 at p. 901. *Jones v. Stott* (1) is not really in point as it deals with the case of an appellant's appeal being dismissed with costs, and the respondent's cross-appeal also being dismissed with costs, it being held that the costs of the appeal and cross-appeal should be separately taxed and the amounts allowed set off against each other. While no authority was cited to me for the proposition that the costs of appeal and cross-appeal should be separately taxed where the same party has succeeded on each, and, in fact, as I have said, it was conceded that in the instant case the respondents could not complain of the taxation of the instructions fee on a composite basis, I incline to the view that, where an appeal and cross-appeal are entirely separate and distinct, it would be more convenient to treat the instructions fees separately.

So far as the instant case is concerned, however, I find it impossible to say that the registrar has not fully taken into account all five items specified in the bill of costs, including the cross-appeal. He has not, it is true, broken down the fee allowed between the different items, but it is clear from the review of the rather unusual history of the case, which is contained in his ruling, that he had in mind each of the items making up the composite instructions fee claimed in the bill. Neither do I think that the amount allowed is so inadequate as to indicate of itself that the registrar could not have taken into account all the relevant factors (*Khatijabhai Jiwa Hasham v. Zanab d/o Chandu Nansi* (2), [1957] E.A. 255 (C.A.)). The amount allowed is, in my view, on the low side, but I do not think that the total amount allowed on the bill is so inadequate that I should increase it under para. 24 of the Third Schedule.

I therefore also disallow the respondents' objection.

In view of the disallowance of both references I make no order as to costs.

This decision may be reported.

Both references disallowed. No order as to costs.

For the appellants:

DN Khanna

For the respondents:

Gerald Harris

For applicants in reference No. 1 and for respondents in reference No. 2:

DN & RN Khanna, Nairobi

For respondents in reference No. 1 and for applicants in reference No. 2:

Hamilton, Harrison & Mathews, Nairobi

Massey-Harris & Co (South Africa) Ltd v J H Muller
[1959] 1 EA 431 (CAN)

Division: Court of Appeal at Nairobi

Date of judgment: 6 June 1959

Case Number: 102/1958
Before: Forbes V-P, Gould and Windham JJA
Sourced by: LawAfrica
Appeal from: H.M. Supreme Court of Kenya–MacDuff, J

[1] *Hire-purchase – Fitness of article hired – Action by hirer for return of deposit – Whether recoverable – Indian Contract Act, 1872, s. 150 – Sale of Goods Ordinance (Cap. 290), s. 2, s. 3, s. 16 and s. 26 (K.) – Factors Act, 1889, s. 9 – Sale of Goods Act, 1893, s. 1, s. 14, s. 25 and s. 62 – Hire – Purchase Act, 1938, s. 8.*

Editor's Summary

The respondent entered into a hire-purchase agreement with the appellant company under which he paid a deposit of Shs. 16,600/- for the option to purchase a combine harvester and also agreed to pay instalments for hiring it. Before entering into the agreement the respondent explained to the agents of the appellant company precisely what he wanted the harvester for and was assured that the model hired would meet his requirements. When the harvester was put to work, the cooling system or the engine proved so faulty by boiling that the respondent rejected the harvester and later sued for the return of his deposit. The trial judge accepted the respondent's evidence, found that the harvester was not satisfactory for the purpose for which it was supplied and could not be considered of merchantable quality. Finding also that the respondent rejected the harvester within a reasonable time he applied s. 16 (1) or, alternatively, s. 16 (2) of the Sale of Goods Ordinance and gave judgment for the respondent. On appeal counsel for the appellant company accepted the facts as found but contended *inter alia* that the trial judge was wrong in law in treating the case as a sale of goods, that the pleadings would not sustain the claim on any other basis, that if s. 150 of the Indian Contract Act made the bailor an insurer, there would be an issue to be tried whether the appellant company was liable for not discovering the defect by the exercise of reasonable care and skill, that if the Sale of Goods Ordinance did not apply the deposit could not be recovered as it was paid for the option to purchase, and accordingly the claim should either be dismissed or a new trial ordered.

Held –

- (i) the terms of the agreement between the parties all pointed to an intention to attain one legal object, namely, to enter into an agreement to hire coupled with an option to purchase; such an agreement is not a contract of sale or an agreement to sell upon a condition; it is a contract which binds the owner to enter into a contract of sale if the hirer decides to accept the offer or exercise the option. *Helby v. Matthews*, [1895] A.C. 471 followed; *Felston Tile Co. Ltd. v. Winget Ltd.*, [1936] 3 All E.R. 473 dissented from.
- (ii) the agreement was within the scope of s. 150 of the Indian Contract which casts an absolute responsibility upon a bailor and imputed into the agreement a condition or warranty that the machine hired would not be subject to any fault which materially interfered with its use.
- (iii) alternatively if the unqualified condition of fitness implied by s. 150 was not applicable then the rather more restricted condition of fitness under common law applied and on the findings of the trial judge the same result followed.

Appeal dismissed.

Cases referred to in judgment

- (1) *Felston Tile Co. Ltd. v. Winget Ltd.*, [1936] 3 All E.R. 473.
- (2) *Helby v. Matthews*, [1895] A.C. 471.
- (3) *Lee v. Butler*, [1893] 2 Q.B. 318.
- (4) *Marten v. Whale*, [1917] 2 K.B. 480.
- (5) *McEntire v. Crossley Bros. Ltd.*, [1895] A.C. 457.
- (6) *Karflex Ltd. v. Poole*, [1933] 2 K.B. 251.
- (7) *Sutton v. Temple* (1843), 12 M. & W. 52; 152 E.R. 1108.
- (8) *Hyman v. Nye* (1881), 6 Q.B.D. 685.
- (9) *G. H. Myers & Co. v. Brent Cross Service Co.*, [1934] 1 K.B. 46.
- (10) *Francis v. Cockrell* (1870), L.R. 5 Q.B. 501.
- (11) *Stewart v. Reavell's Garage*, [1952] 1 All E.R. 1191; [1952] 2 Q.B. 545.
- (12) *Bank of England v. Vagliano Bros.*, [1891] A.C. 107.
- (13) *Robinson v. Canadian Pacific Railway Co.*, [1892] A.C. 481.
- (14) *Lever Bros. Ltd. v. Bell*, [1931] 1 K.B. 557.
- (15) *Weeding v. Weeding*, 70 E.R. 812.
- (16) *Brough v. Nettleton*, [1921] 2 Ch. 25.

June 6. The following judgments were read:

Judgment

Gould JA: This is an appeal from a judgment and decree of the Supreme Court of Kenya in an action in which the plaintiff (respondent) obtained judgment against the defendant (the appellant company) for Shs. 18,536/67 and costs, and a counter-claim by the latter was dismissed. At the hearing of the appeal counsel for the appellant company accepted the facts as found by the learned trial judge in his judgment (thereby abandoning ground No. 3 in the memorandum of appeal) and confined his argument, so far as it purported to show that the judgment was wrong, to one question of law. The facts, for this purpose may be briefly stated.

The claim upon which the respondent succeeded in the action was for the return of Shs. 16,600/- (with interest) paid by him to the appellant company under the terms of a hire-purchase agreement dated November 22, 1955, made between the parties and relating to a combine harvester and its accessories. The appellant company is a manufacturer of and dealer in farm and agricultural machinery and equipment and the respondent is a farmer; the learned judge held that the respondent, prior to entering into the agreement, had explained to the agents of the appellant company the exact purpose for which he wanted the harvester, that he had been assured that the particular model would do all that he required, and that the respondent in entering into the transaction relied upon the skill and judgment of the appellant

company's agents. The judge then said:

"I would hold therefore that the plaintiff would be entitled to rely on the implied condition set out in s. 16 (1) of the Sale of Goods Ordinance that the harvester supplied was fit for the particular purpose for which it was required.

"In the alternative, if that were not so, I would be compelled to hold that it was an article sold by description within the provisions of s. 16 (2) of the Ordinance and that there was an implied condition that it should be of merchantable quality."

Upon delivery of the harvester it was found that when it was used for the purpose for which it had been ordered, i.e. the harvesting of wheat upon the respondent's farm, the water in the radiator persistently boiled. The learned judge's finding upon this aspect of the matter was as follows:

“I accept the plaintiff’s evidence and find that immediately the harvester was put into the field under working conditions its cooling system and/or engine was faulty to such an extent that it overheated to the extent of the radiator boiling and this to such an extent that it could not be considered satisfactory for the purpose for which it was supplied, nor could it be considered at that stage to be of merchantable quality.”

The learned judge then found that the respondent rejected the harvester and did so within a reasonable time.

The hire-purchase agreement is in a not unusual form and the relevant clauses are as follows:

- “1. The company shall let and the hirer will hire from the company as from the 22nd day of November, 1955, the chattels described in the schedule hereunder (hereinafter collectively referred to as ‘the said goods’ which expression shall include any renewals or additions thereto).
- “2. Until the determination of the hiring the hirer shall pay to the company the above balance in the following manner:
May 22, 1956 Shs. 13,277/80
November 22, 1956 Shs. 12,797/80
and a final payment of Shs. 8,294/- on the 22nd day of May, 1957.
- “3. The hirer shall pay to the company on the signing hereof a sum of Shs. 16,600/- as consideration for the option of purchasing at any time before the said hiring shall be determined the said goods for the sum of Shs. 48,545/-. If the option shall be exercised the company shall give credit against the said hire-purchase price of Shs. 48,545/- for the sum of Shs. 16,600/- option money so paid as aforesaid and also for all sums which shall have been paid by way of hire up to the date of the exercise of such option. Should the hirer not exercise the option to purchase he shall not in any circumstances be entitled to repayment of the said sum of Shs. 16,600/- or any sum paid by way of hire or interest.
- “4. Until the said option shall be exercised and the instalments above mentioned shall have been duly paid the said goods shall remain the property of the company to all intents and purposes.
- “7. In the event of the hirer:
 - (a) Failing to pay any of the hire-purchase instalments aforesaid or any part thereof within seven days after the same shall have become due and/or
 - (b) Failing to observe and perform all and every of the terms and conditions of this agreement or suffering or doing any act or thing whereby the company’s rights shall or may be prejudiced and/or
 - (c) Becoming bankrupt or compounding with his creditors or being convicted of a felony or other criminal offence and/or
 - (d) Having any distress or execution levied upon the said goods or giving or executing a chattels mortgage on any of his goods

it shall be lawful for the company immediately to put an end to the hiring and retake possession of the said goods without verbal or written notice to the hirer and for that purpose the hirer hereby authorises the company, its servants and agents to enter upon any premises on which the said goods may be for the time being and to seize and to take away the same and all reasonable expenses to which the company may be put in connection with so seizing and taking away the said goods shall be paid by the hirer to the

company on demand together with interest thereon at the rate of 10 per cent. per annum from the date of such demand addressed to the hirer and if the company shall think proper the company may without any consent of the hirer sell the same as freely as if this agreement had not been made.

- “9. If the company shall seize and take possession of the said goods under the provisions of cl. 7 above then (subject to the right of the hirer given by cl. 10 hereof) all hiring instalments paid by the hirer shall be absolutely forfeited and such instalments as were overdue and unpaid at the date of retaking possession shall be paid by the hirer immediately.
- “10. If the company shall seize and take possession of the said goods under cl. 7 hereof the hirer shall have the right within seven days after such seizure of purchasing the said goods by the payment to the company of Shs. 48,545/- together with the costs and expenses of an incidental to such seizure plus any interest which may be payable under this agreement. In the event of the hirer making such payment within the time aforesaid he shall receive credit from the company for all sums previously paid by him less interest (if any) owing at the date of such seizure. If the hirer shall not exercise such option and make such payments within the time aforesaid the right given to the hirer by this clause shall cease.
- “11. The hirer may at any time determine the hiring of the goods by returning the same to the company at Nakuru in good condition and repair as required by cl. 6 above provided that he shall have paid all instalments and interest which shall have fallen due prior to such return and shall have paid a full instalment for any broken period of hire reckoned from the due date of the last instalment up to the date of such return.
- “12. Upon payment being made by the hirer to the company of the full sum of Shs. 48,545/- by the instalments aforesaid or by anticipation as hereinbefore provided together with all other sums (if any) which may become payable to the company by the hirer under this agreement and the hirer having duly performed and observed all the agreements and stipulations herein on his part to be performed and observed this agreement shall be deemed completed and the said goods shall become the sole property of the hirer but until such payment shall have been made the said goods are only let on hire to him and the property in the said goods shall not pass to him.”

It is obvious from the findings of the learned judge already referred to that the case was dealt with as falling within legal principles applicable to the sale of goods and his reasons for this approach are apparent from the following passage from his judgment:

“Counsel settled the issues to be decided in the following terms:

- 1. Was the harvester fit for the purpose for which it was supplied?
- 2. Was the said harvester of merchantable quality?
- 3. Was the said harvester supplied to the plaintiff under a contract of conditional sale or was the contract one of hire only?
- 4. Did the plaintiff accept the said harvester?
- 5. If the plaintiff did accept the said harvester did he suffer any and what damage?
- 6. If the plaintiff accepted the said harvester is he indebted to the defendant company for any and what sum?

I propose, however, to deal with them in a different order.

“The third issue is whether this transaction was one of conditional sale or hire. This point was not argued for the defendant company and in effect I gathered that it was more or less conceded on its behalf. However, *Felston Tile Co. Ltd. v. Winget Ltd.*, [1936] 3 All E.R. 473 would appear to be clear authority that a hire-purchase agreement of this nature is a contract of sale within the Sale of Goods Act, 1893, and consequently within the Sale of Goods Ordinance (Cap 290 Laws of Kenya) and the usual statutory conditions and warranties are implied.”

It would appear then to have been accepted by counsel and the court that the case above mentioned (which I shall refer to as the *Felston Tile* case (1)) concluded the matter; on appeal however the point has been taken and argued that the decision in the *Felston Tile* case (1) is inconsistent with that of the House of Lords in *Helby v. Matthews* (2), [1895] A.C. 471. It will be necessary therefore to examine these cases in some detail.

In the *Felston Tile* case (1) the plaintiffs sued for damages for breach of warranty in respect of a tile-making machine which they had acquired from the defendants under a hire-purchase agreement. The details of the agreement are not given in the report, but that it was one of the type which confers an option to buy upon the purchaser appears from references in the judgments. Slessor, L.J., at p. 480 of the report used the phrases “. . . if he is under the agreement called upon to sell” and

“. . . the obligation of sale which might arise under the hire-purchase agreement . . .”

Scott, L.J., said, at p. 481:

“The purchaser is given by it the right to turn the contract into a contract of sale for all purposes, and to bring about an actual sale by exercising the option which the terms of the contract give him.”

Prior to the signing of the hire-purchase agreement a letter had been sent by the defendants to the plaintiffs containing an estimate, stated to be subject to certain printed conditions, one of which negatived any warranty or condition implied by law. The hire-purchase agreement itself provided (*inter alia*) that

“This agreement embodies the entire agreement as to the hiring of the machinery . . .”

The Court of Appeal decided that, particularly having regard to the form which the pleadings took, the letter formed part of the contract between the parties and the defendants’ liability for breach of warranty or condition was excluded. The final paragraph of the headnote indicates that the court also held that:

“(iii) since the hire-purchase agreement was an irrevocable agreement to sell on the part of the owner, it was a contract for the sale of goods within the Sale of Goods Act, 1893, s. 1, and the statutory warranties and conditions would be implied.”

In his judgment, at p. 478, Greer, L.J., said:

“There can be no question that the hire-purchase agreement was, within the definition of the Sale of Goods Act, 1893, s. 1, an agreement for sale, and it is in respect of agreements for sale that s. 14 applies. It applies to the agreement for sale after there has been delivery under the agreement for sale.”

There is a similar implication in the following passage in the judgment of Slessor, L.J., at p. 480:

“Strictly this agreement, so far as the lender is concerned, so far as affects the position of the seller if he is under the agreement called upon to sell, is that he has irrevocably agreed to sell the goods if the purchaser calls upon him so to do; and it seems to me that this case, therefore, is governed generally by the conditions of the Sale of Goods Act, 1893, and more particularly by that provision in s. 1 (2), which says that a contract of sale may be absolute or conditional.”

In the following passage at p. 481 Scott, L.J., agrees with the opinion expressed but makes it clear that it was not one which was essential to the decision of the court:

“I cannot see that it matters whether the contract is called a contract of sale, or called a hire-purchase agreement, or called a contract of bailment, because the whole contract is in writing, and the written contract contains express conditions applied by the parties to their contract, whatever its nature was, and under those conditions the right of action claimed by the plaintiffs here is quite clearly excluded. If the parties chose to agree to conditions of that kind, they were at liberty to do so, whatever may have been the nature of the fundamental bargain. As a matter of fact, here it may well be that the contract partook, as is alleged in the statement of claim, of two characters, partly contract of sale, and partly bailment, but that does not affect the question, because they have themselves appended to that contract the special conditions to which I have referred. As Greer, L.J., said in his judgment, a hire-purchase agreement is quite clearly *inter alia* an agreement for sale within the meaning of the Sale of Goods Act, 1893, s. 1 (1), and is a conditional agreement within sub-s. (2) of that section. The purchaser is given by it the right to turn the contract into a contract of sale for all purposes, and to bring about an actual sale by exercising the option which the terms of the contract give him. But it seems to me that it would be wrong in a contract of that kind, because it was not a present sale, to say that the conditions and terms agreed in the written contract were not applicable to the whole contract from the start, so far as in terms they are made applicable by the agreement of the parties. Therefore, the question as to whether it was a bailment or whether it was a contract of sale, and if a contract of sale when it would operate as a contract of sale, all seems to me irrelevant. The parties here had in their contract agreed to terms which in my view afford a complete answer to the action brought.”

Helby v. Matthews (2), was referred to in argument in the *Felstone Tile* case (1) but was not mentioned in any of the judgments. At p. 511, note (1) of Vol. 19 of Halsbury’s Laws of England (3rd Edn.) the opinion is expressed that the *Felston Tile* case would not be followed, as it appears to be inconsistent with *Helby v. Matthews* (2). A similar opinion is to be gathered from Dunstan’s Law of Hire Purchase (4th Edn.) at p. 92.

The hire-purchase agreement with which *Helby v. Matthews* (2) was concerned related to a piano and contained (*inter alia*) the following agreements on the part of the owner:

- “A. That the hirer may terminate the hiring by delivering up to the owner the said instrument.
- B. If the hirer shall punctually pay the full sum of £18 18s. by 10s. 6d. at date of signing, and by thirty-six monthly instalments of 10s. 6d. in advance as aforesaid, the said instrument shall become the sole and absolute property of the hirer.
- C. Unless and until the full sum of £18 18s. be paid, the said instrument shall be and continue to be the sole property of the owner.”

The hirer, after paying a few instalments, pledged the piano with a pawnbroker and the owner brought an action in trover against the pawnbroker for its recovery. The question in the action was whether the pawnbroker, having received the goods in good faith, could claim the protection of s. 9 of the Factors Act, 1889, and the answer to that question in turn depended upon whether the hirer was a person who had “bought or agreed to buy” the piano. Their Lordships held that he was not such a person and distinguished the case of *Lee v. Butler* (3), [1893] 2 Q.B. 318 on the ground that the hire-purchase agreement there in question was one which conferred no option upon the hirer to return the goods and determine the hiring, but which imposed an absolute obligation to pay all the instalments stipulated for. The basis of their Lordships decision was that though the owner of the piano had made a binding offer to sell there was no binding obligation upon the hirer to buy; therefore the hirer had not “agreed to buy” the piano.

The following extracts from the speeches of their Lordships suffice to illustrate their reasoning.

Lord Herschell, L.C., said (p. 475 and p. 476):

“My Lords, I cannot, with all respect, concur in the view of the Court of Appeal, that upon the true construction of the agreement Brewster had ‘agreed to buy’ the piano. An agreement to buy imports a legal obligation to buy. If there was no such legal obligation, there cannot, in my opinion, properly be said to have been an agreement to buy. Where is any such legal obligation to be found? Brewster might buy or not just as he pleased. He did not agree to make thirty-six or any number of monthly payments. All that he undertook was to make the monthly payment of 10s. 6d. so long as he kept the piano. He had an option no doubt to buy it by continuing the stipulated payments for a sufficient length of time. If he had exercised that option he would have become the purchaser. I cannot see under these circumstances how he can be said either to have bought or agreed to buy the piano.”

Later (at p. 477) he said:

“It was said in the Court of Appeal that there was an agreement by the appellant to sell, and that an agreement to sell connotes an agreement to buy. This is undoubtedly true if the words ‘agreement to sell’ be used in their strict legal sense; but when a person has, for valuable consideration, bound himself to sell to another on certain terms, if the other chooses to avail himself of the binding offer, he may, in popular language, be said to have agreed to sell, though an agreement to sell in this sense, which is in truth merely an offer which cannot be withdrawn, certainly does not connote an agreement to buy, and it is only in this sense that there can be said to have been an agreement to sell in the present case.”

Lord Watson said (p. 479 and p. 480):

“In order to constitute an agreement for sale and purchase, there must be two parties who are mutually bound by it. From a legal point of view the appellant was in exactly the same position as if he had made an offer to sell on certain terms, and had undertaken to keep it open for a definite period. Until acceptance by the person to whom the offer is made, there can be no contract to buy.”

At p. 480, he said:

“The distinction between a pre-contract of that kind and a proper agreement for the sale and purchase of goods, does not appear to me to have been sufficiently regarded by the learned judges of the Appeal Court. Their Lordships seem to have assumed that, because the appellant had bound

himself to sell if Brewster chose to buy upon the terms prescribed, he was in reality a seller; and that the existence of a seller necessarily implies the existence of a buyer. In my opinion, that reasoning is inconclusive. Whilst, in popular language, the appellant's obligation might be described as an agreement to sell, it is in law nothing more than a binding offer to sell. There can, in such a case, be no agreement to buy, within the meaning of the Act of 1889, until the purchaser has exercised the option given him in terms of the agreement."

The hire-purchase agreements in the *Felston Tile* case (1) and *Helby v. Matthews* (2) were basically of the same nature and it is therefore necessary to ascertain whether there is any ground upon which the opinions expressed in the former case can be distinguished from the decision in the latter. As has been indicated above, the opinions relating to the sale of Goods Act, 1893, expressed by their Lordships in the *Felston Tile* case (1), though obviously entitled to the greatest respect, were not essential to the actual decision, and were, in that sense, obiter. They were of opinion that the hire-purchase agreement in question constituted a conditional agreement for sale. The House of Lords in *Helby v. Matthews* (2), looking at the agreement more especially with regard to the position of the hirer, found that he had not agreed to buy. They said that only in popular language could the owner be said to have agreed to sell and in truth he had merely made an offer which could not be withdrawn. It is necessary to have regard to the definitions in the Sale of Goods Ordinance (Cap. 290) the provisions of which (though under different section numbers) are drawn from the corresponding English legislation. The conditions or warranties of fitness and merchantable quality relied on in the present case and referred to in the *Felston Tile* case (1) are drawn from s. 16 of the Ordinance and are implied in certain circumstances in respect of goods "supplied under a contract of sale". By s. 2 "contract of sale" includes an agreement to sell. The first three sub-sections of s. 3 are as follows:

- "3.(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part owner and another.
- "(2) A contract of sale may be absolute or conditional.
- "(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell."

The distinction between a sale and an agreement to sell under these provisions is clearly confined to the question when the property in the goods is to pass. The following words in s. 3 (1) are applicable to an agreement to sell: "... agrees to transfer the property in goods to the buyer..." By s. 2 "buyer" is defined as "a person who buys or agrees to buy goods". It is quite clear therefore that the "agreement to sell" contemplated by the Ordinance is one which entails mutual obligations to buy and to sell and that any meaning which the words may have in what their Lordships in *Helby v. Matthews* (2) called "popular language" has no relevance.

It is next necessary to consider the effect of s. 3 (2) of the Ordinance, under which a contract of sale (and therefore an agreement to sell) may be conditional. Both Slessor, L.J., and Scott, L.J., in the *Felston Tile* case (1) emphasized the corresponding provision in the English legislation, and apparently considered that the hire-purchase agreement in question amounted to a conditional

agreement to sell. This appears to be contrary to the general trend of the speeches in *Helby v. Matthews* (2), in which it is emphasized that, in agreements of this nature, the owner makes an offer of sale, for which he receives consideration and by which he is therefore bound. The hirer is not bound to accept the offer. The aspect of mutuality in an agreement to sell is emphasized in the words of Lord Watson above quoted:

“In order to constitute an agreement for sale and purchase, there must be two parties who are mutually bound by it.”

By making the offer (or giving the option) and accepting consideration therefore the owner enters into a binding contract, but it is not a contract of sale or an agreement to sell upon a condition. It is a contract which binds him to enter into a contract of sale if the hirer decides to accept the offer (or take advantage of the option). Such a contract does not and can not in itself effect a sale of goods, and the true agreement for sale must be capable of such a result upon completion, even though it may never be completed by reason of the occurrence or non-occurrence of some event or circumstance upon which the obligation to complete has by mutual agreement been made conditional. The case of *Marten v. Whale* (4), [1917] 2 K.B. 480 points this distinction between the option to purchase and conditional contract of sale. Though their Lordships in *Helby v. Matthews* (2) did not in terms mention the conditional agreement to sell, it would, in my opinion, be quite inconsistent with their approach to the question of hire-purchase agreements of the type in question, to hold that they fell within that category. As I see it the volition of a possible buyer in deciding whether or not to take advantage of an offer of sale cannot itself be a condition upon which an ensuing contract of sale is dependent, for there is no contract of sale at all, conditional or otherwise, until that volition is given effect by acceptance. So far as the contract for sale of goods is concerned, these conclusions appear to me to flow logically from the decision in *Helby v. Matthews* (2).

I have given serious consideration to the question whether the present case was distinguishable from *Helby v. Matthews* (2) upon quite another ground. The opening words of the speech of Lord Herschell, L.C., in that case as reported at p. 475 were:

“My lords, it is said that the substance of the transaction evidence by the agreement must be looked at, and not its mere words. I quite agree. But the substance must, of course, be ascertained by a consideration of the rights and obligations of the parties, to be derived from a consideration of the whole of the agreement. If Brewster agreed to buy the piano, the parties cannot, by calling it a hiring, or by any mere juggling with words, escape from the consequences of the contract into which they entered. What, then, was the real nature of the transaction?”

The agreement concerning the piano in that case was that hire should be paid by monthly instalments of 10s. 6d. each over a period of three years. The Lord Chancellor said (p. 476) that

“The monthly payments were no doubt somewhat higher than they would have been if the agreement had contained no such provision.”

(i.e. the option to buy). The corresponding terms of the agreement with which we are presently concerned are materially different. The respondent was to pay Shs. 16,600/- on November 22, 1955, Shs. 13,277/80 on May 22, 1956, Shs. 12,797/80 on November 22, 1956, and a final sum of Shs. 8,294/- on May 22, 1957. These instalments contained interest on the unpaid balance. Thus, a very substantial amount was payable over a period of eighteen months in respect of a machine obviously designed to have a much longer useful life,

and the financial consequences to the respondent, if he desired to exercise the option of determining the hiring conferred by cl. 11, would have been disastrous. Determination of the hiring at any time (say) within the first six months would have resulted in forfeiture of the first payment of Shs. 16,600/- and liability to pay the whole of the second instalment (see cl. 11) of Shs. 13,277/80. Such payments have no relation to agreements for pure hire and make it clear that the transaction was regarded by the parties as one of purchase. No “hirer” in his senses would enter into such a bargain except in full confidence of his ability to complete the payments. However, the fact that for practical purposes the transaction was intended to be a sale does not alter the legal method by which, with their eyes open, the parties chose to implement that intention. In *McEntire v. Crossley Brothers* (5), [1895] A.C. 457 at p. 462 and p. 463 Lord Herschell, L.C., said:

“Coming then to the examination of the agreement, I quite concede that the agreement must be regarded as a whole—its substance must be looked at. The parties cannot, by the insertion of any mere words, defeat the effect of the transaction as appearing from the whole of the agreement into which they have entered. If the words in one part of it point in one direction and the words in another part in another direction, you must look at the agreement as a whole and see what its substantial effect is. But there is no such thing, as seems to have been argued here, as looking at the substance, apart from looking at the language which the parties have used. It is only by a study of the whole of the language that the substance can be ascertained.”

The language used by the parties to the present agreement does not point in differing directions—it all points to the intention to attain one legal object (however onerous the terms) which is to enter into an agreement to hire coupled with an option to purchase. I do not think, therefore, that the practical difference between this agreement and the one in *Helby v. Matthews* (2) can be made the basis of a legal distinction. In *Karflex Ltd. v. Poole* (6), [1933] 2 K.B. 251 at 264 Goddard, J., (as he then was) said:

“Now it does not seem to me by any means to follow that the doctrines which were applied to ordinary simple bailments which has in it, not only the element of bailment, but also the element of sale. I say the element of sale, because, of course, it is well known, since the leading case of *Helby v. Matthews* (2), that the hire-purchase agreement, as drawn at present, is not a true contract of sale but an option of sale. Therefore it is a contract between the parties which is partly giving an option of sale and partly creating a bailment, and I think one has only to consider that for a moment to see how fallacious it would be to try to fuse that with the hard and fast rules with regard to bailments which were laid down before any contract of hire-purchase was contemplated.”

I think I can go no further than to indicate that in my opinion the present case is one in which the element of sale by far outweighs the element of bailment.

What then are the conditions and warranties to be implied at common law in a hire-purchase agreement of the type now under discussion? In *The Law of Hire-Purchase* (2nd Edn.) by Earegey at p. 39 it is stated that until the *Felston Tile* case it was thought that the conditions and warranties implied in a simple hire agreement still applied. Possibly the impact shortly afterwards of the Hire-Purchase Act, 1938, obviated to some extent the necessity of further decisions at common law. Among the notes appended to s. 8 of the last mentioned Act in Vol. 22 of Halsbury’s Statutes of England (2nd Edn. at p. 1025 and p. 1026) is the following:

“Conditions and warranties. It is not clear what conditions and warranties are implied in a hire-purchase agreement apart from this section. It would seem that the Sale of Goods Act, 1893 (c. 71), does not apply (see notes to s. 1 of that Act, p. 986, ante) but in view of the element of sale in a hire-purchase agreement it may be that conditions and warranties similar to those implied in a sale of goods would be implied at common law.”

The suggestion that, even though this court may feel itself precluded from accepting the view expressed in the *Felston Tile* case (1) that certain conditions and warranties are in fact implied in such agreements by the Sale of Goods Act, 1893, the appropriate conditions and warranties should be drawn at common law from that Act by analogy, is one which has considerable attraction. It must be observed however that the conditions and warranties implied by the Hire-Purchase Act, 1938, though drawn from the Sale of Goods Act, 1893, were to some extent varied. The condition particularly relevant in the present case was expressed in even wider terms by s. 8 (2) of the Act of 1938:

“(2) Where the hirer expressly or by implication makes known the particular purpose for which the goods are required, there shall be an implied condition that the goods shall be reasonably fit for such purpose.”

In Halsbury’s Laws of England (3rd Edn.), Vol. 19 p. 532 the position is stated thus:

“In hire-purchase agreements outside the statutory control there is an implied term that the goods are as reasonably fit and suitable for the purpose for which they are expressly hired, or for which from their character the owner must be aware they are intended to be used, as reasonable care and skill can make them.”

The principal authorities quoted in the relevant foot-note are *Sutton v. Temple* (7) (1843), 12 M. & W. 52 and *Hyman v. Nye* (8) (1881), 6 Q.B.D. 685 both of which deal with contracts of pure hire.

It was held by the divisional court in *G. H. Myers & Co. v. Brent Cross Service Co.* (9), [1934] 1 K.B. 46 that the warranty in a contract for work done and materials supplied as to the fitness of the materials was not less than that implied in a contract for the sale of goods. Du Parcq, J., said that it was true that they must not look at the Sale of Goods Act, 1893, because the contract in question was not one for the sale of goods. He then went to the common law and placed reliance upon the following passage in the judgment of Kelly, C.B., in *Francis v. Cockrell* (10) (1870), L.R. 5 Q.B. 501 at 503:

“I do not hesitate to say that I am clearly of opinion, as a general proposition of law, that when one man engages with another to supply him with a particular article or thing, to be applied to a certain use and purpose, in consideration of a pecuniary payment, he enters into an implied contract that the article or thing shall be reasonably fit for the purpose for which it is to be used and to which it is to be applied.”

Du Parcq J: then went on to indicate an exception in contracts of carriage of persons, with relation to defects unknown, and undiscoverable by the exercise of any reasonable skill and diligence, or by any ordinary means of inquiry and examination. At p. 53 he says.

“We are, therefore, brought to this view of the law, that in *Francis v. Cockrell* it was stated as a general proposition, applicable, as I understand it, to all cases where goods were supplied for a known purpose, that the persons supplying them warranted that they were reasonably fit for their purpose, and that certainly so far as contracts for the sale of goods are concerned, there is no limitation whatever of the nature which had been suggested, that the supplier is not responsible for latent defects.

“Now it is argued that where goods are supplied in the course of a contract to do work and labour, there is no such warranty. I should like to say this, first of all, that it would strike one as very surprising if it were so. It would seem remarkable if, because of some of the technical distinctions which for good and proper reasons the law draws between contracts so closely analogous, there were the great difference suggested by Mr. Werninck between the warranties to be implied in them.”

This decision was applied in *Stewart v. Reavell's Garage* (11), [1952] 2 Q.B. 545. Though an agreement for hire-purchase of the kind here in question may not be described as a sale of goods it is also substantially analogous, in that it is intended to culminate in a sale and in the vast majority of cases does so.

Though, as I have indicated, the references in the judgments in the *Felston Tile* case to the implied conditions in the Sale of Goods Act, 1893, should in my opinion be regarded as obiter, it is permissible at least to draw from that case the inference that the Court of Appeal saw nothing unreasonable in implying into such a hire-purchase agreement the implied conditions of fitness and merchantable quality. I am myself satisfied that these agreements were evolved as a means of effecting sales, at the same time giving security to the owner for his purchase money, and allowing the hirer to use the chattel while he paid for it. As was pointed out by Goddard, J., in the above quoted passage from his judgment in *Karflex Ltd. v. Poole* (6) the contract is not one of pure bailment and ought not to be treated as one. I would add, with respect, my own opinion that not only is the contract not pure bailment in law but it is, in the minds and intentions of the parties predominantly sale. This I think was recognised and accepted when the Hire-Purchase Act, 1938, was drawn. If, then, implied terms of this sort are at common law drawn from the normal understanding of rational men as to the basis upon which they contract I would say that the condition of fitness to be implied in contracts such as the one now under consideration should be drawn from the law of sale of goods rather than from that of pure bailment.

I do not, in the present case, need to base my decision upon that opinion. Assuming that the contract imports only the condition or warranty, implied in a pure bailment I remain of the opinion that the appellant nevertheless cannot succeed in this appeal.

In this territory the Indian Contract Act is in force and the attention of the court was drawn to s. 150:

“150. The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risks; and if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.

“If the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed.”

The present case falls within the latter part of the section, upon the construction of which there is a lack of Indian authority. Reading the plain words of this section I am unable to see that it casts anything but an absolute responsibility upon the bailor and the illustrations appended to the sections do nothing to disturb this view. There are two classes of faults:

- (a) Those which materially interfere with the use of them (the goods).
- (b) Those which expose the bailor to extraordinary risks.

We are concerned here with class (a). The bailor “is responsible” for damage arising directly from such faults:

- (a) If, in any case, being aware of them, he fails to disclose them.
- (b) In a case of bailment for hire, whether he was or was not aware of the existence of such faults.

There seems to be nothing in this wording which should be construed so as to make an exception of faults which could not be discovered by any care or skill and if any difficulty at all arises in the interpretation of the section it arises from the words “extraordinary risks” which are quite unconnected with faults which interfere with the use of the goods and consequently with the present case. The learned editors of Pollock & Mulla on The Indian Contract and Specific Relief Acts; (8th Edn.) at p. 568 express the opinion that the language of the second paragraph of the section is open to three constructions:

- “(i) The bailor is under a duty to take reasonable care to make the goods reasonably safe for the purpose for which he knows they have been hired.
- (ii) The bailor is under a duty to supply goods that are reasonably safe, the only defence being that the defect is a latent one that could not be discovered by any care or skill.
- (iii) There is an absolute guarantee of fitness.”

Having considered the English common law authorities they submit that (ii) above is best in accord with the language and the English authorities. It appears to me that only if the section is approached with these authorities in mind is there any suggestion of alternative interpretation. The Act is one which codifies principles of common law and of the interpretation of such enactments Lord Herschell in the *Bank of England v. Vagliano Bros.* (12), [1891] A.C. 107 said (at p. 144 and p. 145):

“My lords, with sincere respect for the learned judges who have taken this view, I cannot bring myself to think that this is the proper way to deal with such a statute as the Bills of Exchange Act, which was intended to be a code of the law relating to negotiable instruments. I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

“If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions, dependent upon a knowledge of the exact effect even of an obsolete proceeding such as a demurrer to evidence. I am of course far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate. Or, again, if in a code of the law of negotiable instruments words be found which have previously acquired a technical meaning, or been used in a sense other than

their ordinary one, in relation to such instruments, the same interpretation might well be put upon them in the code. I give these as examples merely; they, of course, do not exhaust the category. What, however, I am venturing to insist upon is, that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground.”

Similar views were expressed by the Privy Council in *Robinson v. Canadian Pacific Railway Co.* (13), [1892] A.C. 481. I think with respect that the learned editors of Pollock and Mulla can not have approached the question of interpreting s. 150 in the light of these statements of the law, at least so far as material interference with the use of goods is concerned. My own co-construction, derived from an approach to the wording of the section only, is as I have stated above; I see nothing unlikely in such a provision in view of the fact, which is noticed in Pollock and Mulla, that there is some conflict in the English decisions on the point.

Section 150 of the Indian Contract Act therefore in my view imports into the present contract a condition or warranty that the machine hired will not be subject to any fault which materially interferes with the use of it. If I am wrong in this I would accept the English common law as being as stated in *Hyman v. Nye* (8) at p. 687 and p. 688:

“A person who lets out carriages is not, in my opinion, responsible for all defects discoverable or not; he is not an insurer against all defects; nor is he bound to take more care than coach proprietors or railway companies who provide carriages for the public to travel in; but in my opinion, he is bound to take as much care as they; and although not an insurer against all defects, he is an insurer against all defects which care and skill can guard against. His duty appears to me to be to supply a carriage as fit for the purpose for which it is hired as care and skill can render it; and if whilst the carriage is being properly used for such purpose it breaks down, it becomes incumbent on the person who has let it out to show that the break down was in the proper sense of the word an accident not preventable by any care or skill.”

The onus, be it observed, is on the bailor.

Having these aspects of the law in view it is necessary to turn to the submissions of counsel for the appellant company. He said that if it were held that the implied conditions under the Sale of Goods Ordinance were not applicable it would be a question for the court whether the pleadings could sustain the claim on any other basis. He said that either the claim should be dismissed or that there should be a new trial. He conceded that if s. 150 of the Indian Contract Act made the bailor an insurer (I have expressed the view that in relation to this type of case it does) then the finding of the learned judge that the harvester was defective would suffice—I understood that to mean suffice to support the judge’s decision. He submitted that if the view of s. 150 expressed by the learned editor of Pollock and Mulla prevailed there would be an issue to be tried, whether the appellant company was liable for not discovering the defect by the exercise of reasonable care and skill. He submitted that, if the Sale of Goods Ordinance did not apply, the initial payment of Shs. 16,600/- could not be recovered in any event as it was paid for the option to purchase. He submitted also that if any question of damages fell to be determined they would be different if the contract were treated as a bailment.

As far as the pleadings are concerned no difficulty arises. The plaint as amended alleged that the plaintiff bought the combine harvester from the defendant company under a hire-purchase agreement. It went on to say that the plaintiff made known the purpose of the purchase, that it was an implied

condition that the harvester should be fit for that purpose or, alternatively, of merchantable quality, that the said conditions were broken and that the plaintiff refused to accept the harvester. The amended defence and counterclaim denied all the allegations of damage, unfitness or unmerchantable quality in the plaint; without prejudice to that denial the defendant company averred that it let and the plaintiff hired the harvester and denied that it had sold the harvester to the plaintiff. The defence next alleged that the defendant company re-possessed the machine and put an end to the hiring. The defence then went on in para. 7 to aver (*inter alia*) that the harvester was at all times during the continuance of the hiring fit for the purpose for which it was intended and was of merchantable quality.

It might be said that the appellant company by these pleadings had admitted that there was an implied condition of fitness or merchantable quality and that it sits ill on them to allege on appeal that some different term was implied. The denial of sale together with the averment of hiring might be deemed to include a denial of the implied conditions alleged by the respondent, but para. 7 of the defence appears to indicate that they were still in issue even under the plea of hiring. That this was the viewpoint of both sides seems clear from the way the issues were framed by agreement between counsel, and if further confirmation of that viewpoint were necessary it is to be found in what counsel for the appellant company is recorded as saying in his final address: "If boiled badly agree that entitled to reject." In my opinion the nature and effect of the contract between the parties was sufficiently in issue on the pleadings and it was not essential to include averments of the legal consequences of the allegations of sale, on the one hand, and of hiring on the other.

It is necessary then to ascertain the position, firstly on the assumption that there is an unqualified condition of fitness implied by s. 150 of the Indian Contract Act and secondly, in case I am wrong on my view of that section, that the rather more restricted condition under common law is implied. I will say at once that, in the circumstances, the defect in the harvester which the learned judge found to exist, if it contravened the terms of the contract at all, was manifestly of such a nature as to amount to a breach of a condition as distinct from a mere warranty. That being so, upon the learned judge's finding that the respondent rejected the harvester without delay, the respondent clearly treated the entire contract as discharged for breach of a condition, and, if the breach existed, was entitled so to do, no less in a contract of hiring than in one of sale. This would entitle the respondent in my opinion to the return of the sum of Shs. 16,600/- paid under cl. 3 of the agreement "as consideration for the option of purchasing . . ." It is not a case of the determination of an existing hiring, but a case in which the whole contract for hiring, with which the matter of the option is so closely linked as to form part of it, would have been discharged. Even if the option and the hiring were looked at separately, there would be a total failure of consideration for the option, which related to a harvester to be delivered under and conforming to the terms of the hiring agreement. If no such harvester was ever delivered under the agreement there was no consideration given for the money paid for the option.

If by virtue of s. 150 of the Indian Contract Act there is an implied condition or warranty in a bailment for hire that the goods hired shall be fit for the particular purpose for which they are hired there is no difficulty. That in effect is the question that the learned judge decided and he found, against the appellant company, that the harvester was not fit for the purpose for which it was supplied. On my interpretation of the section that is sufficient to dispose of the appeal. If, however, my interpretation should be incorrect and the matter falls to be determined as at common law the position is more complex and some reference to the evidence is necessary.

The harvester in question was taken delivery of by the respondent's brother from the appellant company's agents and brought to the respondent's farm which is in a district of considerable elevation; the farm was known to the agents. No field test on the farm was made by the agents and when the harvester was put into use by the respondent the overheating began. Evidence was given on behalf of the appellant company by their service manager who, in cross-examination, said:

"Company expects routine of field test to be carried out. If customer complained would stay until he was satisfied or take it away. If taken away service man must put it into field until he is satisfied; that is out policy."

Mr. Dawson, former office manager for the appellant company said:

"Under normal circumstances if combine boiled it should not be accepted by purchaser. It should be minor matter which should be able to be fixed. Under these circumstances we would regard it as being necessary that combine should be tested in client's presence and if necessary on his farm."

These references to the practice of the appellant company of course indicate no legal liability upon it to carry out such tests, but go to show that the defect in the harvester could by some such method have been easily ascertained by the appellant company. There was some evidence also given for the appellant company that later, when the harvester had been resold it worked satisfactorily, which appears to show that the defect was capable of rectification though, as the appellant company ought to have known of the defect at the time of delivery, this factor is probably not relevant. In these circumstances and having regard to the fact that the onus of showing the exercise of all care and skill is on the bailor (*Hyman v. Nye* (8)), the judge, if he had had his particular issue put to him, could not in my view have come to any other conclusion than that the onus had not been discharged. Nor, having regard to the nature of the evidence before the court, and taking into consideration that the actual issues were framed by counsel by consent, would I, had my decision rested on this aspect of the case, have ordered that the case be sent back for a new trial on this issue. It is not a case which, in the words of Scrutton, L.J., in *Lever Bros. Ltd. v. Bell* (14), [1931] 1 K.B. 557 at 583,

"... would require the investigation of new and disputed facts which have not been investigated at the trial,"

and I think such a course could only result in futile and unnecessary expense.

I would dismiss the appeal with costs.

Forbes V-P: I have reached a similar conclusion. It is, naturally, with great reluctance that I find myself obliged to differ from opinions expressed by their Lordships of the Court of Appeal in England, and I have accordingly been at pains to try to distinguish *Felston Tile Co. Ltd. v. Winget Ltd.* (1) from *Helby v. Matthews* (2). In Salmond and Williams on Contracts (2nd Edn.) at p. 132 it is stated that a person who for valuable consideration has obtained an irrevocable option

"has the benefit not of a mere revocable offer but of an irrevocable and binding, though conditional, contract."

And at p. 133 the learned authors say:

"It may, indeed, be suggested that, although such an option arises from and is conferred by way of contract, the terms specified in it as those

which the option holder may elect to accept are not themselves, before acceptance, an existing contract or part of such a contract but are merely the terms of a contract not yet existing but which the grantor of the option contracts with the grantee to make with him on his request within the specified time. In other words, it may be suggested that an option is merely an offer and therefore revocable like any other offer, but that the offer or has entered into a collateral contract for good consideration not to revoke his offer, and will therefore be liable in damages if he wrongfully revokes it. If this were so, however, the revocation of an option would be legally effective to prevent the subsequent acceptance of it from constituting a contract, the remedy of the option holder being merely an action for damages for being so deprived of his opportunity of entering into the contract specified in the option. But this is not the true interpretation or effect of the grant of an option. The consideration given by the option-holder deprives the grantor not merely of the right to revoke the option lawfully, but of his power to revoke it effectively. Notwithstanding any such wrongful revocation, the option may be exercised, and the conditional contract already constituted by the grant of the option will become ipso jure an absolute contract by the fulfilment of the condition. The true formula of the grant of an option (for the sake of simplicity taking only the case of an option by way of simple contract) is not: 'I promise for good consideration hereafter to enter into such and such a contract with you if within a certain time you demand that I do so.' The true formula is, on the contrary: 'I here and now for good consideration contract with you on such and such terms, subject to the condition that within a certain time you give me notice that you intend to demand fulfilment of my contract'."

A similar view is expressed in Halsbury's Laws of England (2nd Edn.) Vol. 31, p. 336, where, dealing with contracts lacking mutuality, it is said:

"A conditional contract must be distinguished from one lacking in mutuality, as, for example, a contract where one party has an option by the exercise of which the other party becomes bound to perform his part."

The authorities on which these views are based are *Weeding v. Weeding* (15), 70 E.R. 812 and *Brough v. Nettleton* (16), [1921] 2 Ch. 25. In the former case Page Wood, V.-C., speaking of an option to a lessee to purchase the demised premises, said, at p. 815:

"It is as much a conditional contract as if it depended on any other contingency than the exercise of an option by a third party, such as, for example, the failure of issue of a particular person."

And in the latter case Lawrence, J., said in reference to an option to purchase contained in an agreement for a lease:

"Although the defendant's obligation to sell the house did not become operative unless and until the plaintiff gave his notice to exercise his option, nevertheless such obligation was imposed upon the defendant by the agreement of August, 1917 (i.e. the agreement for the lease and the option), and by none other."

Following this line of argument it is an attractive proposition that a contract containing an irrevocable option to sell goods is a conditional contract within s. 3 (2) of the Sale of Goods Ordinance, and it may be that this is what their Lordships of the Court of Appeal had in mind. However, in *Helby v. Matthews* (2), the House of Lords held that such a contract was not a conditional contract for the purposes of s. 9 of the Factors Act, 1889, the wording of which is similar to s. 25 (2) of the Sale of Goods Act, 1893 (s. 26 (2) of the Sale of Goods

Ordinance); and in *Marten v. Whale* (4), following *Helby v. Matthews* (2), a similar conclusion was reached in relation to s. 25 (2) of the Sale of Goods Act, 1893. It is true that the decisions in *Helby v. Matthews* (2) and *Marten v. Whale* (4) turned on the construction of the words “a person having bought or agreed to buy” in s. 9 of the Factors Act, 1889, and s. 25 (2) of the Sale of Goods Act, 1893, it being held that a person could not have “agreed to buy” goods if he merely held an option to purchase which he had not exercised; while in s. 14 of the Act (s. 16 of the Ordinance) the words to be construed are “a contract of sale”, which, under s. 1 (2) of the Act (s. 3 (2) of the Ordinance) “may be absolute or conditional.” But a consideration of the definition of a contract of sale of goods in s. 1 shows that the reasoning in *Helby v. Matthews* (2) applies equally to that definition. A contract of sale of goods is defined as

“a contract whereby the seller transfers or agrees to transfer the property in goods to a buyer for a money consideration”;

and “buyer” is defined in s. 62 as “a person who buys or agrees to buy goods.” It is therefore essential that, to constitute a contract of sale of goods within the meaning of the Act, the buyer must have bought or “agreed to buy” the goods, and this still remains an essential element whether the contract is absolute or conditional. And the decision in *Helby v. Matthews* (2) is that an option to buy does not amount to an agreement to buy.

Accordingly I agree that s. 16 of the Sale of Goods Ordinance has no application to the contract in issue in the instant case.

However, although I have come to the conclusion that that section does not apply, the conditions or warranties embodied in that section are merely a modification of the long existing common law in relation to sales. In the instant case the sum of money in issue is not any sum paid for hire under the contract, but that which was expressed to be the consideration for “the option of purchasing.” The payment therefore is directly referable to a transaction very closely akin to a transaction of sale, and, for myself, I have no doubt that the court ought to imply in the contract conditions or warranties similar to those contained in s. 16. On this ground I would hold that the appeal ought to be dismissed.

If I am wrong as to this, then I find myself in agreement with the reasoning in the judgment of Gould, J.A., which leads to a similar conclusion.

The appeal is dismissed with costs.

Windham JA: I agree with the conclusion arrived at by the learned Justice of Appeal and the learned vice-president. The essential terms of the transaction in the present case, as also in those in *Helby v. Matthews* (2) and *Felston Tile Co. Ltd. v. Winget Ltd.* (1) were an option to the purchaser to buy, granted for consideration by the vendor and irrevocable by him, and an agreement by the vendor to sell, to be implemented in the event of the option being exercised. Such an agreement was held in *Helby v. Matthews* (2) not to be a conditional contract, whereas in the *Felston Tile* case (1) it was held, or at least clearly implied, that it was. I am unable to see how the two cases can be reconciled, and with great respect I agree that the decision of the House of Lords in *Helby v. Matthews* (2) must prevail. Section 16 of the Sale of Goods Ordinance therefore has no application, but I agree that, since the transaction is far more akin to a contract of sale than it is to a bailment, the common law conditions and warranties which s. 16 was designed to codify should be implied.

Appeal dismissed.

For the appellant:

B O'Donovan QC and BRP Todd
Lawrence Long & Todd, Nakuru

For the respondent:

CS Rawlins
Geoffrey White & Co, Nakuru

**R Ex parte Eastern Province Bus Company (1945) Limited v Road Transport
Appeal Tribunal
[1959] 1 EA 449 (HCU)**

Division:	HM High Court for Uganda at Kampala
Date of Judgment:	24 June 1959
Case Number:	27/1959
Before:	Lyon, J
Sourced by:	LawAfrica

[1] Certiorari – Application for licence – Transport Licensing Board – Board consulting own records – Unsuccessful applicant unable to contest records – Whether proceedings in breach of rules of natural justice – Traffic Ordinance, 1951 (as amended by Traffic (Amendment) Ordinance, 1955 (No. 45 of 1955)), s. 85 (2), s. 85 A and s. 85 B. (U.).

Editor's Summary

The Transport Licensing Board at Jinja held an inquiry to decide which of two applicants should be granted a licence for an express bus route from Jinja to Soroti. The board granted a licence to one applicant and in the course of his decision the chairman said:

“From the records held by the board, the board were of the unanimous opinion that the interests of the public would be best served by granting this route to the Kampala and District Services, Ltd.”

The other applicant unsuccessfully appealed to the Appeals Tribunal and then filed notice of motion for an order for certiorari to quash the decision of the board on the ground, *inter alia*, that the decision was reached in breach of the rules of natural justice because it utilised and considered its own records in arriving at a decision without giving the unsuccessful applicant an opportunity of contesting anything contained in these records.

Held –

- (i) the board had not acted entirely in either a judicial or an administrative capacity; when it was complying with s. 85 A and s. 85 B (1) and (2) it was acting in an administrative capacity, but as soon as it began to act under s. 85 (B) (3), that is to say, began to hear the applicants and objectors,

it was acting in a quasi-judicial capacity.

- (ii) the board was entitled to consider its own records, had acted in accordance with the relevant legislation and there had been no breach of the rules of natural justice.

Application dismissed.

Case referred to in judgment

- (1) *B. Johnson & Company (Builders) Ltd. v. Minister of Health*, [1947] 2 All E.R. 395.

Judgment

Lyon J: This is a notice of motion for an order of certiorari, to remove into this court and quash the decisions of the Transport Board and Road Transport Appeal Tribunal. Under the provisions of s. 85 et seq of the Traffic Ordinance, 1951 as amended by Traffic (Amendment) Ordinance, 1955 (No. 45 of 1955) a transport inquiry was held by the Transport Licensing Board at Jinja on October 14, 1958. There were two applications for a route described as ECL.3 and there were several objectors. ECL.3 is a licence for an express bus route from Jinja to Soroti.

I think I should set out the composition of the Board. These members sat:

Mr. J. B. White, C.B.E.

Mr. J. J. Dickie, representing the Solicitor-General

Mr. K. P. Gower, representing the Permanent Secretary Ministry of Commerce and Works

Mr. J. A. Hayes, representing the Commissioner of Police

Mr. F. C. Elliott and

Mr. W. F. Singer, Secretary of the Board.

In the end, after what I consider to be a careful hearing, the chairman said this:

“ . . . The board will consider the representations which have been received and will also take into account the written representations of local authorities, D.C.s and members of the public which it has received. The board will also take into consideration all relevant information contained in its records . . . ”.

And at a later date, October 24, 1958, the record of this matter closed in this way:

“REASONS FOR DECISION.

“There were two applicants for this route, the Eastern Province Bus Co. (1954) Ltd., who have been operating over this route, and the Kampala and District Services Ltd. This is a new express service.

“From the records held by the board, the board were of the unanimous opinion that the interests of the public would be best served by granting this route to the Kampala and District Services Ltd. A further point in its favour is the ability of the Kampala and District Services Ltd. to provide a direct service from Kampala through to Soroti, thus enabling passengers from the west to proceed to Soroti on a through ticket.

“DECISION

“The Transport Licensing Board has considered all the representations in connection with Express Carriage Licence No. 3, and has decided to grant the licence to Kampala and District Services Ltd., subject to the submission of a time table to be approved by the board and to such other conditions as may be notified to the licensee by the executive officer and secretary/member.

(Sgd.) James B. White,

Chairman,

Transport Licensing Board.”

Although Mr. Baerlein took other points, I am inclined to agree with Mr. Maloney that the only point of substance is that the board, as is frankly stated by the chairman, considered some records in the board's possession in coming to their decision to grant the licence, not to the Eastern Province Bus Company, but to the Kampala and District Services Ltd.

To complete the background in this matter, Mr. Baerlein on behalf of the Eastern Province Bus Company appealed to the tribunal constituted to hear such appeals; and on March 6, 1959, that tribunal dismissed the appeal and ordered that the decision of the board should stand. The sections in the Traffic Ordinance, 1951, which in my opinion are applicable here are:

Section 85 (2), 85 A and 85 B, but I am more particularly concerned with 85 (2) (Traffic (Amendment) Ordinance, 1955):

- “(2) In considering the grant of any stage carriage licence over any route, routes or combination of routes, the board shall have due regard to the following matters:
- (a) the needs of the public;
 - (b) the desirability of providing services which are both efficient and economic;
 - (c) the co-ordination in so far as may be possible of all forms of passenger transport both in any particular area and in the whole Protectorate;
 - (d) the reliability, character and financial stability of each applicant for a licence, and the facilities at his disposal for the general maintenance of the service on such route, routes or combination of routes;
 - (e) the interests of any persons who hold stage carriage licences over any route, routes or combination of routes, or part thereof, and of any persons who are already providing transport facilities along or near the route, routes or combination of routes concerned;
 - (f) the representations of any local authority, district commissioner or member of the public interested.”

and 85 B (3)–

- “(3) The board shall hear all applicants or objections either in person or by advocate and shall take into account any written application or objection.”

I have had an opportunity of seeing the full transcript of the proceedings and hearing before the board. There is no doubt whatever that all the provisions of s. 85 et seq were strictly carried out. Both applicants had ample opportunity to present their cases and there is no ground whatever to complain in any way of the procedure adopted.

Now in their reasons for the decision, the board said:

“From the records held by the board, the board were of the unanimous opinion that the interests of the public would be best served by granting this route to the Kampala and District Services Ltd. (and here the board were plainly applying s. 85 (2) (a)). A further point in its favour is the ability of the Kampala and District Services Ltd. to provide a direct service from Kampala through to Soroti, thus enabling passengers from the west to proceed to Soroti on a through ticket.”

(Here the board were plainly applying s. 85 (2) (c) which relates to co-ordination of routes; and a quite proper consideration in the instant case.)

This is not an appeal. This is a notice of motion for an order of certiorari. The grounds on which the order prayed for would be granted are well-known. They are set out in Short and Mellor on The Practice of the Crown Office, in Halsbury and in the White Book, 1959. Among them are bias, pecuniary interests of a judge, corruption, want of jurisdiction, excess of jurisdiction and where a conviction has been obtained by fraud and so on. They are perhaps most conveniently set out in Halsbury’s Laws of England, Vol. 11 (3rd Edn.) at paras 268 and 272 inclusive. Among these the following other grounds are set out (p. 145):

- “2. Breach of the rules of natural justice, a judicial decision reached by an inferior tribunal in violation of these rules, e.g. where a party is not given a full and fair opportunity of being heard, may be quashed on certiorari.”

and

- “5. A decision of an inferior tribunal which contains an error of law apparent on the face of the record may be quashed.”

I can see no error of law apparent on the face of the record of either the hearing before the board or the appeal—as I understand Mr. Baerlein, his contention is that as the board utilised its own records and considered them in reaching their decision, he had no opportunity of contesting anything contained in those records. He did not see them; and he does not know even today what they contain. He therefore asserts that there was here a breach of the rules of natural justice such as is described above. Section 85 (2) sets out what matters the board shall have due regard to. Among them is 85 (2) (f)

“the representations of any local authority, district commissioner or member of the public interested.”

which clearly means that the board may consider letters or other memoranda. Mr. Maloney submitted with some force that the Uganda Transport Licensing Board are in the same position as the Minister in *B. Johnson & Company (Builders) Ltd. v. Minister of Health* (1), [1947] 2 All E.R. 395. Before citing the decision in that case I must refer to the nature of the board in the instant case. Mr. Baerlein submits that it acted in a judicial capacity, while Mr. Maloney and Mr. Vergee both assert that it acted in an administrative capacity. I do not think it acted entirely in either one way or the other. For example, while the board was complying with s. 85 A and s. 85 B (1) and (2), it was acting in an administrative capacity; but in my view as soon as the board began to act under s. 85 B (3), that is to say began to hear the applicants and objectors, it was acting in a quasi-judicial capacity. The headnote in *Johnson's* case (1) is brief, while the judgment of the Master of the Rolls, Lord Greene, is long. I refer to the full terms of that judgment. It was there held that although the Minister had not made available to the objectors contents of certain letters written to him by the local authority, before he had made his order in confirmation, that order was essentially an administrative act and the obligation of the Minister did not go beyond making available to both sides matter which had come into existence for the purpose of the quasi-lis, the inspection of which was marked and constituted by the making of the objections. There was, therefore, no obligation on the Minister to make available material which came into his possession before that date.

After careful consideration I have reached the conclusion that the board were quite entitled to consider their own records and further that the reasons they gave for their decision was quite reasonable and that they acted all along in accordance with the relevant legislation. There was, in my opinion, no breach of the rules of natural justice.

This application is therefore dismissed with costs. To include costs of Mr. Vergee's clients.

Application dismissed.

For the applicant:

AI Jones

Baerlein & James, Jinja

For the respondent:

MT Maloney (Crown Counsel, Uganda)

The Attorney-General, Uganda

Re The Tanganyika Non-Racial Education Trust
[1959] 1 EA 453 (HCT)

Division: HM High Court of Tanganyika at Dar-Es-Salaam
Date of Judgment: 2 April 1959
Case Number: 15/1959
Before: Crawshaw J
Sourced by: LawAfrica

[1] Trust and trustee – Charitable trust – Application by trustees to pay administrative and maintenance expenses out of capital instead of income as required by trust – No income available as trust funds not invested – Whether court has power to grant application.

Editor's Summary

The Tanganyika Non-Racial Education Trust which was created in 1957 had as its general purposes the promotion and encouragement of education in Tanganyika. The trustees were empowered by the trust to apply “the trust fund in the purchase of land and buildings and in the erection and adaptation of buildings for use as schools and for purposes ancillary thereto” but the expenses of the management of the trust fund and the maintenance of the school or schools were to be met from the income of the trust fund. The trustees had acquired property at Rungemba for use as a school, but as no part of the trust fund had been invested, there was no income from which to defray the expense of maintaining the school's buildings at Rungemba, the administrative and legal expenses in connection with the trust, salaries, and other emoluments of the school staff or general expenses of running and administering the school. The trustees, therefore, applied to the court for an order that these expenses be paid out of the trust fund so long as there was no income available. One question was whether the court had power to make the order sought.

Held –

- (i) to disallow the application in toto would be to prevent the purposes of the trust being carried out.
- (ii) the order sought would be granted but the powers given there under to the trustees would be effective until the end of May, 1960, which would be one month after the end of the school's financial year.
- (iii) if the trustees should still require assistance from capital, they could move the court prior to the expiration of the order for its extension; in any event, the trustees should then move the court for consideration by the court whether the capital expended for purposes outside those authorised by the trust deed should be recouped from future income of the trust and if so, in what manner.

Order accordingly.

Cases referred to in judgment

- (1) *Re New*, [1901] 2 Ch. 534.
- (2) *Re Royal Society's Charitable Trusts*, [1955] 3 All E.R. 14.
- (3) *Willenhall Chapel Estates*, 62 E.R. 698.
- (4) *Andrews v. M'Guffog* (1886), 11 App. Cas. 313, H.L.
- (5) *Attorney-General v. Exeter Corporation*, 38 E.R. 252.

Judgment

Crawshaw J: This is an application by the trustees of the Tanganyika Non-Racial Education Trust for an order that certain expenses connected with the administration of the trust which normally would be paid out of income should be paid out of the capital of the trust fund.

The trust deed is dated February 28, 1957, and the general purposes of the trust are described in cl. 3 which reads:

“The trustees shall stand possessed of the trust fund upon trust to apply the same and the income thereof in perpetuity for the promotion and encouragement of education in Tanganyika.”

Clause 4 begins,

“The trustees shall apply the trust fund in the purchase of land and buildings and in the erection and adaptation of buildings for use as schools and for purposes ancillary thereto . . .”.

Clause 6 provides that the trustees shall first pay out of the income the expenses of management of the trust fund, and then

“shall . . . apply the same towards the maintenance of the school or schools established or taken over by them and subject as aforesaid shall apply the said income in the execution generally of the trusts and powers of this deed”.

Clause 15 enables the trustees to charge such fees for tuition and boarding as they think fit, and under cl. 16 they may pay the school staff such salaries as they think proper.

The trust started with the sum of £5 under the deed but by March 31, 1959, the fund had, according to a supplementary affidavit filed on April 2, 1959, increased by subscriptions from the Government of Tanganyika and the public, to Shs. 1,010,100/-. No part of the fund has been invested and there has therefore presumably been no income. Paragraph 5 of the original affidavit filed with the application reads:

“The trustees had at the date of the said account expended the sum of Shs. 375,014/17 in connection with the purchase of a suitable building and grounds at Rungemba for use as a school and for the provision therein of furniture fixtures and a generator”.

I do not know when this money was expended, but it does seem rather surprising that no moneys at all have at any time been invested in, say, some readily realisable security, the expenses in connection with the purchase and sale of which would not be high, or placed on fixed deposit at the bank, but the reason given,

“that such funds may be required at short notice in connection with capital expenditure”

may, of course, in the circumstances as known to the trustees but not to this court be sufficient.

Having acquired the property at Rungemba it is now said that expenditure will be required for the following purposes:

- “(a) On the maintenance of the said estate and buildings.
- “(b) On administrative and legal expenses.
- “(c) On payment of salary and other expenses to a headmaster and other staff.
- “(d) On the general running expenses of the said school”.

It seems over Shs. 17,000/- has already been spent from the fund under the heads (a) and (b), and expenses under (c) may, I understand, start in the fairly near future. The trustees are of opinion that the school fees which they will charge will not for the first two years or so cover the running expenses of the school, until in fact a sufficient number of pupils are enrolled. That this will be

the position I can well understand, although I hope that it will be found practicable to invest at least some of the fund and so help to meet the expenses from income.

The trust deed does not specifically permit the use of capital for the maintenance and management of a school, and although cl. 3 is in wide terms, read with the deed as a whole it seems doubtful whether such use of capital is authorised. The trustees therefore ask that they be empowered to utilise capital for the following purposes:

- “(a) The maintenance of the building and grounds at Rungemba purchased by the registered trustees for use as a school;
 - “(b) administration and legal expenses in connection with the trust;
 - “(c) salaries and other emoluments to the headmaster and other staff of the said school; and
 - “(d) in connection with the general running and administration of the said school
- for as long as there be no income available to the registered trustees for such purposes”.

The question is whether the court has power to make the order sought. Mr. Walker for the applicant has referred me to *Re New* (1), [1901] 2 Ch. 534, but that case relates to a non-charitable trust, and different considerations therefore arise. Mr. Thornton, who appeared on behalf of the Attorney-General (who does not oppose the application), has referred me to *Re Royal Society's Charitable Trusts* (2), [1955] 3 All E.R. 14. There the court was merely asked to authorise the investment of the trust funds in securities outside the range of authorised investment and to allow certain funds to be consolidated for convenience. The nature of the present application is very different.

More in point are the following two cases I think. In *Willenhall Chapel Estates* (3), 62 E.R. 698, a trust fund had been formed, the sole purpose of which was to provide income for the support of the incumbent. It being desired to repair and enlarge the chapel, authority was sought from the court to pay for this out of the capital of the trust fund, the incumbent nobly consenting. The court, in the particular circumstances pertaining, not only sanctioned this but made no order requiring the expenditure to be recouped out of future income, though such would normally be required. On the latter point the Vice-Chancellor, Sir R. T. Kindersley, said:

“In the ordinary case of a charity, such as a school, hospital, etc., which is intended for the benefit of a numerous and indefinite class of objects, the court looks to the future extension of the charity, so that it may benefit as numerous a class of objects as possible; and for that reason, if it sanctions the application of a portion of its capital fund for a particular object, it generally takes care that the capital be recouped out of income.”

In *Andrews v. M'Guffog* (4) (1886), 11 App. Cas. 313, H.L., certain moneys were bequeathed to trustees to be invested by them and the income therefrom to be applied annually towards the support and maintenance of a school. The trustees in fact used the capital to meet building expenses of a school. An action was brought against the trustees and the court ordered that they replace and invest the money so spent. On appeal, the Second Division reversed this order. The plaintiffs then appealed to the House of Lords who upheld the decision of the Second Division, but remitted the case to the court below for consideration whether the encroachment which had been made on capital ought to be repaid in whole or in part out of accumulation of future income. Lord Herschell, L.C., said at p. 329:

“No doubt it may at the outset have been difficult to carry out the declared intention of the testator that the interest only should be expended upon the management of the school, but I think that the trustees erred in making the expenditure they did. It was their duty to administer the trust according to the dispositions of the testator, not to make other dispositions which might seem to them better suited to carry out the main purpose which he had expressed in founding the school; and I think that if it appeared to them that the main purpose could not be efficiently accomplished without departing from the terms of the trust, their proper course was to have come to the court for a scheme to enable them to depart from the declared intention of the testator so far as was necessary for the purpose of carrying out that main object. But although it might have been better that they should have come, in the first instance, to the court to sanction what they thought it expedient to do, yet I can entertain no doubt that they acted perfectly honestly and with the very best intentions with regard to the trust which it was left to them to administer. Under those circumstances I think it is impossible to come to the conclusion that the court should hold them personally liable in respect of the expenditure of the money, although they have departed from the strict letter of the trust.”

I understand that in the instant case moneys may have already been spent in a manner not strictly in accordance with the terms of the trust deed; if this is so it may be that the trustees will be able to find some comfort from the *Andrews* case (4) and from the quotation therein from Lord Eldon’s observations in *Attorney-General v. Exeter Corporation* (5), 38 E.R. 252. I am not now concerned with these payments, however, but I am asked to sanction future expenditure. In the *Andrews* case (4) Lord Watson said,

“The question is not what decree would the appellants be entitled to demand, if they were beneficiaries under a private trust, but what course is, *tota re perspecta*, best for the interest of the school”.

It is obvious that in the instant case certain initial expenses will be incurred before the school gets going, and it is clearly unlikely that to start with the fees from the pupils will be sufficient to meet the running expenses. To disallow this application in toto would be to prevent the purposes of the trust being carried out, and I make the order in the terms asked in (a), (b), (c) and (d) of the application already set out, but with the following qualifications. The powers given to the trustees by this order will only be effective to the end of May, 1960, which will be, I am told, one month after the end of the school financial year. If, as I apprehend they will, the trustees then still require assistance from the capital, they can move the court prior to the expiration of the order for its extension, and the court will review the matter in the light of the circumstances then pertaining. In any event the trustees should then move the court for consideration by the court whether the capital expended for purposes outside those authorised by the trust deed should be recouped from future income of the trust and if so in what manner; I do not feel that I am in a position at the present stage to make any decision as to this. The costs of this application will be paid out of the trust funds.

Order accordingly.

For the applicants, the trustees:

HC Walker

HC Walker, Dar-es-Salaam

For the Attorney-General:

GC Thornton (Crown Counsel, Tanganyika)

For the respondent:

R S Alexander v Saint Benoist Plantation Limited
(In Liquidation)
[1959] 1 EA 457 (CAN)

Division: Court of Appeal at Nairobi
Date of Judgment: 26 June 1959
Case Number: 23/1959
Before: Forbes V-P, Gould and Windham JJA
Sourced by: LawAfrica
Appeal from: H.M. Supreme Court of Kenya—Miles, J

[1] Company – Receiver – Remuneration – No remuneration agreed – Management and sale of plantation – Whether remuneration assessable on basis of quantum meruit – Whether there is any established practice for professional accountants to charge a specific percentage of price realised for assets sold.

Editor's Summary

The receiver and manager, appointed under a debenture, carried on the business of the respondent company for several months and then sold the company's main asset, a coffee plantation, for £190,000. No agreement had been made concerning the receiver's remuneration and the liquidator of the company disputed the amount claimed by the receiver, but when the sale price of the plantation was received, the liquidator consented to the receiver retaining about £10,000 thereof pending a decision of the court on the quantum of the receiver's remuneration. The receiver, after satisfying the debenture holder's claim, paid over to the liquidator the balance and brought an action to fix his remuneration, claiming five per cent. on the gross price realised on sale of the plantation and management fees and disbursements. The trial judge held that the remuneration must be assessed on the basis of quantum meruit and found there was an established practice amongst professional accountants to charge a percentage which was usually, but not invariably, five per cent. of the gross sum realised by the assets, plus a fee for management, but subject to the qualification that each case is considered on its merits. He awarded the receiver the management fee and disbursements claimed, a further sum for legal expenses and a fee of three per cent. on the sale price of the plantation. The receiver appealed on the ground that the trial judge had given insufficient weight to evidence that there is an established practice on the part of professional accountants to claim and be paid remuneration at the rate of five per cent. on the gross price realised on the assets sold.

Held – whilst there was evidence of an established practice that the remuneration of a receiver, in the absence of agreement, is a percentage of the gross assets realised and that percentage was usually five per cent., there was no fixed scale or rate and it was not possible to say that in fixing a fee calculated at the rate of three per cent. the trial judge had erred.

Appeal dismissed.

Cases referred to in judgment

- (1) *Brown v. Nairne* (1839), 9 C. & P. 204; 173 E.R. 803.
- (2) *Price v. The Hong Kong Tea Co.* (1861), 2 F. & F. 466; 175 E.R. 1144.
- (3) *Dale v. Croft*, 2 Beav. 288.
- (4) *Prior v. Bagster* (1887), 57 L.T. 760.

Judgment

Gould JA: read the following judgment of the court: This was an appeal from a judgment of the Supreme Court of Kenya in an action brought for the purpose of fixing the remuneration of the appellant as receiver and manager of property charged by a certain debenture issued by the respondent company to the National Bank of India. Upon completion of the hearing we dismissed the appeal and indicated that we would give brief written reasons for our decision and now proceed to do so.

The learned judge in the court below gave a brief history of the matter in the following passage of his judgment:

“The defendant, who is an incorporated member of the Institute of Chartered Accountants, was appointed receiver and manager by the bank on October 5, 1955.

“By contract dated December 8, 1955, the defendant sold the plaintiff company’s main asset, which was a coffee plantation known as St. Benoist Plantation, to a syndicate for a sum of £190,000. The defendant also carried on the business of the plaintiff company from the date of his appointment until December 8, 1955.

“In pursuance of an agreement with the liquidator, the defendant retained the sum of Shs. 195,721/90, and Shs. 4,000/- in respect of legal fees pending the decision on the question of his remuneration and disbursements, and paid over to the liquidator the sum of Shs. 630,272/64.

“The defendant claimed the sum of Shs. 195,721/90 in respect of receivership fees and disbursements. The plaintiffs claim that the sum retained by the defendant is excessive and unreasonable.

“In this case I am only concerned with the question of remuneration.

“In a letter of February 17, 1956 (No. 118) the defendant claimed:

- (1) £9,500 being five per cent. on the gross realisation of £190,000 for St. Benoist Plantation, and
- (2) Management fees from October 5, 1955, until December 8, 1955, at £20 per week amounting to £180.
- (3) Disbursements amounting to £106.1.90.”

No agreement had been made concerning the quantum or basis of the remuneration of the receiver and manager for his services.

The learned judge having considered the authorities and examined the evidence upon the matter came to the conclusion that the remuneration must be assessed upon a basis of quantum meruit and went on to say:

“The overwhelming weight of the evidence points to the fact that there has now become a well-established and well-recognised practice amongst professional accounts that the normal fee for a receivership and managership is a percentage usually, but not invariably, five per cent. on the gross amount of the assets realised, plus a fee for management, although there is no fixed scale and each case is considered on its merits. It is not a question of usage in the legal sense of the term, and Mr. Salter did not at any time use the word in connection with this practice. Applying that principle, it is necessary to examine the circumstances of the present receivership and managership to see whether five per cent. on the gross realisation is an unreasonable fee in the present case.”

After examining the evidence touching the facts of and surrounding the particular receivership the learned judge allowed the management fee (£180) and disbursements (£106.1.90) as claimed, together with £200 for legal expenses, but allowed for the receivership fee only a sum equal to three per cent. on £190,000 (£5,700) in lieu of the five per cent. (£9,500) claimed as above.

Counsel for the appellant did not contest that the approach of the learned judge in applying the principle of quantum meruit was the correct one. The memorandum of appeal contained the following three grounds:

- “1. That the learned trial judge failed to give due weight to the evidence of an established and well-known practice on the part of professional accountants, when appointed as receivers out of court, to claim and be paid remuneration for their services as such at the rate of five per cent. on gross receipts, in default of express agreement to the contrary.
- “2. That the learned trial judge erred in holding himself free, notwithstanding such practice as aforesaid, to assess the appellant’s remuneration in this case at any other rate or on any other basis.
- “3. That in the alternative (and without prejudice to para. 2 hereof), the learned trial judge erred in holding that remuneration at such rate as aforesaid was not just and reasonable in the particular circumstances of this case.”

Counsel argued the first two of these together and summarised them as follows:

“In determining quantum meruit evidence of practice may be so strong as to be conclusive. My submission is that that is the case here in respect of professional accountants appointed as receivers for debenture holders.”

He quoted para. 522 of Vol. 34 of Halsbury’s Laws of England (2nd Edn.), p. 461, of which the first part is as follows:

“When remuneration is due for work and labour done, but there is no special agreement as to the amount of such remuneration, the amount recoverable by the person employed is such a sum as is just and reasonable. If it can be established that a certain rate of remuneration is customary for a particular employment, that rate is accepted as just and reasonable.”

In support of his argument counsel relied upon *Brown v. Nairne* (1) (1839), 9 C. & P. 204; 173 E.R. 803. That was a case of shipping broker’s commission in which Alderson, B., said, in summing up (at p. 803 of the English Report):

“If you are satisfied that in point of fact it is the practice for brokers to be paid £5 per cent. on such a charter as this, you will find for the plaintiff for £50 more than has been paid into court. If you think that the practice is to pay 2½ per cent. on all charters, you will find for the defendant. If you think that there is no practice on the subject, you will find what is the amount that you think a reasonable remuneration to the broker in this case for his services;”

Pollock, C.B., made a similar pronouncement to a jury in *Price v. The Hong Kong Tea Company* (2) (1861), 2 F. & F. 466 (175 E.R. 1144), when he said at p. 1144 of the last-mentioned report:

“Both points are for you. And as to the first and principal one, the rate of charges, it is impossible to lay down any rule except this, that whenever a certain rate or way of charging is usual and general among the most large class of persons carrying on an employment, it may fairly be presumed to be just and reasonable.”

While we do not differ in any way from the principle of law implicit in the passages quoted above we do not read the judgment of the learned judge as finding that there was a firmly established practice that remuneration for receivership in cases of this type should be five per cent. of the gross receipts.

As appears from the passage from the judgment above quoted he found an established practice among professional accountants that the normal fee for a receivership and managership is a percentage of the gross proceeds of the assets realised; that the percentage was usually five per cent. but that there was no fixed scale and each case was considered on its merits. Had he considered that there was an established practice to charge five per cent. he would not have proceeded to examine the merits of this particular receivership and to assess an appropriate percentage. In arriving at his view that the proper course was to treat each case upon its own merits he considered the cases of *Dale v. Croft* (3), 2 Bev. 288, and *Prior v. Bagster* (4) (1887), 57 L.T. 760, and passages from Kerr on Receivers, The Law Relating to Bankruptcy Liquidations and Receiverships by C. A. Sales, The Rights and Duties of Liquidators, Trustees and Receivers by Rankin, Spicer and Pegler and Sproull on Accountants' Fees and Profits, as well as the evidence given before him. It is not necessary to repeat the extracts from the authorities and text-books above mentioned, which are set out in the judgment under appeal but, read as a whole, they appear fully to support the learned judge's conclusion.

As to the evidence given at the hearing, counsel for the appellant invited this court to come to its own conclusion; it was not a matter of a discretion in the learned judge in the court below; within the principles relating to appeal from a judge sitting alone it was a re-trial by this court on the evidence. We agree that no question of credibility arose at the trial and that therefore it was open to this court to arrive at a different conclusion if it considered that the learned judge had been in error upon his evaluation of the evidence. We were not, however, of that opinion.

It was conceded that there was little or no evidence to be had of any practice in Kenya of the kind relied upon. Reference was therefore made to the practice of English professional accountants and, while it does not seem particularly obvious that any practice developed in Kenya would necessarily be the same, no point was taken on behalf of the respondent on this question and we therefore do not have regard to it.

The main evidence on the subject of accountants' practice was given by Mr. S. R. Hogg of London, a man of the widest experience in receivership in various parts of the world. It is correct to say that Mr. Hogg stated that the general practice of English accountants was to charge five per cent. on the gross receipts for receiverships, but his evidence read as a whole, was not such as to lead to the conclusion that such a practice existed so settled and so general as to make it the only guide for a court to follow in deciding what was just and equitable. Perusal of the record of his evidence leads rather to the conclusion that the general practice is to agree to a fee and if, in so doing, five per cent. of the gross proceeds is taken as a "starting point" in the negotiations that does not of itself establish a charge of five per cent. as settled practice. Mr. Hogg in quoting specific instances did not quote any in which he had, without discussion of or reference to remuneration, sent in his bill for five per cent. and been paid without question. On the contrary he said,

"I always arrange my fee by discussion except when by order of the court it is fixed by the master".

Another passage in his evidence relied upon by counsel for the respondent was, "I agree each case is decided upon its merits and there is no fixed scale". This answer in cross-examination was, however, given after a passage at p. 37 of the text-book by Rankin, Spicer and Pegler (21st Edn.) had been read to him. As the particular passage was in a section dealing with receivers appointed by the court it may be that the witness' answer was intended to be so understood. Nevertheless he said later, and in no such context, "I agree each case is decided on its merits".

Brief reference may be made to the particular instances put forward by Mr. Hogg. One was from East Africa and related to the Dwa Plantations Ltd. The remuneration was fixed by the master from year to year having regard to the responsibility involved. The overall percentage approximated 3½ per cent. It seems a justifiable comment that if, as is suggested, a master fixes the remuneration of a receiver in his discretion, one would expect him to be influenced, if not guided, by a widespread and settled practice, such as is now urged upon the court, if it existed to such an extent as to be a guide to the court itself. The next two receiverships were those of Vivian Lloyd & Company and Hants and Sussex Motor Company and Associates. In both of those cases Mr. Hogg's remuneration was five per cent. of the gross takings but he said that "Both these fees were fixed by the bank at the close of the receiverships". In the case of Miles Aircraft Ltd. the total receipts were just over £1,000,000; Mr. Hogg agreed his fee with the bank at £20,000 or approximately two per cent. Two of these cases provide evidence that the five per cent. charge is sometimes just and reasonable just as the other two show clearly that it is not just and reasonable in every case. Mr. Hogg additionally said that he would in fixing his fee bear in mind the probable outcome, and that if it appeared to be disastrous to the appointer, he would, from his own goodwill, reduce his fee.

The other witnesses did not carry the matter much further though a passage from the evidence of Mr. A. Dunstan-Adams, who practised as an accountant in Nairobi until last year, is worthy of note. He said that a normal charge for a receivership would be five per cent. on the gross realisation but:

"They may accept a time basis or a straight fee or a lower percentage by agreement. There is nothing to prevent a professional accountant accepting a reduced fee or asking for more than the scale fee."

Mr. Dunstan-Adams also said that he would have made a voluntary reduction in the present case, but in that he differed from Mr. Hogg.

There appear to be three possibilities on the evidence. An accountant appointed receiver might make a specific agreement that his remuneration should be a percentage less than or exceeding five per centum; he might make a specific agreement that it should be five per centum or he might make no agreement at all. There was no specific evidence showing the comparative numbers of cases falling into each class, but the instances quoted by Mr. Hogg and the evidence generally did not incline us to the view that departures from the 5 per cent. rate (whether by agreement or "voluntary" reduction) were in the least rare. The onus being upon the party relying on the alleged practice to prove it we took the view that it had not been proved to be a practice of such a nature as should incline the court to deem it conclusive of what was just and equitable. We were therefore of opinion that the learned judge was correct in considering whether, upon the evidence, it was just and equitable to allow the remuneration, as claimed, at five per centum or to substitute some other rate.

Under ground 3 of the memorandum of appeal counsel for the appellant contested the correctness of the learned judge's finding on this aspect of the case. He submitted that in fixing the remuneration regard should have been had to the responsibility and difficulty of the receivership, the skill and status of the receiver and the outcome of the receivership. In his judgment the learned judge placed the question of difficulty in the forefront and examined it in great detail. In a way that question is linked with that of responsibility though counsel for the appellant submitted that the latter can be measured only by amount. The matters of skill and status and the outcome were before the learned judge and if they had appeared to him to be of consequence one way or the other he would no doubt have dealt with them. Having heard argument on the matter

we are of opinion that they are not in the circumstances of the case, of sufficient moment as to have a material influence on the decision.

The learned judge considered the time factor in deciding what was just and equitable and this has been made a matter of criticism. The major task of the receiver as such was to sell the only asset which was a coffee estate. It was argued that it did not matter how long it took to effect the sale and that there was advantage to the parties concerned if the sale was effected promptly. There is an element of weight in the last suggestion but we are not of opinion that the learned judge wrongly considered the matter of time. He did not put in the forefront as counsel for the appellant suggested—pride of place was given to the question of difficulty—but considered it as one factor. We are not of opinion that he was wrong, as surely the length of time spent in considering offers and bargaining with prospective buyers should have some influence upon the question of what remuneration is equitable. It is in fact related to the question of difficulty as it is some indication of the ease or otherwise with which a satisfactory offer has been obtained.

For the foregoing reasons we did not differ from the findings of or the remuneration assessed by the learned judge and we dismissed the appeal.

Appeal dismissed.

For the appellant:

Humphrey Slade and DF Shaylor
Buckley, Hollister & Co, Nairobi

For the respondent:

JPG Harris
Robson, Harris & Co, Nairobi

BEA Timber Co v Inder Singh Gill **[1959] 1 EA 463 (CAN)**

Division:	Court of Appeal at Nairobi
Date of Judgment:	10 June 1959
Case Number:	82/1958
Before:	Forbes V-P, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya—MacDuff, J

[1] *Practice – Appeal – Whether respondent must give notice of appeal when supporting decision appealed from on grounds different from those relied on by trial judge – Eastern African Court of Appeal*

Rules, 1954, r. 65 (1).

[2] Pleading – Amendment – Plaint amended without leave before service – Whether leave required – Civil Procedure (Revised) Rules, 1948, O. VI, r. 19 (K.).

[3] Fraud – Pleading – Facts which if proved amount to fraud pleaded – Whether fraudulent intent must be specifically alleged.

[4] Evidence – Admissibility – Letters written to and by party showing his state of mind – Whether admissible under Indian Evidence Act, 1872, s. 157.

[5] Fraud – Order of court obtained by half truth – Whether half truth can amount to fraud.

Editor's Summary

In 1952 the defendant, a landlord, applied to the Central Rent Control Board for vacant possession of certain business premises at Nairobi occupied by the plaintiff firm on the ground that the defendant required possession of the premises to enable reconstruction or rebuilding thereof to be carried out. In June, 1953, the board made an order for possession subject to the condition that the plaintiff firm should have a tenancy of part of the premises on completion of the reconstruction. The plaintiff firm duly vacated but the defendant instead of rebuilding sold the premises in December, 1953. In June, 1955, the plaintiff firm sued the defendant alleging that the order of the board was obtained by misrepresentation or concealment of material facts and principally that the defendant had concealed from the board his intention to sell the premises and certain negotiations for sale thereof. The plaintiff firm being unable to serve the defendant who was out of the jurisdiction, took other proceedings before the board against the defendant which had not concluded when the Increase of Rent (Restriction) Ordinance, 1949, ceased to apply to business premises. Thereupon the board held that it had no further jurisdiction. The plaint filed in 1955, was then amended to allege fraud specifically and was filed in June, 1956, and served on the defendant in July, 1956. In August, 1956, the defendant unsuccessfully moved the court to disallow the amendments. The defendant did not appeal but asked that the objection be reserved for argument in the event of appeal. Later the trial judge held that notwithstanding his suspicions regarding the evidence of and for the defendant, on a balance of probabilities the defendant intended to rebuild and the action accordingly failed. On appeal by the plaintiff firm counsel for the defendant sought to raise two preliminary issues, first, as to the amendments to the plaint and, secondly, that the amendment alleging fraud introduced a new cause of action which was barred by limitation at the time the amendment was made. On the merits it was submitted for the plaintiff firm that if the trial judge had considered the effect of one passage in the cross examination of the defendant, which apparently he had not, he would certainly have found for the plaintiff firm.

Held –

- (i) in view of s. 76 of the Civil Procedure Ordinance and s. 65 (1) of the Eastern African Court of Appeal Rules, 1954, the defendant, as respondent

in the appeal, was entitled without giving notice of cross-appeal to raise objections to the amendment of the plaint. *Attorney-General v. Block and Massada*, [1959] E.A. 180(C.A.) followed.

- (ii) O. VI, r. 19 allows an amendment to be made without leave at any time before the expiration of twenty-one days from the date specified in the summons for appearance and since the plaint had not even been served at the time of amendment the plaintiff firm was entitled to amend without leave.
- (iii) whilst the word “fraud” had not been used in the original plaint the alleged fraudulent acts were explicitly set out; these, if proved, were inconsistent with innocent misrepresentation and since fraud is a conclusion of law it was not necessary to allege specifically the fraudulent intent; accordingly, the amendment did not introduce a new allegation or a new cause of action; and since the original plaint was filed within two years as required by s. 5 (2) of the Limitation Ordinance, the plaintiff firm’s claim was not time barred.
- (iv) an alleged change of mind by the defendant at a material time is a relevant fact and letters written to and by him about two months before the board’s order of 24th June, 1953, were sufficiently proximate in time to be admissible under s. 157 of the Indian Evidence Act.
- (v) the trial judge did not sufficiently consider the passage in the defendant’s cross examination to the effect that he only intended to reconstruct the premises if it suited him; the order was obtained from the board by means of a half truth which in the circumstances amounted to a deliberate misrepresentation.

Appeal allowed. Decree of the Supreme Court and order of the Central Rent Control Board set aside. Order that judgment be entered for the plaintiff firm for damages to be assessed by the Supreme Court.

Cases referred to in judgment

- (1) *The Attorney-General v. Block and Massada*, [1959] E.A. 180 (C.A.).
- (2) *Queensland Insurance Co. Ltd. v. Omar Abdullah Baabad*, [1958] E.A. 621 (C.A.).
- (3) *Davy v. Garrett*, [1878] 7 Ch. 473.
- (4) *Thorne v. Smith*, [1947] 1 All E.R. 39; [1947] K.B. 307.
- (5) *Gillie v. Posho*, [1939] 2 All E.R. 196.

June 10. The following judgments were read:

Judgment

Forbes V-P: This is an appeal from a judgment of the Supreme Court of Kenya dated July 14, 1958, dismissing a claim by the appellant firm (the original plaintiff) against the respondent/defendant for the setting aside of an order of the Central Rent Control Board (hereinafter referred to as the board) and for damages on the ground that the order of the board had been obtained by fraud, misrepresentation and concealment of facts.

The broad facts of the case appear in the following extract from the judgment of the learned trial

judge:

“The plaintiff firm is a partnership of some five partners carrying on business in Nairobi as sawmillers and timber merchants. The defendant is concerned in a number of businesses but he comes in this action by virtue of his occupation as a property owner. The defendant was the lessee of four plots, Nos. 209/902/3, 4, 5 and 6, situate in Factory Street, Nairobi. He became the lessee of a block of land which included these plots, by way of assignment, about the year 1944. In 1937 the then lessee had sublet to the plaintiff firm a piece of land which was eventually sub-divided into six plots now known as Nos. 209/902/3, 4, 5, 6, 7 and 8. In or about

the year 1949, plots No. 7 and 8 were handed back to the defendant at his request. In the result then the remaining plots Nos. 3, 4, 5 and 6 continued to be sub-let to the plaintiff firm and were protected by the provisions of the Increase of Rent (Restriction) Ordinance, 1949. On November 25, 1952, the defendant applied to the Central Rent Control Board, Nairobi, for an order that the plaintiff firm deliver up to him vacant possession of the said premises on the ground, pursuant to s. 16 (i) (k) of the Ordinance, that he required possession of the premises to enable the reconstruction or rebuilding thereof to be carried out. On June 24, 1953, the board made an order that the plaintiff firm deliver up vacant possession of the premises within three months from the date of the order, with a condition that on completion of the reconstruction the plaintiff firm be taken back as a tenant of a designated part of the premises at a rent to be assessed by the board. Subsequently the plaintiff firm vacated the premises but instead of rebuilding or reconstructing those premises the defendant, on December 18, 1953, sold them to a Mr. T. M. Bell for a purchase price of Shs. 200,000/-."

The appellant firm alleged that the respondent obtained the order for possession

"by fraud and/or misrepresentation and/or the concealment of material facts",

and gave particulars in the plaint as follows:

"Both before and after the defendant's application to the said board for possession of the said premises, which was made in pursuance of s. 16 (1) (K.) of the Increase of Rent (Restriction) Ordinance, 1949, and filed on November 25, 1952, the defendant was negotiating for the sale of the said plot and buildings thereon with divers persons, and at the time of obtaining the said order the defendant had no intention of reconstructing or rebuilding the said premises. On the contrary, after obtaining the said order, the defendant entered into possession of the said premises and, instead of starting to reconstruct or rebuild the same in accordance with the order of the said board, proceeded with negotiations for the sale of the said property and finally sold the same on or about December 22, 1953, which sale was completed on or about February 4, 1954.

"The defendant concealed from the said board at all material times his intention to sell the said property, the said negotiations for its sale and the sale thereof."

Certain issues were settled by counsel, but the learned judge dealt with the matter on the basis set out in the following passage from his judgment:

"The action resolves itself into a common law action for deceit. There appears to be no dispute between learned counsel as to the law to be applied. The representation made by the defendant to the Central Rent Control Board was a representation as to the existence of an intention in the mind of the defendant. The representation must be shown to be false at the date when the representee altered his position on the faith thereof. In the case of a continuing representation the material date to which the falsity must be assigned is the date when the representation was acted upon and not the date when it was made. And if a representation is false when made but becomes true when acted upon it is then no misrepresentation (*Ship v. Crosskill*, (1870) 10 EQ. 73). Following those principles the question resolves itself into this—at the material date, that is the date of

the hearing of his application before the Central Rent Control Board on June 24, 1953, did the defendant in fact have no intention to reconstruct or rebuild the suit premises and did he fraudulently represent to the board that his intention was to reconstruct or rebuild the suit premises and secondly was it as a result of this fraudulent misrepresentation that the board made in his favour an order for vacant possession of the suit premises. The plaintiff firm alleges that the whole course of conduct of the defendant warrants a clear inference being drawn that this was the case. The defendant on the other hand says that while earlier he was attempting to sell the suit premises and while subsequent to his obtaining the order from the board he did in fact sell them, for a period which covered the material date his real intention was to rebuild."

After reviewing the evidence the learned judge reached the following conclusion:

"On the whole of the circumstances, in my view, the balance of probabilities fall on the side of the defendant's explanation of his intentions, and the reasons therefore, at the various dates being a correct one. Accordingly I find that his intention being to rebuild as at the date the Central Rent Control Board made its order the defendant did not fraudulently misrepresent his intention, at that date, to the board. In view of that finding the remaining issues do not arise."

Before dealing with the grounds of appeal set out in the memorandum of appeal, it is necessary to consider certain matters in the nature of preliminary issues. For this purpose it is necessary to set out shortly the history of the suit.

As already stated, the order of the board which is challenged was obtained on June 24, 1953. The original plaint was filed on June 21, 1955. An attempt to serve this plaint was made, but it was returned unserved as the respondent was then out of the jurisdiction. Apparently no further efforts to effect service were made for the time being, the reason for this being that other proceedings had also been commenced by the appellant firm against the respondent in respect of the same matter. These proceedings were before the board under s. 16 (8) of the Increase of Rent (Restriction) Ordinance, 1949 (hereinafter referred to as the Ordinance). Before these proceedings were determined by the board, the Ordinance ceased to apply to business premises, and the board thereupon held that it had no jurisdiction in the matter. This decision was challenged on appeal, first to the Supreme Court and then to this court. The decision of this court given on June 15, 1956, upheld the contention that the board had no jurisdiction. Upon this decision being given, certain amendments to the plaint were effected, and the amended plaint was filed on June 19, 1956. The plaint and amended plaint and a summons were served on the respondent on July 9, 1956. An appearance was entered on July 17, 1956. The amendments to the plaint consisted of the insertion of the words "fraud and/or" in para. 5, so that this paragraph now read:

"The defendant obtained the said order by fraud and/or misrepresentation and/or the concealment of material facts, as set out in the particulars hereunder:";

and the insertion of a new claim to relief in the prayer in the following terms: "(i) That the order of the said board be set aside." The particulars set out in para. 5 of the plaint remained unaltered and are in the terms set out earlier in this judgment.

On August 2, 1956, the respondent moved the court to disallow the amendments. This motion was dismissed with costs on November 26, 1956. The respondent did not appeal against this ruling, but there is a note on the record

that at the commencement of the hearing of the suit counsel for the respondent

“asks that objection in respect of which Rudd, J., gave ruling and which are now binding on this court be reserved for argument in event of appeal.”

Counsel for the respondent now seeks to raise before us his objections to the amendment of the plaint which were overruled by Rudd, J., counsel for the plaintiff firm submitted that though the point was reserved, as appears from the extract from the record set out above, there was in fact no appeal against the interlocutory order, nor has there been a cross-appeal, and that it is not now open to the respondent to take the objections.

I do not think this contention is sound. Sub-s. (1) of s. 76 of the Civil Procedure Ordinance (Cap. 5) provides:

“Save as otherwise expressly provided, no appeal shall lie from any order made by a court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.”

It is clear that the appellant firm could, in the memorandum of appeal, have challenged the correctness of the order of November 26, 1956; and I think it follows that it must be open to the respondent also to challenge the correctness of the order. So far as an appellant is concerned, his objection to an order must be set out in his memorandum of appeal if he is to take advantage of the section. The position of the respondent is, however, somewhat different. Rule 65 (1) of the Eastern African Court of Appeal Rules, 1954, provides *inter alia* that

“It shall not ordinarily be necessary for a respondent to give notice of appeal, but, if a respondent intends, upon the hearing of the appeal, to contend that the decision of the court below should be varied, he may . . . give notice of cross-appeal”,

and, in r. 65 (3), that if the respondent fails to give such notice within the time prescribed, he shall not, without the leave of the court, be allowed to contend on the hearing of the appeal that the decision of the court below should be varied. In a recent case (*The Attorney-General v. Block and Massada* (1), [1959] E.A. 180 (C.A.)), it was held

“that ‘the decision of the court below’ in r. 65 (3) of the rules of this court means the decision as embodied in the decree or order appealed against and not the grounds of that decision (or the decisions on the issues)”

and that a respondent is not obliged to give notice of cross-appeal where he seeks to support the “decision” of the court below on grounds other than those relied on by the trial judge. It appears to me that a decision on an interlocutory order, is, so far as a respondent is concerned, in a similar position to a decision on an issue, and that, in the present state of the rules of this court, it is not necessary for a respondent to give notice of cross-appeal if he seeks to support the decision of the court below on the ground, *inter alia*, of some “error, defect or irregularity” in an order. I am accordingly of opinion that in the instant case the respondent is entitled to raise before us his objections to the amendment of the plaint which were overruled in the order of November 26, 1956.

These objections were (a) that the amendments to the plaint had not been made within the period allowed for amendments without leave by O. 6, r. 19 of the Civil Procedure (Revised) Rules, 1948, and therefore should be struck out as they had been made without leave; and (b) that the amendments sought to introduce a new allegation of fraud and a claim for relief based on fraud;

that the amendments were made nearly three years after the cause of action arose; that the limitation period in respect of fraud is two years; and that therefore the amendments, if allowed, would operate to defeat accrued rights, and should accordingly be disallowed.

As regards the first objection, r. 19 of O. 6 reads as follows:

“19. A plaintiff may without leave amend his plaint once at any time within twenty-one days from the date specified in the summons for the appearance of or the entering of an appearance by the defendant; or, where a written statement of defence is filed, then within fourteen days from the filing of the written statement of defence or the last of such written statements.”

It was argued, both before the learned judge who heard the application and before us, that r. 19 limited the period within which an amendment without leave might be made to the twenty-one days running from the date specified in the summons for appearance, or the fourteen days running from the filing of the defence, as the case might be. The learned judge however, construed the rule as meaning that an amendment without leave might be made at any time before the expiration of twenty-one days from the date specified in the summons for appearance. I would respectfully agree. It would, in my view, be quite illogical to permit an amendment without leave within the period of twenty-one days following the date of or limited for appearance, and possibly within the twenty-one days before such date, and not permit amendment before the plaint has even been served. I can see no merit in the argument that in such case the plaint should be withdrawn and a new plaint filed. It seems to me that the object of the limitation laid down in the rule is to fix the latest date at which an amendment without leave may be effected. I derive support for this view from the decision of this court in *Queensland Insurance Co. Ltd. v. Omar Abdullah Baabad* (2), [1958] E.A. 621 (C.A.) where similar words in r. 7 of the Rules of Court (Proceedings in Arbitration) in relation to the lodgement of objections were held not to preclude the lodgement of objections before the commencement of the period specified. In my opinion the first objection should fail.

The second objection is more serious. The learned judge dealt with the matter as follows:

“In this case misrepresentation and concealment were originally pleaded and they are somewhat analogous to fraud. Further the particulars are unchanged. When the allegation of fraud was added the facts relied on as proving the allegation were unchanged. I think that subject to the question of limitation this is one of the cases in which an amendment pleading fraud to the extent that this is done in the amended plaint should be allowed. As to limitation: this would be a fatal bar to the amendment if a new allegation of fraud were made by it at a time when an action for fraud would have been barred. But I do not think the allegation is a new one. The particulars are unchanged. It remains to be seen whether they constitute fraud and whether they are proved, but they were there from the beginning of the suit and the plaintiff says he will claim that they constitute fraud. I do not think that in that event the suit would be barred. Fraud should be specifically pleaded, but if one took out a writ claiming damages for certain facts set out in the writ in terms complying with the recognised legal definition of fraud, say that stated in *Derry and Peek*, in that case I do not think the absence of the word fraud would mean that relief would not be given on the basis of fraud or that the suit was not a suit on the basis of fraud.”

For the respondent it was argued that the original plaint was clearly based on

the statutory cause of action contained in s. 16 (8) of the Ordinance; that fraud is not a necessary ingredient of a cause of action under that section, and that it was not pleaded and was not intended to be pleaded; that the amendment and the additional prayer introduce an entirely new cause of action based on deceit; and that such cause of action was barred by limitation at the date the amendment was made.

Although the wording used in para. 5 of the original plaintiff is very similar to the wording of s. 16 (8) of the Ordinance, I do not think it is to be inferred that the claim was made as a claim under that sub-section. On the face of the sub-section the statutory cause of action can be entertained only by the board, the coast board or the court, the latter being by definition a subordinate court of the first class. Since proceedings to enforce the statutory remedy had been commenced before the board, and the instant proceedings were alternative proceedings instituted in the Supreme Court, it seems clear that the object of these proceedings must have been to enforce a remedy other than the statutory remedy provided by s. 16 (8) of the Ordinance.

Nevertheless the question remains whether the amendments to the plaintiff can be allowed to stand. It is, of course, as stated by the learned judge, well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. Fraud, however, is a conclusion of law. If the facts alleged in the pleading are such as to create a fraud it is not necessary to allege the fraudulent intent. The acts alleged to be fraudulent must be set out, and then it should be stated that these acts were done fraudulently; but from the acts fraudulent intent may be inferred. (Kerr on Fraud and Mistake (7th Edn.) p. 644). In *Davy v. Garrett* (3), [1878] 7 Ch. 473 at p. 489 Thesiger, L.J., said:

“In the common law courts no rule was more clearly settled than that fraud must be distinctly alleged and as distinctly proved, and that it was not allowable to leave fraud to be inferred from the facts. It is said that a different rule prevailed in the Court of Chancery. I think that this cannot be correct. It may not be necessary in all cases to use the word ‘fraud’—indeed in one of the most ordinary cases it is not necessary. An allegation that the defendant made to the plaintiff representations on which he intended that the plaintiff to act, which representations were untrue, and known to the defendant to be untrue, is sufficient. The word ‘fraud’ is not used, but two expressions are used pointing at the state of mind of the defendant—that he intended the representations to be acted upon, and that he knew them to be untrue. It appears to me that a plaintiff is bound to show distinctly that he means to allege fraud. In the present case facts are alleged from which fraud might be inferred, but they are consistent with innocence. They were innocent acts in themselves, and it is not to be presumed that they were done with a fraudulent intention.”

The instant case seems to fall directly within the rule stated in *Davy v. Garrett* (3). The particulars given in the original plaintiff (which remain unchanged) allege, *inter alia*, that

“at the time of obtaining the said order the defendant had no intention of reconstructing or rebuilding the said premises”

and that

“the defendant concealed from the said board at all material times his intention to sell the said property.”

It appears to me that these allegations point clearly to the state of mind of the respondent and show that the appellant firm intended to allege fraud in the original plaintiff. The facts alleged are not consistent with innocent misrepresentation.

I am accordingly of opinion that the amendment to cl. 5 of the plaint does not introduce a new allegation of fraud or introduce a new cause of action.

As regards the amendment to the prayer, the new relief claimed is one to which the appellant firm would be entitled in an action for deceit (*Thorne v. Smith* (4), [1947] K.B. 307 at p. 311). As I have held that this is such an action there is no reason why the prayer should not be amended accordingly.

Accordingly I do not think that either of the amendments of the plaint can be said to deprive the respondent of accrued rights. The period of limitation applicable is two years (s. 5 (2) of the Limitation Ordinance (Cap. 11)), and the original plaint was filed within that period. I do not think the appellant firm's claim is barred by limitation, and I think the second objection to the amendments to the plaint should fail.

Before dealing with the issues raised in the memorandum of appeal there is another matter with which it is convenient to deal at this stage.

In the course of his argument for the appellant firm Mr. Salter submitted that certain letters, namely, a letter dated April 30, 1953, to the respondent from a "J. M. Manek", and the respondent's reply to such letter dated May 6, 1953, had been wrongly admitted in evidence. There was disagreement between counsel as to whether objection to the admissibility of these letters had been taken at the hearing, and the record itself is equivocal on the point, but I do not think it matters. The letters in question formed part of an agreed bundle of correspondence which was put in at the hearing, and, no doubt, was put in subject to questions of admissibility. Mr. Salter's original complaint, as I understand it, was that Manek, the writer of the letter, had not been called, nor had anyone else, to prove his signature, and at one point he stated that he would not have objected to the admissibility of the letters if Manek or someone to prove his signature had been called. Subsequently, however, Mr. Salter conceded that consent to an agreed bundle of correspondence obviated strict proof of the letters contained in the bundle, and therefore the letters in question could be used in evidence although Manek had not been called, if they would otherwise have been admissible, but he submitted then that the letters themselves were not admissible.

The letter of April 30, 1953, from Manek, omitting formal parts, reads as follows:

"Factory Street, Plots at Nairobi Nos. 902/3, 4, 5 and 6.

"I shall thank you to let me know if you are interested to sell your above plots, as I have a keen buyer at an attractive price of Shs. 250,000/-. I shall be glad to hear in the matter at an early date.

"Please treat this URGENT."

The reply, on May 6, 1953, states:

"Re Factory Street Plots Nairobi.

"I thank you for your offer of the 30th ultimo for my Factory Street, Nairobi plots. I do not now intend to sell these and wish to develop a Joinery Factory there."

Mr. Salter argued that the letters were not part of the *res gestae*, and that while letters against interest would be admissible, letters in favour would not be admissible unless part of the *res gestae*. The court had drawn attention to the case of *Gillie v. Posho Ltd.* (5), [1939] 2 All E.R. 196. Mr. Salter very properly informed the court that he understood that s. 157 of the Indian Evidence Act (which applies in Kenya) had not been brought to the attention of the Privy Council in that case, and that there had been some subsequent correspondence on the subject. He argued, however, that s. 157 of the

Evidence Act did not apply in the instant case since the material time here was June 24, and the letters had been written in April and early May, and that in other respects *Gillie v. Posho* (5) was an authority in his favour.

Section 157 of the Evidence Act reads as follows:

“157. In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.”

The section clearly admits evidence of previous consistent statements which would not be admissible under the English law of evidence. The section is not mentioned in the judgment in *Gillie v. Posho* (5) and I do not think that case can be taken as any authority in relation to the section. In the instant case I think the disputed letters are admissible under s. 157. In the circumstances of this case I do not think that “the fact” is limited to the question of the respondent’s state of mind on June 24. Bearing in mind that his original intention had been to sell, it is a relevant fact that shortly before June 24 that intention underwent a change. I think the disputed letters are sufficiently proximate to the alleged change of mind for them to be admissible.

I now come to the appeal itself. Three grounds of appeal are set out in the memorandum of appeal, but the substantial ground is an attack on the finding of fact of the court below. I do not think that it is seriously challenged that the learned judge’s view of the law applicable is correct, that the real issue in the case is the state of the respondent’s mind at June 24, 1953, the date of the order of the board, and that this issue is a question of fact. It is not necessary to set out again here all the evidence on which the parties relied at the trial. Briefly, it was to the effect that up to about April 23, 1953, i.e. before the board’s order, the respondent had been trying to sell the plots in question, and that some months after the board’s order, he did sell the plots. The appellant firm asked the court to draw the inference that he always did intend to sell, and, at the date of the board’s order, had no genuine intention to reconstruct. The evidence was carefully reviewed by the learned judge in the course of his judgment, and, as already remarked, he reached the conclusion that the balance of probabilities fell on the side of the respondent’s assertion that at the date of the order he did have a genuine intention to reconstruct.

There is, however, one passage in the evidence of the respondent himself which the learned judge does not mention in his judgment, and it is on this passage that the appellant firm principally relies. This passage occurs in the course of the cross-examination of the respondent, and it refers to the possibility of the respondent selling Gill House, Nairobi, of which he was the owner, to the Government of Kenya. It reads as follows:

“By May and June, 1953, I had arranged nothing about the sale of Gill House. I had a hope. On June 24, 1953, I still had a hope to sell Gill House. If I did not sell Gill House I would have wanted to sell these plots. This was position on June 24, 1953.”

It is clear from the evidence that at this stage the negotiations for the sale of Gill House to the Government which had been opened by the respondent were in the merest preliminary stage. The first paragraph of a letter dated May 22, 1953, written by a Mr. Butter, on behalf of the member for finance and development, to the respondent following on an interview between the respondent and Mr. Butter, reads as follows:

“With reference to your approach to this office, I am directed to inform you that the Government is prepared to enter into negotiations with a view

to seeing whether agreement can be reached on a price at which you would be prepared to sell Gill House to the Government. It must be understood that, if as a result of these negotiations, a price is agreed it will then be necessary for the matter to be considered by the planning committee, and in the event of the planning committee agreeing to make an allocation of funds for the purchase of Gill House, it will be necessary for the funds to be voted by the Legislative Council.”

It is also clear that at this time the respondent was under considerable financial pressure arising out of claims against him in respect of income tax, and that to meet the claims he had to dispose of some of his property. The contention for the appellant firm is that the respondent’s replies in cross-examination set out above disclose that at the date of the board’s order the respondent had no genuine intention to reconstruct; that at most he had a pious hope that he would be able to reach a satisfactory arrangement for the sale of Gill House, but that he had in contemplation throughout that the Gill House negotiations might be abortive and that in that event he would have to sell the plots; and that therefore the representation to the board that he wanted the premises for purposes of reconstruction was a fraudulent misrepresentation of the true position.

It is of course well established that an appellate court should not lightly differ from a finding of fact by a court of first instance and as a general rule should not interfere with such a finding unless it can be shown that the judge has drawn a wrong inference from the proved facts, or has misdirected himself on the facts, or has failed to take into account some material fact.

It does not appear from the judgment that the learned trial judge considered the effect of the passage from the respondent’s cross-examination which is set out above. The question is whether, if he had had regard to this evidence, he must have reached a conclusion in favour of the appellant firm. In my view he must have done so. He regarded the evidence of both the respondent and the respondent’s manager with considerable suspicion, and found as a fact, *inter alia*, that the respondent

“either personally, or through the agency of his manager, instituted proceedings before the board on the basis of a fraudulent mis-statement of intention and that for some months those proceedings were kept in being on the same basis.”

It was merely on a balance of probabilities that he found in favour of the respondent’s assertion that he had changed his mind before the date of the board’s order. But the above passage, as I read it, is a clear admission that on June 24, 1953, the respondent was alive to the fact that, to meet his financial obligations, he must sell either Gill House or the plots. No doubt he hoped to sell Gill House. But in the stage the Gill House negotiations had reached it could not possibly be said that there were grounds on which he could have a reasonable expectation that the outcome would be agreement on a sale at a price satisfactory to him. The most that can be said is that at the date of the board’s order he intended to reconstruct if he succeeded in selling Gill House, but not otherwise. But this is not what the board was told. The board was led to believe that the respondent had a genuine intention to reconstruct—not that he had an intention to reconstruct only if he did not have to sell, it being very probable that he would have to sell.

What it amounts to is this: that I do not seek to upset the learned judge’s finding that prior to the board’s order the respondent had changed his mind in regard to the future of the plots; but that I think the learned judge did not sufficiently consider, in the light of the respondent’s admission, just what the change of mind amounted to, and whether, in the light of his state of mind as

revealed by the admission, the representation to the board that he required the premises for reconstruction was fraudulent. The respondent's intention was not the formed and fixed intention to reconstruct which the board would require before making an order, but an intention to reconstruct if, and only if, when the time came it suited the respondent's interests. I think there can be no doubt that the order was obtained from the board by means of a half truth; and, in the circumstances of the case, I think the presentation of half the truth only to the board amounted to a misrepresentation of the facts. Further, in view of the respondent's previous conduct, I have no doubt that the misrepresentation was deliberate. Had the learned judge considered this aspect of the matter and taken into account the respondent's admission, I think he must have reached a similar conclusion.

I would accordingly hold that the appellant firm has established its allegation that the order of the board of June 24, 1953, was obtained by fraudulent misrepresentation. I would allow the appeal with costs, set aside the decree of the Supreme Court and substitute an order that the order of the board be set aside and that judgment be entered for the appellant firm for such damages as may be assessed by the Supreme Court. The case must be remitted to the Supreme Court for this purpose and I think the costs in the Supreme Court should be left to the discretion of the judge after the issue of quantum of damages has been decided. As regards costs in this court I would certify the case as being fit for two counsel.

Gould JA: I agree.

Windham JA: I also agree.

Appeal allowed. Decree of the Supreme Court and order of the Central Rent Control Board set aside. Order that judgment be entered for the plaintiff firm for damages to be assessed by the Supreme Court.

For the appellants:

CW Salter QC and US Kalsi

US Kalsi, Nairobi

For the respondent:

JM Nazareth QC and AE Hunter

Daly & Figgis, Nairobi

The Fort Hall Bakery Supply Co v Frederick Muigai Wangoe **[1959] 1 EA 474 (SCK)**

Division: HM Supreme Court of Kenya at Nairobi

Date of Judgment: 10 June 1959

Case Number: 974/1957

Before: Templeton J

Sourced by: LawAfrica

[1] *Business names – Registration of – Firm consisting of over twenty members trading for gain – Not registrable under Business Names Ordinance – Firm not registered under Companies Ordinance – Whether firm has legal existence – Companies Ordinance (Cap. 288), s. 338 (K.) – Registration of Business Names Ordinance, 1951, s. 11 (1) (K.).*

[2] *Practice – Action by unregistered firm consisting of over twenty members trading for gain – Existence of plaintiffs as a body not recognised in law – Whether action maintainable – Companies Ordinance (Cap. 288), s. 338 (K.) – Registration of Business Names Ordinance, 1951, s. 11 (1) (K.).*

[3] *Costs – Plaintiffs non-existent in law – Action struck out – Whether costs can be awarded.*

Editor's Summary

The plaintiffs brought an action for recovery of a certain sum of money from the defendant. During the hearing evidence disclosed that the plaintiffs were an association consisting of forty-five persons trading in partnership for gain and that the firm was not registered under the Registration of Business Names Ordinance. Counsel for the defendant thereupon submitted that the action was not properly before the court, that the association was illegal as s. 338 of the Companies Ordinance prohibited an association or partnership consisting of more than twenty persons formed for the purpose of business (other than banking) that has for its object the acquisition of gain unless it is registered as a company under the Ordinance, and that the court had no power to grant relief under the proviso to s. 11 (1) of the Registration of Business Names Ordinance.

Held –

- (i) the plaintiffs could not be recognised as having any legal existence, were incapable of maintaining the action and, therefore, the court would not allow the action to proceed.
- (ii) since a non-existent plaintiff can neither pay nor receive costs there could be no order as to costs.

Action struck out. No order as to costs.

Cases referred to in judgment

- (1) *Smith v. Anderson*, [1880] 15 Ch. 247.
- (2) *In Re Padstow Total Loss and Collision Assurance Association*, [1882] 20 Ch. 137.
- (3) *Banque International de Commerce de Petrograd v. Goukassaow*, [1923] 2 K.B. 682.

Judgment

Templeton J: This is an action brought in the name of “The Fort Hall Bakery Supply Company” as plaintiff for the recovery from the defendant of moneys alleged to be owing as a result of his failure to carry out the terms of his contract as manager of that company.

Before the close of the plaintiff's case it came to light that the Fort Hall Bakery Supply Company consists of forty-five persons trading in partnership and that the name of the firm has never been registered under the Registration of Business Names Ordinance (No. 48 of 1951). It was therefore submitted for the defendant that this action is not properly before the court and that the

court has no power to grant relief under the proviso to s. 11 (1) of the Ordinance by reason of s. 338 of the Companies Ordinance (Cap. 288) which prohibits partnerships of more than twenty members. Section 338 reads as follows:

“No company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any business (other than the business of banking) that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof, unless it is registered as a company under this Ordinance, or is formed in pursuance of some other Ordinance or of an Act of Parliament, or of letters patent.”

This section is almost identical with s. 434 (1) of the English 1948 Act, which in turn was taken from the Companies Act, 1862.

In *Smith v. Anderson* (1), [1880] 15 Ch. 247 Lord Justice James referring to this part of the Act said, at p. 273:

“The Act was intended, as it appears to me, to prevent the mischief arising from large trading undertakings being carried on by large fluctuating bodies, so that persons dealing with them did not know with whom they were contracting, and so might be put to great difficulty and expense, which was a public mischief to be repressed.”

These words are particularly appropriate here as it seems clear from the evidence that certain Asian traders who dealt with the Fort Hall Bakery Supply Company had not the slightest idea with whom they were contracting.

In the case of *In re Padstow Total Loss and Collision Assurance Association* (2), [1882] 20 Ch. 137 it was held by the Court of Appeal that although the business of the Association had not for its object the acquisition of gain by the Association, it had for its object the acquisition of gain by the individual members; that as it consisted of more than twenty members and was not registered, its formation was forbidden by the Companies Act, 1862, s. 4; and that the court, therefore, could not recognise it as having any legal existence. A reference to this case appears in Halsbury's Laws of England (3rd Edn.), Vol. 6, p. 794, para. 1061, where it is stated:

“Companies formed in contravention of the prohibition are illegal, and where such a company is formed, the law can take no cognizance of its existence except perhaps from a penal point of view.”

There is evidence that the Fort Hall Bakery Supply Company consists of more than twenty persons and that it carries on a business that has for its object the acquisition of gain by the individual members. It is not registered as a company under the Companies Ordinance or formed in pursuance of some other Ordinance or Act of Parliament or of letters patent. It cannot therefore be recognised as having any legal existence. In the words of Bankes, L.J., in *Banque Internationale de Commerce de Petrograd v. Goukassaow* (3), [1923] 2 K.B. 682 at p. 688:

“the party seeking to maintain the action is in the eye of our law no party at all but a mere name only, with no legal existence.”

A non-existent person cannot sue, and once the court is made aware that the plaintiff is non-existent, and therefore incapable of maintaining the action, it cannot allow the action to proceed.

The order of the court is that the action be struck out, as the alleged plaintiff has no existence. Since a non-existent plaintiff can neither pay nor receive costs there can be no order as to costs.

Action struck out. No order as to costs.

For the plaintiff:

SR Cockar

Cockar & Cockar, Nairobi

For the defendant:

RC de Souza

Stephen & Roche, Nairobi

Akerhielm and another v R De Mare and others
[1959] 1 EA 476 (PC)

Division:	Privy Council
Date of Judgment:	1 June 1959
Case Number:	8/1957
Before:	Lord Keith of Avonholm, Lord Jenkins and Mr L M D de Silva
Sourced by:	LawAfrica
Appeal from:	E.A.C.A. Civil Appeal No. 57 of 1955; H.M. Supreme Court of Kenya—Sir Owen Corrie, J

[1] Fraud – Company – Misrepresentation in circular letter – Subscriptions for shares obtained by misrepresentation – Action for deceit – Finding that defendant honestly believed statements made – Finding reversed on appeal – Whether appellate court justified in interfering with finding of trial judge on question of credibility.

[2] Appeal – Judge without jury – Finding as to credibility and honesty of defendant – Circumstances in which appellate court may interfere.

Editor's Summary

In 1947 the defendants issued a circular letter, inviting persons they knew, including the plaintiffs, to subscribe for shares in a company about to be formed, details of which were contained in an accompanying memorandum. Among those who subscribed for and were allotted shares were the plaintiffs. The company was duly incorporated, was not a success and when it was subsequently wound up, the members received nothing back. In 1951 the plaintiffs sued, alleging that three statements in the circular letter were false, and that the defendants knew the statements were false or had made the statements recklessly not caring whether they were true or false and the plaintiffs claimed damages for fraud. The first defendant's evidence at the trial was that the wording of the circular letter had been settled by the company's advocate, who, however, was not called as a witness at the trial by either side. The trial judge dismissed the action holding that, although two of the three statements were in fact untrue, the defendants honestly believed them to be true. On appeal by the plaintiffs this decision was reversed. The appellate court considered that the defendants should have called the advocate to support

their case, that an unfavourable inference should be drawn from their failure to do so, and that in any event one of the three statements must have been to the knowledge of the defendants untrue. The defendants then appealed contending *inter alia* that the appellate court had erred in taking the view that they should have called the advocate, or in drawing unfavourable inferences from their failure to do so.

Held –

- (i) in considering whether a person honestly believes a representation made by him to be true, the court should consider whether he believed the representation to be true in the sense in which he understood the statement made by him, albeit erroneously, when it was made, and not whether he believed the representation to be true in the sense assigned to it by the court on an objective consideration of its truth or falsity.
- (ii) this was not one of those exceptional cases in which an appellate court was justified in reversing the decision of a trial judge, founded upon the judge's opinion of the credibility of a witness, formed after seeing him and hearing his evidence; the question of credibility (of a witness charged with deceit) was vital, and the principle applied that where a defendant has been acquitted of fraud in a court of first instance, the decision in his favour should not be displaced on appeal, except on the clearest grounds.

[**Editorial Note:** For the judgment in the Court of Appeal, see (1956), 23 E.A.C.A. 214.]

Appeal allowed.

Cases referred to in judgment

- (1) *Derry v. Peek* (1889), 14 App. Cas. 337.
- (2) *Arnison v. Smith*, [1889] 41 Ch. 348.
- (3) *O'Rourke v. Darbishire*, [1920] A.C. 581.
- (4) *Angus v. Clifford*, [1891] 2 Ch. 449.
- (5) *Lees v. Tod*, 9 Rettie. 807.
- (6) *Hontestroom (S.S.) v. Durham Castle (S.S.)*, [1927] A.C. 37.
- (7) *Watt (or Thomas) v. Thomas*, [1947] 1 All E.R. 582; [1947] A.C. 484.
- (8) *Yuill v. Yuil*, [1945] 1 All E.R. 183; [1945] P. 15.
- (9) *Benmax v. Austin Motor Co. Ltd.*, [1955] 1 All E.R. 326; [1955] A.C. 370.
- (10) *Glasier v. Rolls*, [1889] 42 Ch. 436.

Judgment

Lord Jenkins: In this case the present respondents (hereinafter called the plaintiffs) brought an action in the Supreme Court of Kenya against the present appellants (hereinafter called the defendants) and one Eric Von Huth (who died after action brought) claiming damages in respect of certain alleged false and fraudulent misrepresentations contained in a circular letter dated February 24, 1948, and signed by the defendants and Von Huth, whereby the plaintiffs alleged themselves to have been induced to subscribe for shares in Dantile Ltd. (a company incorporated in Kenya on March 20, 1948) and by so subscribing to have suffered damage.

The plaintiff Rolf de Mare subscribed in cash for 500 ordinary shares of the company of Shs. 20/- each. The plaintiff Guy Magnus Alexander Faugust subscribed for 1,500 ordinary shares and 250 preference shares of Shs. 20/- each, and made over 500 of his ordinary shares by way of gift to his wife, the plaintiff Barbro Wilhelmina Elisabeth Faugust, who did not herself subscribe for any shares.

The company was formed with a view to the manufacture and sale in Kenya and elsewhere of tiles for use in bathrooms etc. of a type known as “cold process tiles” as distinct from the conventional baked or heat-treated type of tile. There appears to be no doubt that at the date of the circular letter “cold process” tiles were being successfully made and marketed in Denmark by way of substitute for the conventional type of tile, which since the war had been difficult or impossible to obtain, and that a method of making “cold process tiles” was the subject of protection under a patent application in Denmark the benefit of which was vested in a Danish company called Muritas A/S.

Unfortunately the company was not a success, its failure being mainly attributable to the reappearance on the market within a short time after its formation of adequate quantities of the conventional type of tile, and the consequent cessation of the demand which had previously existed for “cold process” tiles,

which were in truth no more than a war-time or post-war substitute for the normal article. In August, 1950, a Mr. Erik Seex (who gave evidence at the trial) was appointed as an Inspector to investigate the affairs of the company under the Kenya Companies Ordinance. His report led to the prosecution of the defendants and Von Huth for certain offences (not involving dishonesty) under the Ordinance. Later the company went into liquidation and it was found that the whole of the shareholders' money had been lost. In such circumstances it was natural that persons in the plaintiffs' position should look back with a somewhat jealous eye at any statements in regard to the

company's position and prospects made to them at the time when they subscribed for its shares.

The statements in the circular letter alleged by the plaintiffs in their plaint to constitute the false and fraudulent misrepresentations on which they relied were three in number, viz.:

- (a) "The tile has been produced and sold successfully in Denmark."
- (b) "We have procured the patent rights for most countries in Africa, India and Pakistan", and
- (c) "About one-third of the capital has already been subscribed in Denmark."

The plaint also charged the defendants with omitting to state in the circular letter that free shares were to be issued to the defendants as well as to other persons.

At the trial before Corrie J. representation (a) was admitted to be true and the complaint concerning the non-disclosure of the issue of "free shares" was found to have been based on a misunderstanding of the position as to shares issued for a consideration other than cash, and was dropped.

There thus remained to be dealt with by the learned judge representation (b) as to the patent rights and representation (c) as to "about one-third of the capital" having "already been subscribed in Denmark". The learned judge held that these representations were both untrue but that the defendants honestly believed them both to be true at the time when they were made. Accordingly, directing himself correctly as to the law applicable to these findings by reference to the principles stated in *Derry v. Peek* (1) (1889), 14 App. Cas. 337, he held that the plaintiffs had failed to make good their charges of fraudulent misrepresentation and by his judgment dated May 18, 1955, dismissed the action.

From that judgment the plaintiffs appealed to the Court of Appeal for Eastern Africa. In a judgment delivered by Briggs J.A., and concurred in by Sinclair V.P. and Bacon J.A. that court as to representation (b) hesitated to hold that it was false and declined to hold that it was made fraudulently; and as to representation (c) concurred with Corrie J.'s finding that it was untrue, but reversed his finding to the effect that the defendants honestly believed it to be true. Accordingly by the judgment of the Court of Appeal dated July 4, 1956, the appeal was allowed, and judgment was directed to be entered for the plaintiffs for damages assessed at the full amounts paid up on the shares subscribed for by them, on the footing that at the date of their allotment such shares were valueless.

The defendants now appeal from that judgment.

The appeal has been fully and elaborately argued, but the essential issues fall within a relatively small compass, and may be thus summarised:

The first question is whether the Court of Appeal were warranted in reopening Corrie J.'s finding to the effect that the defendants honestly believed representation (c) to be true; and if so whether the Court of Appeal, treating the matter as at large, were justified in concluding as they did that the defendants did not honestly so believe. A distinction is here to be observed between the first defendant Baron Akerhielm who gave evidence at the trial and the second defendant Mr. Ole Beyer who did not.

The second branch of this first question only arises if the defendants fail to secure a negative answer to the first.

The second question is whether the circumstances of the case are, as the plaintiffs contend, such as to warrant their lordships in reopening the concurrent findings of the trial judge and the Court of Appeal to the effect that the defendants honestly believed representation (b) to be true; and if so whether a finding to the effect that they did not honestly so believe would be justified on the facts.

If the defendants succeed on the first question in either of its branches, then the appeal must be allowed unless the plaintiffs succeed on both branches of the second question. All else failing, it is still open to the defendants to contend that the representations complained of were true or that they were immaterial and did not induce the plaintiffs' purchases of shares.

Finally, the defendants contend that even if the decision of the Court of Appeal is held to have been right in other respects the damages awarded by that court are excessive.

As to the facts, the plaintiffs and the defendants are, and Von Huth was, of Scandinavian origin.

In 1947 the plaintiffs and defendants were resident in Kenya. Von Huth who had formerly been so resident was living in Denmark where he had been for some years.

In 1947 Von Huth conceived the idea that the manufacture of cold process tiles might be profitably carried on in Kenya. He enlisted the co-operation of Mr. D. G. Stewart an accountant practising in Nairobi and opened negotiations with Muritas A/S with a view to obtain from them the requisite interest in their patent rights under the Danish patent application referred to above. These negotiations resulted in an agreement between Muritas A/S and Von Huth which must be referred to in some detail. By this agreement, which was dated November 29, 1947, and expressed to be made between Muritas A/S (thereinafter called "the Vendor") and Dantile East Africa Ltd., by Erik Von Huth (thereinafter called "the Purchaser") it was agreed (so far as material for present purposes) as follows:

I.

"The Vendor agrees to assign unto the Purchaser the sole right of exploitation within the territories (the countries, the governmental districts) of Kenya and Uganda in East Africa of the manufacturing of Muritas tiles which is patented in this country, with priority right, by the Vendor's application for Danish Letters Patent of November 5, 1946, No. 4330.

II.

"The Purchaser's right of exploitation shall be limited to the aforesaid two territories, within which he shall be entitled to manufacture, sell and advertise Murit glazing powder or Murit products of any kind, while the Purchaser must not in any other territory (country or governmental district) undertake any of the above mentioned acts before a special agreement concerning such exploitation has been entered into with the Vendor in regard to each territory (country or governmental district).

"However, the Purchaser shall be entitled to sell a quantity not exceeding 20,000 Murit tiles for the purpose of introducing the article in any other territory in which the Vendor has not advised the Purchaser that he has, by a final agreement, assigned the right of exploitation to a third party.

III.

"By an option on the right of exploitation of the Muritas patent in (1) Abyssinia, (2) Belgian Congo, (3) Madagascar, (4) Mozambique, (5) Nyasaland, (6) North Rhodesia, (7) South Rhodesia, (8) Southwest Africa, (9) Natal, (10) Transvaal-Oranje, (11) Cape Colony, (12) Tanganyika, (13) Zanzibar and (14) the Indian Empire with Ceylon, already given to third party, the Vendor is, until further, prevented from assigning to the Purchaser the right of exploitation in the aforesaid 14 territories. However, the Vendor declares himself to be willing, if the third party has not on or

before June 30, 1948, alternatively October 1, 1948, carried out his option by concluding a final agreement of exploitation, to give the Purchaser an option on the right of exploitation in all, respectively the remaining part of the 14 countries, for a consideration of £500.0.0 for each of the 11 countries mentioned above under 3–13 and £1,000.0.0 for each of the countries mentioned under (1) and (2), and £5,000.0.0 for No. 14, the Indian Empire and Ceylon together.

“However, in the event that a third party should acquire the right of exploitation for all, respectively part of the 14 countries, the Vendor shall bind himself to include in the final agreement drawn up in this respect, stipulations concerning a definite limitation of the right of exploitation within the countries in question, and concerning liquidated damages to be paid by such third party for manufacturing, selling or advertising the Murit products of such third party outside the countries in question, such liquidation damages to be not less than £250.0.0 for each of the 13 countries first mentioned, and £1,500.0.0 for (14) the Indian Empire and Ceylon; and to assign to the Purchaser the right to the said liquidated damages when the Purchaser to the Vendor establishes the possibility of the third party having exceeded his right of exploitation, and undertakes for his own account to collect the liquidated damages.

“In this connection, however, reservation shall also be made as to the right of effecting an introductory sale of not more than 20,000 tiles as outlined under II, par. 2.

VII.

“As consideration for the right of exploitation in the 2 countries mentioned in the Section II, the Purchaser shall (A) on signing this agreement pay to the Vendor a sum of Kroner 6,500.00 say six thousand five hundred kroner, the receipt whereof the Vendor hereby acknowledges, and (B) pay a corresponding amount of Kr.6,500.00 in shares in Dantile East Africa Ltd., converted into £ at the rate of Kr.20.00 to £1.

VIII.

“The Company of Dantile East Africa Ltd., is established by the Purchasers with a nominal capital of £10,000.0.0 say ten thousand pounds, of which amount £3,325 shall be paid in cash, or as far as concerns the amount due the Vendor according to Section VII (Kr.6,500.00 or £325.0.0) in other values.

“Dantile East Africa Ltd., shall be registered in Kenya, and the board of directors shall comprise Erik Von Huth, Ole Beyer, Danish Vice Consul and Baron Uno Akerhielm, the latter of whom, being the attorney of the Vendor on the board, shall represent the Vendor’s voting power.

“The said 3 members of the board shall jointly, and inclusive of the Vendor’s £325.0.0 shares mentioned in Section VII, hold 60% of the capital subscribed in Dantile East Africa Ltd.

“The remaining 40% shall be subscribed by Chartered Accountant D. G. Stewart, who shall himself be a member of the board of directors of the company together with his nominee.

X.

“On receipt of the first instalment of the consideration for the countries concerned, the Vendor shall bind himself immediately to extend the protection of his patent acquired by the application for Danish patent of

November 5, 1946, No. 4330, which is immediately valid for one year in all countries, to be valid for another year in all countries for which the said payment has been made by applying for a patent and thereupon expedite as much as possible the acquisition of the final patents in the same manner as the Vendor is already endeavouring to obtain a final Danish patent.

“All expenses incurred in connection with such extension must be borne by the Purchaser.”

Having secured this agreement Von Huth returned to Kenya and succeeded in interesting the defendants in his proposed tile-making company. It should be emphasised that this company had not yet been formed and that “Dantile East Africa Ltd.” referred to in the agreement of November 29, 1947, was merely the name provisionally given by Von Huth to the proposed new company, ultimately formed as “Dantile Ltd.”, with which the present case is concerned.

Points to note about this agreement are (i) that the sole right of exploitation given by cl. I was limited to Kenya and Uganda, (ii) that as regards the 14 other countries mentioned in cl. III all the Purchaser was given was an option to take up the right of exploitation in all or any of these countries on payment of the prices therein mentioned, totalling £12,500 in the event of the right being taken up in all of them, in addition to the payments in cash and shares provided for by cl. VII; and (iii) that the 14 countries mentioned in cl. III were subject to a prior option outstanding in a third party. The third party referred to in the singular was primarily Mr. Stewart, but a Mr. Alber appears to have been to some extent interested jointly with him. It appears that Mr. Stewart’s prior option was cleared off by an agreement under which he was to retain the option for South Africa to the exclusion of Von Huth and Dantile Ltd., while Dantile Ltd. was to take over his option for the rest of the 14 countries mentioned in the agreement of November 29, 1947. This arrangement would seem to have been made before the date of the circular letter by letters dated January 26 and 27, 1948, passing between the second defendant Ole Beyer and Mr. Stewart to the production of which the plaintiffs objected, but the existence of which is not now open to doubt. Mr. Albert’s interest was also got in, but it is not clear whether this transaction was actually completed before or after the date of the circular letter. Von Huth appears to have agreed orally with the defendants before the date of the circular letter to make over his interest to the company when formed, and to have confirmed this letter in writing. It is unnecessary to investigate these transactions in detail, as it is now reasonably plain that at the date of the circular letter the defendants and Von Huth had either got in or were satisfied that they were in a position to get in these prior interests so as to be able to make over to the company when formed the unencumbered benefit of the agreement of November 29, 1947.

Reference should next be made to the circular letter of February 24, 1948. The defendants and Von Huth appear to have collaborated in the production of this document and to have been assisted, to an extent not easy to assess, by a Mr. Hollister, a solicitor, who later became solicitor to the company when it had been formed. The circular letter was not an invitation to the public to subscribe for shares but was sent out to individuals by name. It was therefore not subject to the statutory requirements applicable to a prospectus. So far as material for the present purpose the circular letter was in these terms:

“Dantile Ltd., (in formation),

P.O. Box 412,

Nairobi.

24/2/48.

“Dear

“The undersigned are forming a Private Limited Company in Kenya for the purpose of producing a cold process tile used for bathrooms etc. The

tile has been produced and sold successfully in Denmark.

“We have procured the patent rights for most countries in Africa, India and Pakistan.

“About a third of the capital has already been subscribed in Denmark and the necessary machinery for the first unit has been purchased and is already on its way to Kenya and the machinery for the second unit is on order.

“We have realised from conversations that most of our Scandinavian friends are very interested in this project and anxious to subscribe some capital.

“For your information we enclose herewith a Memorandum showing the proposed formation of the Company and a statement of expected profit and loss account for the first year. Will you please let us know at your early convenience whether you wish to take up any shares.

“Any further information you may like to have will gladly be given by us at our offices—c/o Beyer’s (Kenya) Corporation, Kingsway Street, Nairobi.

“With kind regards,

Sgd. Baron Akerhielm.

Sgd. Ole Beyer.

Sgd. E. Von Huth.”

“Memorandum on Dantile Ltd.

(annexed to Circular Letter)

Strictly Private and Confidential not for Publication

Memorandum on Dantile Ltd.

Suggested Share Capital	Shs.	220,000.00
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To be divided into:

2,500 Six per cent Preference Shares at Shs. 20/- each	”	50,000.00
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8,500 Ordinary Shares at Shs. 20/- each	”	170,000.00
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	Shs.	220,000.00
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Already subscribed	”	70,000.00
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To be subscribed	”	150,000.00
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Directors:

Eric Von Huth (Danish) Nairobi.

Baron Uno Akerhielm (Swedish) Nairobi.

Ole Beyer (Danish) Nairobi.

Secretary:

Registered Office: Box 412, Nairobi.

Objects and Prospects:

“We further enclose a form of Subscription of the Shares, and should be grateful for your reply at an early date, as only a limited number of shares still are available.

“The Company has a contract with the patent holders in Denmark for the production rights of a tile used for bathrooms, kitchens, breweries, bakeries, fire places etc.

“Several factories are already existing in Denmark and paying a good dividend.

“The production of this tile is an entirely new invention, as the tiles are not burnt, but made by a cold process as specified in the contract with the patent holders.

“The tiles are sold in Denmark at 52 Ore per tile, whereas here in Kenya the suggested price has been put as low as 36 cents.

“This price can most likely be raised considerably.

“The purpose of the Company is further to produce anything as specified in the Memorandum and Articles of Association, (these are at your disposal in our office) but in principal the production of the above-mentioned tile.

“Besides the patent right for Kenya and Uganda, the Company holds the option for several other countries in Africa, India and Pakistan.

“These patent rights can either be taken up by the Company, or sold to other parties at considerable profit.

“Should the Company consider it advisable to start production in other countries, further capital would naturally be required and old share-holders will have priority in taking up these shares in proportion to shares already held.

Management

“The Company will be managed by the Directors, with Eric Von Huth as Manager and Accountant.

.....

Contract:

“A contract is held with the patent holders, A/S Muritas, Copenhagen, in the name of Dantile Ltd.,

Signed Uno Akerhielm. Eric Von Huth. Ole Beyer.”

It will be convenient to deal first with representation (b)—“We have procured the patent rights for most countries in Africa, India and Pakistan.”

This statement in the circular itself should be read in conjunction with the following passage in the attached memorandum:

“Besides the patent right for Kenya and Uganda, the Company holds the option for several other countries in Africa, India and Pakistan.

“These patent rights can either be taken up by the Company, or sold to other parties at considerable profit.”

Reference should also be made to the section headed “Contract.”

“Contract:

“A contract is held with the patent holders, A/S Muritas, Copenhagen, in the name of Dantile Ltd.”

On the question whether representation (b) was true or false, the trial judge said this:

“The position at the time when the Circular Letter was issued that under the agreement made on November 29, 1947, between Muritas A/S and Dantile

East Africa Limited, (exhibit 'E') Muritas had agreed to assign to Dantile the sole right of exploitation within the territories of Kenya and Uganda. There is no evidence that any attempt had then been made to register the patent rights in Kenya and Uganda; or indeed, to take the necessary preliminary step of registration in the United Kingdom. As far, therefore, as Kenya and Uganda are concerned, it was untrue to say that the defendants had procured the patent rights. No patent rights for Kenya or Uganda were then in existence.

"As regards the other African Territories and as regards India and Pakistan, according to the uncontradicted evidence of the 1st defendant, the option held by Mr. Von Huth and Mr. D. G. Stewart had been split; Mr. D. G. Stewart retained the sole right to exercise the option in respect of South African provinces mentioned in clause 3 of the agreement, and surrendered his right as regards the remaining territories mentioned in that clause to Dantile Limited, to whom also Mr. Von Huth had transferred his interests in the option.

"Assuming that this is a correct statement of the position at the time when the circular letter was issued, while it was clearly not the fact that the defendants had 'Procured the patent rights for most countries in Africa, India and Pakistan' as stated in the Circular letter, it was not untrue to say, as was stated in the attached memorandum, 'The company hold the option for several other countries in Africa, India and Pakistan.'"

In the Court of Appeal Briggs, J.A., reached a conclusion more favourable to the defendants on the question whether representation (b) was true or false. He said in regard to it:

"I turn now to the patent rights. As I have said, Muritas had filed an application for Danish letters patent in 1946. I presume that under the international convention this would have enabled them to register in the United Kingdom and so to obtain provisional protection in Kenya and Uganda. There is some evidence that they did instruct agents to apply for registration in the United Kingdom. There is no reason to suppose that letters patent were ever issued in Denmark or that registration was ever completed in the United Kingdom. There was certainly no registration at any material time in Kenya or Uganda. It is of course necessary to distinguish between 'patent rights' and 'letters patent' or 'a patent'. The respondents never claimed the latter: but the former phrase, though vague, must have some validity and meaning. If A says, 'I have the patent rights for Kenya', I think he must mean at least, 'There is somewhere a patent, or an application for patent, which I believe to be valid, and to be capable, by registration in the United Kingdom and Kenya, of being valid in Kenya: to this I hold by licence, or agreement or option for licence, the exclusive rights in respect of Kenya.' It may be objected that he means much more, in particular, that the original patent or application has already by registration been validated as regards Kenya and Uganda. This was the view which commended itself to the learned trial judge."

After a quotation from Corrie J's judgment on this point, Briggs J.A. continued:

"Under the rule in *Benmax v. Austin Motor Co. Ltd*, (1955) A. C. 370, I think we must form our own opinion on this question. Speaking for myself, I think that in a case of alleged fraud I might have been inclined to take a view more generous to the defendants, and to have found that the statement 'We have procured the patent rights for most countries in Africa, India and Pakistan' was not proved to be untrue as regards Kenya and Uganda, but on the view which I take of other issues it is not necessary

finally to answer this question. As regards other countries, the position is more complex.”

Then after discussing the company’s title to Mr. Stewart’s and Von Huth’s interests Briggs J.A. said this:

“The general effect of all this is, however, that there is good *prima facie* reason to suppose that all rights of Von Huth and Stewart under the prior option, except those in respect of South Africa, had become vested in Dantile Ltd. Without saying for a moment that that was proved, I think it is so probable that it would be impossible to say that the respondents did not honestly believe it to be the case, whether or not they so swore. For these reasons I should hesitate to hold that the second statement was false, and I should decline to hold that it was made fraudulently.”

Their lordships will return later in this judgment to Corrie J.’s conclusion to the effect that the defendants honestly believed representation (b) to be true and the evidence upon which that conclusion was based; but assuming, without deciding, that representation (b) was not wholly true, they may say at once that they see no sufficient reason for disturbing the concurrent findings of Corrie J. and the Court of Appeal in favour of the defendants on this point.

Before passing to the question whether representation (c) was true or false, it will be convenient to state the position at the date of the circular letter in regard to the shares to the nominal amount of Shs. 70,000/- referred to as “capital already subscribed” in the “specification of capital required” annexed to the circular letter, which obviously constituted the capital referred to as having “already been subscribed in Denmark” in the letter itself. It appears that a Danish resident named Dan Christensen had promised to subscribe in cash for shares to the nominal amount of Shs. 25,000/-; that the defendants and Von Huth had promised him an allotment of shares to the nominal amount of Shs. 3,500/- credited as fully paid up for services rendered in the formation of the company; and that under the agreement of November 29, 1947, the defendants and Von Huth had promised to allot Muritas A/S shares to the nominal amount of Shs. 6,500/- in part payment for the patent rights in respect of Kenya and Uganda. As to the total cost of Shs. 18,000/- attributed to the patent rights, Mr. Seex in his report Schedule II breaks this down into Shs. 6,500/- in cash and Shs. 6,500/- in shares (making Shs. 13,000/- in all) for Muritas A/S; Shs. 2,000/- in cash and Shs. 2,000/- in shares for Von Huth in respect of his interests in the patent rights; and Shs. 1,000/- in cash for Mr. Alber, which last item suggests Mr. Alber’s interest had been got in by the date of the circular letter, though the letter of March 23, 1948, hereafter referred to suggests the contrary. In Schedule I of his report Mr. Seex gives “particulars of preliminary expenses” which show allotments of the following amounts in shares credited as fully paid up: to Von Huth (Shs. 20,000/-), to the Baron (Shs. 5,000/-) and to Ole Beyer (Shs. 5,000/-), besides the allotment to Christensen of shares to the nominal amount of Shs. 3,500/- already referred to. Mr. Seex thus shows a total of shares to a nominal amount of Shs. 33,500/- issued to Von Huth and the defendants credited as fully paid up as part of the preliminary expenses, this figure being not far short of the Shs. 37,000/- for formation expenses included in the schedule of capital required annexed to the circular letter. The figures in the case are by no means easy to follow, but it appears plain that the statement that about one-third of the capital in the shape of the Shs. 70,000/- worth of shares referred to in the “Schedule of Capital Required” had already been subscribed in Denmark can only be justified as a statement of truth on the footing that the fully paid shares to be taken by Von Huth and the defendants could truly be so described.

On the question whether representation (c) was true or false, the plaintiffs’ main argument was to the effect that the word “subscribed” in the circular

letter meant “subscribed in cash” and in support of this proposition they relied on *Arnison v. Smith* (2), [1889] 41 Ch. 348. The learned trial judge rejected this contention in these words:

“If the phrase: ‘About a third of the capital has already been subscribed in Denmark’ stood alone, a reader might reasonably infer that this meant subscribed in cash. When, however, he turned to the second page of the ‘Memorandum on Dantile Limited’ attached to the circular letter, he would find the following under the heading ‘Specification of Capital Required’.”

Then, after reading the items totalling Shs. 70,000/- under that heading the learned judge continued:

“From this it is clear that the ‘Capital already Subscribed’ included shares issued for considerations other than cash; indeed upon the face of it, it would appear that it consisted entirely of such shares.

“If the plaintiffs had any doubt as to the meaning of these items they had only to enquire at the company’s offices. Actually, the 2nd plaintiff did go to the office and make enquiries before he signed his cheque for the purchase of shares in the company, but there is no evidence that he then made enquiries as to the capital subscribed in Denmark.

“The proposed capital of the company was Shs. 220,000/- of which, as shown in the memorandum, Shs. 70,000/- had already been subscribed. Thus the statement to which the plaintiffs object would be true, provided that the whole Shs. 70,000/- had, in fact, been subscribed in Denmark. This is an aspect of the matter upon which Mr. Salter has not laid any stress, but it is clearly important.

“The Register of Shareholders in Dantile Limited has been put in evidence as part of exhibit 5. In this register the names and addresses of all shareholders are entered, with the value in pounds of the shares allotted to them respectively.

“Upon examination of the register it will be noted that the only shareholders with addresses in Denmark are as follows:

Name	Total Value of Shares Held
Harold Dan Christensen	£1,425
A/S Muritas	£325
	<hr/> £1,750

“If to this amount there be added the value of the shares registered in the name of Eric Von Huth for services rendered by him in Denmark: £1,100, we arrive at a total of £2,850, that is to say Shs. 57,000/-: which falls short by more than Shs. 16,000/- of a third of the total capital of the company.

“On this ground I hold that the statement that ‘About a third of the capital has already been subscribed in Denmark’ was untrue.”

Briggs JA: in the Court of Appeal agreed that representation (c) did not mean that one-third of the capital had already been subscribed in cash, so that it could not be held false on the ground that the Shs. 70,000/- of capital referred to in the “Specification of Capital Required”, or some part of it, was in fact to be issued for consideration other than cash, but also agreed that it could not be said that the whole of this Shs. 70,000/- of capital was in fact to be subscribed “in Denmark”. Representation (c) was thus held false on the narrow ground that while the representation as to the amount of capital already

subscribed was correct the representation that this amount had already been subscribed “in Denmark” was untrue.

Their lordships agree on both points. It seems to them impossible to maintain that the defendants and Von Huth could not consistently with the representation pay (for example) the formation expenses by allotting fully paid shares of the appropriate nominal amount to the persons to whom the expenses were payable instead of issuing shares to a like nominal amount for cash and paying the cash so raised to those persons, or by allotting fully paid shares to the appropriate nominal amounts to Muritas A/S or Von Huth in respect of the patent rights. On the other hand their lordships cannot regard the words “subscribed in Denmark” as apt, according to their ordinary meaning, to include shares allotted as fully paid to persons resident in Kenya for services rendered in Denmark in connection with the formation of the company.

The only witness called on the defendants’ side was the Baron, and accordingly the question whether the defendants honestly believed representations (*b*) and (*c*) or either of them to be true depended before the learned trial judge not only on the content of the Baron’s evidence but also in great measure on the view formed by the learned trial judge of the Baron’s credibility as a witness and honesty as a man, after seeing and hearing him give his evidence.

The Baron was examined and cross-examined at considerable length, and reference to his evidence must perforce be selective.

The following passages are taken from his examination in chief:

“Q. Now before we do anything else, I want you to tell my lord the exchange rate between kroner and the East African shilling or pound in 1947 and explain fully what you say? A. In 1947 or 1948 the exchange rate was 19.38 to the pound.

“Q. Now what does that mean in terms of per cent? A. 3.1%. It depends if you are buying or selling. 19.38 buyers, 19.36 sellers.

“Q. And an exchange rate of 1,500 kroner at 3.1%? A. Approximately 48,500 kroner carries an exchange rate for East African shillings of Shs. 1,500/-. Those two figures added together make a total of Shs. 50,000/-.

“Q. And if one adds another Shs. 20,000/- on to that the sum becomes Shs. 70,000/-? A. Agreed.

“Q. Now would you tell his lordship why Shs. 20,000/- carried no exchange? A. I know Eric Von Huth asked for 20,000 kroner for his work in Denmark. Mr. Eric Mr. Von Huth was given Shs. 20,000/- in shares; the work was done in Denmark, so the company saved the exchange.

“Q. And this Shs. 48,500/- which carried the exchange was that money or services in Denmark? A. It was machinery and money invested in Denmark.”

.....

“Q. What did he [i.e. Von Huth] tell you if anything about licences and patents? A. He showed me all the different contracts and licences; and also showed me an application from Muritas written to the English Patent, some bureau . . .”

.....

“Q. Now before you sent out the letters, had you received any financial support from anywhere? A. From a person or the company?

“Q. Either. A. Yes, the company had received payment from Mr. Dan Christensen in Denmark.

“Q. Was it the company in formation? A. Yes.

- “Q. And perhaps you might tell us at this stage, did you yourself invest money in this concern? A. Yes.
- “Q. I again think it is admitted by a plaintiff witness: it was £500. A. It is only £400 in the books, but I actually paid £500 in cash.
- “Q. Did you do any work in connection with this company or did you leave it to others? A. I did all the work myself.
- “Q. And we know that you did in fact receive a certain allotment of shares without cash consideration? A. I did.
- “Q. Did you get any cash payment for the work which you told his lordship you did? A. No.
- “Q. And the letters as you call them; were the letters sent out to friends? A. That is correct.
- “Q. Were they all Scandinavians? A. Yes.”

.....

- “Q. . . . Now this letter to the subscribers did you draft it yourself, or who? A. It was very likely drafted by us and I gave it to Mr. Hollister for his final draft.
- “Q. You did a rough draft and passed it on to Mr. Hollister and he did the final draft? A. Yes. He did all the contracts, all the letters and everything.
- “Q. And why did Mr. Hollister do this thing and not someone else? A. They wanted to be sure the letter was correct. Mr. Hollister was appointed the company’s lawyer.
- “Q. And when he put this thing in final draft, I suppose you and the other two read it over and signed it? A. Yes.
- “Q. And it did consist as we have heard of about five pages? A. Yes.
- “Q. And at the time when you signed it and sent it to these people, did you consider that anything in it was untrue? A. I did not.
- “Q. Do you even now consider that anything is untrue? A. There is nothing untrue.”

.....

- “Q. Did Mr. Ole Beyer get any shares for a consideration other than cash? A. He did, for his work done for the company.
- “Q. What sort of work did he do? Was it small, insignificant, substantial, easy or hard? A. He did all the secretarial work; there was quite a lot of it.
- “Q. And you heard Mr. Seex say that if Mr. Eric Von Huth spent a year in Denmark travelling around looking for factories and coming to Kenya, that Shs. 20,000/- worth of shares was a reasonable remuneration? A. I certainly agree with that.
- “Q. And do you agree that you got too much for the work you did? A. I do not think so.”

.....

- “Q. Now these three statements which are complained of in the plaintiffs’ plaint paragraph 4. (a) ‘The tile has been produced and sold successfully in Denmark’. Now what is your honest opinion about that statement? A. That it is quite true, my lord.
- “Q. When you say you believe it to be true, do you mean then or now, or both? A. Then and now.

“Q. (b) ‘We have procured the patent rights for most countries in Africa, India and Pakistan’. What is your honest opinion about that statement? A. Quite true statements, according to the information I had.

“Q. (c) ‘About a third of the capital has already been subscribed in Denmark’; What do you say about that statement? A. That is also quite true.”

.....

“Court: There is one point which I think arises at this stage. The witness has just said that the statement:

(b) ‘We have procured the patent rights for most countries in Africa, India and Pakistan’,

is perfectly true. So far, all I have seen with regard to the acquisition of patent rights is exhibit ‘E’ which relates only to Kenya and Uganda. I presume they are covered by the agreement with Mr. Eric Von Huth which I have not seen. A. It was, of course, the occasion of the patent rights. Exhibit ‘E’ sets out the amounts which Dantile would have to pay for the patent rights.

“Mr. Morgan: Was anything said on the other pages of the circular letter? A. It was mentioned on the second page that we had the option of these patent rights.

“Q. Whose wording was the wording of this circular; was it yours? A. It was the solicitor’s, I should think. It was drafted by us, but properly written by our solicitor, Mr. Hollister.

“Mr. Morgan: Your mother tongue, although you speak English is Swedish, isn’t it? A. Yes. Swedish, my lord.”

.....

“Q. Do you remember the expression ‘About one-third of the capital has been subscribed in Denmark’? A. I do.

“Q. From memory, and without looking at the memorandum does it say what sum was about one-third of the capital? A. About Shs. 70,000/-.

“Q. And again from memory, can you recall how that Shs. 70,000/- is made up? A. Roughly, I can. Part was for machinery and patent rights and part was Mr. Dan Christensen’s money; part work done by Mr. Eric Von Huth and part was exchange from money invested in Denmark.

“Q. Now to assist the court, is there any English or East African coin which is the approximate equivalent to kroner? What is the value of one kroner? A. I think it is 97 cents: about 3 per cent. difference for one shilling.

“Q. So Shs. 25,000/- would be about 25,000 kroner? A. Yes, there is about 3 per cent. difference.

“Q. And when you use the expression ‘about one-third of the capital has been subscribed in Denmark’ what did you intend to convey? A. To convey that that money was actually subscribed. We had bought machinery; paid for services rendered and had cash for it; it was actually invested or subscribed in Denmark.”

.....

“Q. For what purpose did you go to Mr. Hollister? A. For the purpose of getting everything straight before starting the company.

“Q. Were you in fact relying upon your co-Directors or upon Mr. Hollister, or upon whom? A. I was relying on Mr. Hollister.”

- “Q. Now do you see on the next page ‘Amount of Capital required’? A. Yes.
- “Q. Do you know who prepared that particular page? A. It was prepared by Mr. Hollister.
- “Q. Do you know if he had any assistance from anyone? A. He might have had.
- “Q. And from whom do you think he would have had assistance? A. He would have figures from the books of the company.
- “Q. And who provided the books? A. Mr. Eric Von Huth.”

.....

The following passages are from the Baron’s cross-examination:

- “Q. When was Mr. Hollister appointed to act as legal adviser to the company? A. As early as possible the company started in formation.
- “Q. When was that? A. I can’t remember the exact date but the first time we visited him was the end of the year 1947.
- “Q. Is Mr. Hollister in Nairobi now? A. As far as I know, yes.
- “Q. Now, I think you told my lord in your evidence-in-chief, you said ‘I should think the wording of the circular was Mr. Hollister’s’. A. I can only take it that it came from Mr. Hollister’s office and we drafted what should be included in the circular, and then we sent it to him.
- “Q. So you, Mr. [name inaudible to shorthand writer] and Mr. Eric Von Huth sent a draft of what the circular should contain. A. We visited him and discussed the whole matter with him, after we had drafted certain points.
- “Q. Of course, Mr. Hollister could act only upon information and instructions received from you and the other two? A. No, he had all the papers, relevant patent rights, contracts and everything.
- “Q. What was the object of the draft? A. To get everything correctly.
- “Q. And did you tell Mr. Hollister that this tile had been produced and sold successfully in Denmark? A. Most likely.
- “Q. I want to know. A. He might have taken it from me or from the letters he received.
- “Q. Did you tell him that: ‘We have procured the patent rights for most countries in Africa, India and Pakistan’? A. I can’t tell for certain; he must have got that from the contracts.
- “Q. Do you say that you did not tell him that? A. I did not say so; I may have done so.
- “Q. Did you tell him: ‘About a third of the capital has already been subscribed in Denmark’? A. I might have done so.
- “Q. ‘and the necessary machinery for the first unit has been purchased and is already on its way to Kenya’? A. I might have done so.
- “Q. ‘and the machinery for the second unit is on order’? A. I might have done so.
- “Q. ‘We have realised from conversations that most of our Scandinavian friends are very interested in this project and anxious to subscribe some capital’? A. I might have done so.
- “Q. Well, he could not have got that from any document, could he? Are you trying to hide and shield yourself behind Mr. Hollister? A. I was only one of the parties at his office.

“Q. But you have accepted responsibility for every single word written in this document? A. I have, my lord.”

.....

“Q. I see. Now would you look at this letter dated March 23, 1948; the second paragraph; does he say this; part of it of course, deals with the patent register which I will come to later on; exhibit 8, a letter dated March 23, 1948, Mr. E. J. Hollister (of Dacre A. Shaw, Buckley & Hollister) to the secretary, Dantile Ltd. (in formation), the second paragraph reads: ‘We have searched the patent register here and the search revealed that so far no Muritas patents have been registered in this country, and we would suggest that you communicate with Muritas at the earliest possible moment and ask them to register their patents in England since English registration is essential prior to registration here’. Did you do that? A. It had already been registered in England.

“Q. This is your own advocate.

‘It is also necessary for Mr. Von Huth to write a letter to Dantile Ltd., whereby he agrees to transfer all or any of his rights with Muritas to Dantile Ltd. in consideration for shares in the company and his employment as a salaried manager. Also you should get in touch with Mr. Alber and he should write a letter to Dantile Ltd., agreeing to transfer any rights he may have with Muritas to the company in return for the shares he will receive of the purchase money paid on the transfer of the South African rights to Mr. Stewart’.

“A. That, as far as I remember is only a confirmation of a conversation we had already had.

“Mr. Salter: This letter exhibit ‘H’ was written presumably in pursuance of the advice in this letter of March 23? A. He transferred to Mr. Stewart previous to that letter.

“Q. I see. So your own advocate, upon your instructions and after discussions with him, was unaware of that? A. He might have been I can’t say.

“Mr. Salter: You have seen this letter?

“Mr. Morgan: He has already elicited the fact that Mr. Hollister was in Nairobi, and this is a letter from a man whom we all know. Can it be admissible?

“Court: Presumably the witness as a Director saw this letter?

“Witness: I do not think I have seen it previously; I have seen it now.

“Mr. Morgan: The hundred per cent. method of proving this would have been to call Mr. Hollister for the plaintiffs; he gave evidence for the prosecution in the criminal case. If Mr. Hollister is not going to be called how . . .

“Mr. Salter: It is, in my submission, wholly relevant.

“Mr. Morgan: Yes, but it is not admissible.

“Mr. Morgan: Although we may still think it is inadmissible we do not object to it going in.

“Exhibit 8: Letter dated March 23, 1948, Mr. E. J. Hollister to Dantile Ltd. (in formation) handed in and accepted by court as Ex. 8.”

.....

“Q. . . . From your circular, exhibit 2 did you not give the impression that you were forming a company to make and market an entirely new

type of tile and that you had obtained the rights to enable you to do so? A. In my opinion we did have the right.”

Their lordships would conclude their citations from the evidence by observing, first, that there was no cross-examination of the Baron as to the honesty of his belief in the truth of representation (c) that “about one third of the capital” had “already been subscribed in Denmark”, or the sense in which according to his evidence in chief he understood that statement; and, secondly, that on a perusal of the Baron’s evidence as a whole it is in their lordships’ judgment impossible to hold that there was no evidence upon which the trial judge and the Court of Appeal could find, as they did concurrently find, that the Baron honestly believed representation (b) as to the patent rights to be true, whether or not objectively considered it was wholly true.

The learned trial judge summarised the effect of the Baron’s evidence thus:

“The first defendant Baron Akerhielm has given evidence and has been examined and cross examined at considerable length. He stated: ‘We prepared the rough draft of the circular letter which was finally settled by Mr. Hollister, the company’s lawyer. We then signed it and I did not consider that anything in it was untrue’ . . . ‘It was quite true that the tile had been produced and sold in Denmark. As regards the patent rights, that was a true statement according to my information. It was also true that one third of the capital had been subscribed in Denmark’ . . . ‘I think the wording of the circular letter was settled by Mr. Hollister. We prepared the first draft’ . . . ‘I saw figures as to production costs and sales figures for one factory in Denmark’ . . . ‘I was relying upon Mr. Hollister to get everything straight. I knew nothing of patent procedure. Before the circular letter went out Mr. Hollister had all contracts, letters and agreements before him. The wording of the circular letter was Mr. Hollister’s and I was satisfied with it’ . . . ‘The “Specification of Capital Required” was prepared by Mr. Hollister with assistance from Mr. Von Huth’.”

The learned judge went on to observe that the plaintiffs had put in evidence the letter of March 23, 1948, from Mr. Hollister which had been put to the Baron in cross-examination, as set out above, read the material part of that letter and continued:

“In view of the terms of this paragraph it is somewhat surprising that rather more than a month earlier Mr. Hollister, an advocate, should have approved of the terms of the circular letter. Mr. Hollister, however, has not been called to say that he did not approve and the evidence of Baron Akerhielm in this respect stands uncontradicted.

“Having heard the evidence of Baron Akerhielm, I am satisfied that he signed the circular letter in good faith, honestly believing that the terms of that letter and of the documents attached to it were true.

“The case as regards the third defendant Mr. Ole Beyer stands upon a different footing, as Mr. Beyer, though stated to be in Kenya at the time of the hearing of the action, has not seen fit to give evidence. There was, of course, no obligation upon Mr. Beyer to do so. It is for a plaintiff to prove his case and there is, in general, no reason for a defendant who is satisfied that the plaintiff’s case must fail, to give evidence on his own behalf.

“The circumstances of this action, however, are somewhat unusual. This is an action of deceit, which involves an allegation by the plaintiffs of fraud on the part of the defendants; and fraud in such a case, has no mere technical meaning, but involves moral turpitude. In such circumstances, it is surprising

that Mr. Beyer who occupied an official position, should not have been eager to come forward and deny the charges against him. In the absence of his evidence, the court has to determine whether the plaintiffs have made good their case against him.

“The case established by the plaintiffs is that two statements contained in the circular letter have been held by this court to be untrue. As against this, there is in favour of Mr. Beyer, Baron Akerhielm’s evidence that the terms of this circular letter and annexures were finally settled by Mr. Hollister, the company’s lawyer, who had all the contracts, letters and agreements before him. In such circumstances, Mr. Beyer was entitled to rely upon the accuracy of the wording of the circular letter and annexures as settled by Mr. Hollister, and honestly to believe that the statements contained in them were true; and the plaintiffs have failed to prove that he did not, in fact do so.

“The plaintiffs’ claim therefore, fails as against both defendants, and their action must be dismissed.”

In the Court of Appeal Briggs, J.A., said this with reference to the learned judge’s comment on the letter of March 23, 1948:

“It seems to have been accepted as true by the appellants that the respondents did consult Mr. Hollister as to the form of the letter and memorandum before sending them out, though there is no evidence of this other than the first respondent’s. It is remarkable that the minute book does not indicate this, though Mr. Hollister is frequently mentioned in other connections. The evidence of Mr. Seex, the accountant who was appointed by the court as an inspector to investigate the affairs of the company, is equivocal and may only mean that Mr. Hollister was consulted afterwards. However, I must accept that Mr. Hollister was consulted, and I shall assume that he did his duty in the matter as an honest and competent solicitor. There is no slightest reason to suppose the contrary, and even if there were it would be grossly unjust to act on any other assumption when Mr. Hollister has not given, and presumably has not had the opportunity to give evidence. It must be noted at once that the appellants could not usefully have called Mr. Hollister, since all the evidence they would have wished to obtain from him would have been excluded by privilege. The learned trial judge appears to have overlooked this and to have assumed that the appellants could have called Mr. Hollister, if they wished, to show that he was not responsible for the substance of the documents. I think with respect that this was a serious misdirection which goes to the root of the learned trial judge’s finding that the respondents acted innocently. In my view, it was for the respondents to call Mr. Hollister to support their case. They made no allegations against him, and if their case was true he would obviously have accepted responsibility for the form of the documents, and might have been able to show that the untrue statement resulted from some mistake or misunderstanding. He was available, and I think an inference unfavourable to the respondents could and should have been drawn from their failure to call him. In his absence, the evidence is that the respondents submitted a draft to him and he settled the final form. I am driven to the conclusion that the facts stated in the documents were facts supplied by the respondents and accepted by Mr. Hollister as their instructions to him. As regards the statement which I have found to be untrue, it is inconceivable to me that Mr. Hollister should have originated it. It was so clearly a matter which either was, or should have been within the clients knowledge that humanly speaking he must have relied on them for it. It was never expressly alleged that Mr. Hollister was the source of that statement, and I find as a fact that he was not, but that the respondents

were the source of the statement and responsible for it. In fact this was practically admitted, for when asked, 'Did you tell him: "About a third of the capital has already been subscribed in Denmark"?' the first respondent replied, 'I might have done so'. In cross-examination the first respondent further said that he accepted responsibility for the whole of the documents, that he was not trying to shelter behind Mr. Hollister, and that in his opinion and belief the statements of fact in the documents were true. Although the learned trial judge accepted this last statement and in the ordinary way I should be loath to differ from him, I think the validity of his finding is gravely impaired by his view of the issue concerning Mr. Hollister. I think we must form our own opinions of the respondents' mental state when they issued the false statement."

Accordingly the Court of Appeal, considering themselves as free on these grounds to go behind the learned judge's conclusion that the defendants honestly believed representation (c) to be true, based though it was (so far at all events as the Baron was concerned) essentially on his acceptance of the Baron as an honest man and a witness of truth after hearing and seeing the Baron give his evidence, proceeded without these advantages to form their own opinion upon this vital issue.

In their lordships' view the Court of Appeal erred in taking this course.

Their lordships cannot accept the view of the Court of Appeal that the trial judge's comment to the effect that Mr. Hollister had "not been called to say that he did not approve" and that "the evidence of" the Baron stood "uncontradicted" was a "serious misdirection" which went "to the root of the learned judge's finding that the respondents [i.e. the defendants] acted innocently."

It must be remembered that the letter of March 23, 1948, had been put to the Baron in cross-examination with a view to destroying the Baron's evidence that Mr. Hollister had approved the circular, on the ground that he could not have been writing like this on March 23, if he had in February approved what was said in the circular about the patent rights. A discussion arose as to the admissibility of the letter of March 23, in the course of which Mr. Morgan, for the defendants, said that "The hundred per cent. method of proving this would have been to call Mr. Hollister for the plaintiffs", adding that Mr. Hollister "gave evidence for the prosecution in the criminal case". The upshot of the discussion was that Mr. Morgan withdrew the objection to the letter being put in "although we may still think it inadmissible".

Read in conjunction with this passage, the learned judge's comment, on reading the letter of March 23, 1948, in the course of his judgment, really came to no more than this:

"It is surprising that Mr. Hollister should have written this letter in March if he had really approved what was said about the patent rights in the circular when it was settled in February; but if the plaintiffs were seeking to prove as part of their case that Mr. Hollister did not in fact approve the circular, their proper course was to call him to say he did not, and as they did not take that course the evidence of the Baron to the effect that Mr. Hollister did approve stands uncontradicted."

Their lordships see no misdirection here. It remained, of course, to consider, and the learned judge went on to consider, whether the uncontradicted evidence of the Baron should be accepted. Their lordships see no reason for assuming against the learned judge that in considering that question he failed to take into account the fact that the Baron's evidence, though uncontradicted, stood alone, whereas if his story was true there was no apparent reason why he should not have called Mr. Hollister to confirm it. If, taking this fact into consideration,

which he can hardly have failed to do, the learned judge nevertheless came to the conclusion that the Baron was an honest man and a witness of truth, it was his duty to find accordingly. Their lordships cannot accept the view that because Mr. Hollister was not called therefore the learned judge could not reasonably accept the evidence of the Baron as true, or the Baron as an honest man and a credible witness.

The view expressed by Briggs, J.A., to the effect that if Mr. Hollister had been called by the plaintiffs all the evidence they would have wished to obtain from him would have been excluded by privilege was not seriously maintained before their lordships. Mr. Willis for the plaintiffs in the course of his argument conceded that the charge of fraud in this case would probably destroy the privilege (see *O'Rourke v. Darbishire* (3), [1920] A.C. 581 at p. 604). Moreover, the privilege might have been waived by the defendants had Mr. Hollister been called by the plaintiffs; and over and above that, it seems to their lordships unrealistic to suppose that the privilege would have been insisted on by the defendants having regard to the suggestion made by their counsel in the course of the Baron's cross-examination that Mr. Hollister should be called.

Their lordships find the reasoning of the Court of Appeal on this part of the case difficult to follow.

First, it is to be observed that the passage in the learned trial judge's judgment in which he comments on Mr. Hollister's letter of March 23, 1948, is primarily related, by the context afforded by the letter itself, to the position in regard to the patent rights, and that the Court of Appeal (concurring in this respect with the learned judge) had themselves held earlier in their judgment that the representation regarding the patent rights, i.e. representation (b), was not made fraudulently, or in other words was made by the defendants in the honest belief that it was true. It seems strange that the stigma of dishonesty held by the Court of Appeal to attach to the Baron through his failure to call Hollister should apply to representation (c) but not to representation (b).

Briggs JA: said he "must accept that Mr. Hollister was consulted", and that he should "assume that he did his duty in the matter as an honest and competent solicitor." But surely these assumptions tend to support the defendants' case rather than destroy it. An honest and competent solicitor consulted in the preparation of a document such as the circular letter in the present case would do his best to see that its contents were accurate.

Briggs JA: after expressing the opinion that it was for the defendants to call Mr. Hollister to support their case, went on to say, a little later in his judgment, that he thought an inference unfavourable to the defendants could and should have been drawn from their failure to call him. What adverse inference had Briggs, J.A., in mind? It appears to their lordships that he can only have meant one of two things; either that the defendants went on and issued the circular containing representation (c) in the teeth of objections by Mr. Hollister, or that they misled Mr. Hollister by giving him the information comprised in representation (c) fraudulently and without any honest belief in its truth. Neither of these inferences appears to their lordships to be warranted.

Briggs JA: further said that the defendants and not Mr. Hollister must have been the source of and responsible for representation (c) (that about one third of the capital had already been subscribed in Denmark). But it was no part of the defendants' case that Mr. Hollister was responsible for this representation. Their case was that they, the defendants, made it, honestly believing when they made it that it was true.

Accordingly, their lordships are of opinion that neither the learned judge's comment on the plaintiffs'

omission to call Mr. Hollister nor the fact that Mr. Hollister was not called by the defendants afforded sufficient ground to

justify the Court of Appeal in reversing the trial judge's view formed after seeing and hearing the Baron give his evidence, that the Baron did honestly believe representation (c) to be true.

The conclusion which the Court of Appeal, on the footing that the matter was at large, thought fit to substitute for the conclusion reached by the learned judge is thus expressed in the judgment of Briggs, J.A.:

"I find that both respondents were well aware in February, 1948, that the only subscribers in view in Denmark were Christensen and Muritas, and that their subscriptions would not nearly cover the Shs. 70,000/- mentioned, or amount to about one-third of the capital of Shs. 220,000/-. I find that the untrue statement was made by both of them with knowledge that it was untrue. If, however, I am wrong in this, and in some remarkable way which I cannot envisage the respondents remained in ignorance of some of the relevant facts, I am of opinion that, having regard to their positions and opportunities of knowledge, they must have made the statement recklessly and careless whether it was true or false. That either of them ever believed it to be true I consider impossible."

On the assumption that contrary to their lordships' opinion the Court of Appeal were justified in substituting their own conclusion for that of the learned judge on the question of honest belief, the conclusion so substituted appears to their lordships to be open to the criticism that the Court of Appeal construed the language of representation (c) as they thought it should be construed according to the ordinary meaning of the words used, and having done so went on to hold that on the facts known to the defendants it was impossible that either of them could ever have believed the representation, as so construed, to be true. Their lordships regard this as a wrong method of approach. The question is not whether the defendant in any given case honestly believed the representation to be true in the sense assigned to it by the court on an objective consideration of its truth or falsity, but whether he honestly believed the representation to be true in the sense in which he understood it albeit erroneously when it was made. This general proposition is no doubt subject to limitations. For instance the meaning placed by the defendant on the representation made may be so far removed from the sense in which it would be understood by any reasonable person as to make it impossible to hold that the defendant honestly understood the representation to bear the meaning claimed by him and honestly believed it in that sense to be true. But that is not this case. It cannot be said that representation (c) could not have been understood by any reasonable person in the sense attributed to it by the Baron in his evidence, or that it was impossible that he should honestly have understood it in that sense, and honestly believed it in that sense to be true. He gave evidence to the effect that he did understand representation (c) in that sense, and did honestly understand it in that sense to be true, and was not cross-examined in either of those points. (For the general proposition that regard must be had to the sense in which a representation is understood by the person making it, see *Derry v. Peek* (1), *Angus v. Clifford* (4), [1891] 2 Ch. 449, *Lees v. Tod* (5), 9 *Rettie* 807 at p. 854, which authorities must in their lordships' view be preferred to *Arnison v. Smith* (2) so far as inconsistent with them).

But this aspect of the matter need be pursued no further. Suffice it to say that their lordships are satisfied that this is not one of those exceptional cases in which an appellate court is justified in reversing the decision of a judge at first instance when the decision under review is founded upon the judge's opinion of the credibility of a witness formed after seeing and hearing him give his evidence (see as to this *Hontestroom (S.S.) v. Durham Castle (S.S.)* (6), [1927] A.C. 37, *Watt (or Thomas) v. Thomas* (7), [1947] A.C. 484, *Yuill v. Yuill* (8), [1945] P. 15 at p. 19, *Benmax v. Austin Motor Co. Ltd.* (9), [1955]

A.C. 370). Their lordships can hardly imagine a case in which the credibility of a witness could be more vital than a case like the present where the claim is based on deceit, and the witness in question is one of the defendants charged with deceit. Their lordships would add that they accept, and would apply in the present case, the principle that where a defendant has been acquitted of fraud in a court of first instance the decision in his favour should not be displaced on appeal except on the clearest grounds (see *Glasier v. Rolls* (10), [1889] 42 Ch. 436, at p. 457).

For all these reasons their lordships are of opinion that the Baron should succeed in this appeal.

The case against the second defendant, Mr. Ole Beyer, is, as the learned judge pointed out, on a different footing, in that he did not give evidence. He is, however, entitled to rely on the evidence of the Baron and its acceptance as establishing the Baron's honest belief in the truth of representation (c). He is also entitled to rely on the fact that Mr. Hollister was consulted. It is improbable that if the Baron was honest Mr. Beyer was fraudulent in the common enterprise in which they were both engaged. The Baron signed the circular honestly believing its contents to be true, and the reasonable inference is that Mr. Beyer signed it in the same frame of mind. It is improbable that if Mr. Beyer had any fraudulent intent in this matter he any more than the Baron would have employed a solicitor, unless indeed he had it in mind to deceive the solicitor as well as the recipients of the circular. Moreover, according to the Baron's evidence, the figures were supplied by Von Huth. In all the circumstances their lordships see no sufficient reason for differing from the learned judge in his conclusion that the case against Mr. Beyer had not been made out.

Accordingly their lordships are of opinion that in his case also the appeal should succeed.

The views their lordships have formed on the other aspects of the case make it unnecessary for them to express any opinion on the question whether representation (c) was a material representation whereby the plaintiffs were induced to subscribe for shares in the company. But they should perhaps add that the words "in Denmark" in representation (c) are in their view on the very fringe of materiality, and that they would hesitate to hold on the evidence that either of the first two plaintiffs should be taken to have been induced by those words to subscribe for shares in the absence of any statement to that effect in their evidence. The third plaintiff who said that she did attach importance to those words did not in fact subscribe, but received her shares by way of gift from her husband the second plaintiff.

For the reasons above stated their lordships will humbly advise Her Majesty that this appeal should be allowed, the judgment of the Court of Appeal for Eastern Africa set aside and the judgment of the Supreme Court of Kenya restored. The respondents must pay the costs of this appeal and the appeal to the Court of Appeal for Eastern Africa.

Appeal allowed.

For the appellants:

HAP Fisher (of the English bar)

Clifford-Turner & Co, London

For the respondents:

R Willis (of the English bar)

Gordon Dadds & Co, London

The Administrator-General, Zanzibar v K M Meghji and others
[1959] 1 EA 498 (HCZ)

Division: HM High Court for Zanzibar at Zanzibar
Date of Judgment: 27 May 1959
Case Number: 54/1958 (O.S.)
Before: Horsfall J
Sourced by: LawAfrica

[1] Administration of estates – Partition – Application by Administrator-General for directions either to vest or partition property among heirs – Whether court has power to order partition except on beneficiary's application – Administrator-General's Decree (Cap. 12), s. 17 (Z.) – Succession Decree (Cap. 13), s. 7, s. 179 and s. 264 (Z.) – Indian Probate and Administration Act, 1881 – Rules of Court, 1922 to 1934, r. 33 (Z.).

Editor's Summary

The Administrator-General took out an originating summons to determine whether a shamba belonging to the deceased should be partitioned among or vested in the heirs in undivided shares. By s. 17 of the Administrator-General's Decree the court has power to order a partition on the application of any person beneficially interested in any immoveable property vested in the Administrator-General, if the court is satisfied that partition would be beneficial to all persons interested. Of the seven heirs concerned, one wrote from Pakistan to the Administrator-General offering to surrender his share for equal distribution between his brothers and sisters, another claimed partition on the grounds that partition was an indisputable right by Mohamedan law, whilst the other five heirs expressed no wishes whatsoever.

Held –

- (i) the Administrator-General is not a person beneficially interested within s. 17 of the Administrator-General's Decree and accordingly the court was not entitled to make an order for partition on his application.
- (ii) in the circumstances the share of the heir in Pakistan should be paid to him in cash and the shamba should be vested in the remaining heirs who could then partition it among themselves, in accordance with their personal law, if they so wished.

Order accordingly.

Judgment

Horsfall J: Section 17 of the Administrator-General's Decree (Cap. 12) permits the court to order a partition on the application of any person beneficially interested in any immoveable property vested in the Administrator-General if the court is satisfied that such partition would be beneficial to all persons

interested. These proceedings are brought by the Administrator-General by way of originating summons under r. 33 (g) of the Rules of Court, 1922 to 1934 (p. 162 of Vol. IV Law of Zanzibar) which provides for the determination of any question arising in the administration of an estate. Accordingly I do not think that this court has jurisdiction to make an order for partition pursuant to s. 17 of the Administrator-General's Decree, as these proceedings are brought by the Administrator-General who is not a person beneficially interested.

At the hearing Mr. Walshe for the Administrator-General stated that he was not seeking an order for the sale of the deceased's shamba but that the substantial question for decision was whether the shamba should be vested in

the heirs in undivided shares or partitioned. I consider that these questions still remain open for my decision under the summons, which in para. (3) requests the determination of the comprehensive question:

“Why such further or other order should not be made providing for the winding up of the deceased’s estate . . .”

Heirs Nos. 1 to 5 have been served with notice of these proceedings but have never attended court to ventilate their wishes. Heir No. 6 was served outside the jurisdiction in Pakistan and by para. 4 of his letter dated February 13, 1959, to the Administrator-General offered to surrender his share in the estate for equal distribution among his brothers and sisters. He has left it ambiguous whether he expects to be compensated for his offer. Heir No. 7, who was represented by Mr. Lakha, requests a partition and urges that partition is an indisputable right in Mohamedan law. He quotes the Hedaya at p. 569. It is admitted that the personal law of all parties is Shia Mohamedan law. Mr. Walshe has urged that the shamba is valued at only Shs. 4,220/-, that it is too small for fragmentation among six persons, that there is a small house on the shamba and the expenses, particularly if the heirs do not agree on their respective shares, may be heavy.

If Mr. Lakha is right that his client has an indisputable right in Mohamedan law to require a partition then I must decide this matter in the light of the Mohamedan law relating to partition. However s. 7 of the Succession Decree (Cap. 13) reads:

“Subject to the provision of parts XXIX to XLI of this Decree Hindus, Mohammedans, Buddhists and exempted persons shall be governed, in matters relating to inheritance, by the personal law to which they are subject.”

See also D. F. Mulla’s Principles of Mohamedan Law, (7th Edn.), para. 30:

“The executor or administrator, as the case may be, of a deceased Mohamedan is under the provisions of the Probate and Administration Act, 1881, (Indian) his legal representative for all the purposes, and all the property of the deceased vests in him as such.”

Mr. Walshe has cited to me William’s on Executors (12th Edn.), Vol. 1, p. 586 to the effect that executors in England had no power to partition before 1926 in support of his argument that s. 264 of the Succession Decree does not confer power on executors in Zanzibar to partition. Section 264 is contained in Part XXXIII of the Decree.

This estate is now vested in the Administrator-General. Section 264 of Cap. 13 provides that an executor or administrator has, subject to the provisions of that section, power to dispose, as he thinks fit, of all or any of the property for the time being vested in him under s. 179. In my view it would be wrong for the court to order the Administrator-General to partition this shamba against his better judgment. I order that this shamba be vested in heirs Nos. 1 to 5 and No. 7 in undivided shares in the proportion of two shares to a male and one to a female. Subsequently if they wish to do so, they can in accordance with their personal law partition it among themselves. The share of heir No. 6 in the estate should be paid to him in cash. The balance of cash in the hands of the Administrator-General will be distributed among heirs Nos. 1 to 5 and No. 7 according to their Koranic shares.

Costs to come out of the estate, both as to the Administrator-General and Mr. Lakha for heir No. 7.

Order accordingly.

For the applicant:

Stephen Walshe (Assistant Administrator-General)

For an heir:

AA Lakha

The other heirs did not appear and were not represented.

For the plaintiff:

The Administrator-General, Zanzibar

For the seventh defendant:

Lakha & Co, Zanzibar

**Sheikha Binti Ali Bin Khamis and another v Halima Binti Said Bin Nassib
and others**

[1959] 1 EA 500 (CAM)

Division:	Court of Appeal at Mombasa
Date of Judgment:	8 May 1959
Case Number:	14/1958 (P.C.)
Before:	Forbes V-P, Gould and Windham JJA
Sourced by:	LawAfrica

[1] *Practice – Leave to appeal to Privy Council – Failure to give notice of intended application for leave – Failure to apply for leave within time limited – Whether court can extend time – East African (Appeal to Privy Council Order in Council, 1951, s. 3, s. 4 and s. 6 – Eastern African Court of Appeal Rules, 1954, r. 79.*

[2] *Practice – Judgment – Court of Appeal – Decision given orally after hearing but reasons in writing given later – Whether “judgment” is the decision or the subsequent reasons – East African (Appeal to Privy Council) Order in Council, 1951, s. 4 – Indian Code of Civil Procedure, s. 2 (9) – Civil Procedure (Revised) Rules, 1948, O. XX, r. 4 (K.) – Interpretation and General Clauses Ordinances, 1956, s. 2 and s. 53 (6) (K.) – English Rules of Supreme Court, O. LXIV, r. 3 – Kenya Colony Order in Council, 1921, s. 4 (K.).*

Editor’s Summary

The applicants applied to a single judge of the Court of Appeal for conditional leave to appeal to the Privy Council from a judgment of the court. The application was rejected on a preliminary objection by the respondents that no notice of intention to apply for leave had been given to the respondents as required by s. 4 of the East African (Appeal to Privy Council) Order in Council, 1951. The applicants then referred the judge’s decision to the full court. At the hearing the respondents took two preliminary objections, namely, (a) that no notice of intention to apply for leave to appeal had been given and (b) that

the application for leave to appeal had not been made within sixty days as required by s. 4 of the Order in Council. The appeal had been heard on October 8, 1958, at the end of which the court announced that the appeal had failed and the reasons would be given in writing later. These were read by the registrar in open court on October 24 and were dated October 20, 1958. The motion for leave to appeal to the Privy Council was filed on Monday December 8, 1958, i.e. sixty-one days after the decision given at the hearing. Counsel for the applicants argued that “judgment” in s. 4 of the Order in Council meant, in the instant case, the reasons for the court’s decision which were read on October 24 and not the decision given in court on October 8, and that therefore the application was well in time. In the alternative he argued that since the last day for filing the motion fell on a Sunday, it should be excluded when calculating the period, and that anything done on the day following should be held to be in time.

Held –

- (i) the “judgment” on the appeal was the decision given on October 8, 1958; the fact that the document giving the reasons of the court for its judgment was headed “judgment” could not alter the fact that judgment on the appeal had been given on October 8 and the document merely set out reasons for that judgment and was not itself the judgment.
- (ii) the time limited by s. 4 of the Order in Council must be calculated from October 8 and in the instant case the time expired on December 7, 1958, a Sunday.

Application dismissed.

[**Editorial Note:** The court did not consider the other point relative to notice of the intended application but expressed the view that counsel for the applicants had not succeeded in establishing that the case of *Hubble v. Commissioner for Transport* (1952), 19 E.A.C.A. 153 had been decided per incuriam.]

Cases referred to in judgment

- (1) *Hubble v. Commissioner for Transport* (1952), 19 E.A.C.A. 153.
- (2) *Kerto v. Hipolito Omach*, E.A.C.A. Civil Application No. 9 of 1958 (P.C.) (unreported).
- (3) *Onslow v. Commissioners of Inland Revenue*, [1890] 25 Q.B.D. 465.
- (4) *Ex parte Chinery*, [1884] 12 Q.B.D. 342.
- (5) *Ramjibhai v. Rattan Singh* (1953), 20 E.A.C.A. 71.
- (6) *Saint v. Hogan* (1953), 20 E.A.C.A. 85.
- (7) *Ex parte Simpkin* (1860), 29 L.J. M.C. 23.

May 8. The following judgments were read:

Judgment

Forbes V-P: This is an application to the court to review the decision of a judge under s. 6 of the Eastern African (Appeal to Privy Council) Order in Council, 1951 (hereinafter referred to as the Order in Council) refusing an application under s. 3 of the Order in Council for leave to appeal to the Privy Council.

The application was rejected by the learned judge on a preliminary point taken by counsel for the first and second intended respondents, the first and second respondents to this application. The fourth respondent withdrew with the leave of the judge at the hearing of the original application on the ground that he had no interest in the appeal, and the third respondents have been unrepresented throughout these applications. At the commencement of the hearing of the application we were informed that there was a second preliminary objection which had not been argued before the learned judge, and that, if the applicants succeeded in the application, counsel for the respondents would raise his second objection. In the circumstances we decided to hear counsel for the respondents first on the second preliminary point and then to hear counsel for the applicants on both the preliminary points.

The two preliminary objections taken by the respondents were (a) that no notice of the intended application for leave to appeal had been given to the intended respondents as required by s. 4 of the Order in Council; and (b) that the application for leave to appeal had not been made within the time limited (i.e. sixty days) by the same section.

As to (a), it was conceded that no notice of the intended application had been given apart from the notice of motion. In *Hubble v. Commissioner for Transport* (1) (1952), 19 E.A.C.A. 153 the same point was considered by this court and it was held that s. 4 of the Order in Council

“clearly requires not merely that the other party to an application made under it should be served with a copy of the motion, but that the other party should first be notified that the applicant intends to make the

application.”

The learned judge held that he was bound by the decision in *Hubble’s* case (1) and accordingly dismissed the application. Before us counsel for the applicants contended that the decision in *Hubble’s* case (1) had been given per incuriam; and in the alternative he argued that the instant case was distinguishable from *Hubble’s* case (1).

As to (b), it appeared that at the end of the hearing of the appeal by this court the then learned Vice-President of the Court announced the decision of the court in the following terms, a cross-appeal having been abandoned:

“The appeal fails and is dismissed on the point already argued . . . The appellants will pay costs of the first and second respondents of the appeal generally and will also pay the costs of the fourth respondent, but in taxing these an instructions fee of Shs. 500/- only will be allowed. Reasons in writing later.”

This decision was given on October 8, 1958. In due course the reasons for the decision were reduced into writing in a document headed “Judgment” which was signed by the three judges who presided at the hearing of the appeal. This “Judgment” is dated October 20, 1958, and was read by the registrar in open court on October 24, 1958. The motion for leave to appeal to the Privy Council was filed on December 8, 1958, i.e. sixty-one days after the decision given at the end of the hearing of the appeal. December 7, the day on which the sixty day period limited by s. 4 of the Order in Council, if calculated from October 8, expired, was a Sunday. The period limited by s. 4 is a fixed period which this court has no discretion to extend, (*Kerto v. Hipolito Omach* (2), E.A.C.A. Civil Application No. 9 of 1958 (P.C.) (unreported)). Counsel for the respondents accordingly contended that the application for leave to appeal to the Privy Council was out of time. Counsel for the applicants argued that “judgment” in s. 4 of the Order in Council meant, in the instant case, the reasons for the court’s decision which were read on October 24, and not the decision given in court on October 8, and that therefore the application was well in time. In the alternative he argued that since the last day of the period limited was a Sunday, it ought to be excluded from the calculation of the period, and that anything done on the day following should be held to be properly done within the period limited.

I will deal with the second preliminary objection first. As I have said, counsel for the applicants argued that the statement of the reasons for the decision of the court was the “judgment”. He referred to r. 79 of the Eastern African Court of Appeal Rules, 1954, and argued that in accordance with sub-r. (1) notice had been given to the parties by the registrar and the reasons read in open court, and that accordingly the reasons must be the judgment of the court.

With respect, I cannot agree. It is true that in the Indian Civil Procedure Code (s. 2 (9)) “judgment” is defined as meaning “the statement given by the judge of the grounds of a decree or order”. This, however, as appears from the note to that definition in Mulla, Code of Civil Procedure (12th Edn.) Vol. I, p. 11 is not the sense in which the word “judgment” is usually used in England. The note states

“In England the word judgment is generally used in the same sense as decree in this code.”

In *Onslow v. Commissioners of Inland Revenue* (3), [1890] 25 Q.B.D. 465 at p. 466 the learned Master of the Rolls, following the decision of Cotton, L.J., in *Ex parte Chinery* (4), [1884] 12 Q.B.D. 342, said: “A ‘judgment’ therefore, is a decision obtained in an action, . . .” I stress the word “decision”. The decision in the appeal in the instant case was given on October 8.

Counsel for the applicant referred to two cases in this court, namely, *Ramjibhai v. Rattan Singh* (5) (1953), 20 E.A.C.A. 71, and *Saint v. Hogan* (6) (1953), 20 E.A.C.A. 85. In *Ramjibhai’s* case (5) reasons read in court after the decision had been given were held to constitute part of the judgment of the Supreme Court. And in *Saint v. Hogan* (6) it was held that reasons written after the decision but not read in court could not constitute part of the judgment.

Counsel conceded that the Civil Procedure Ordinance and Rules did not govern appeals from this court, but argued that those two cases indicated that the reasons for a decision are the judgment.

Those cases, however, related to the provisions of O. 20, r. 4 of the Civil Procedure (Revised) Rules, 1948, which reads:

“Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.”

I have already indicated that the word “judgment” in the Indian Civil Procedure Code is used in a different sense from that in which the word is normally understood in England. It is true that the definition of “judgment” which I have set out above does not appear in the Kenya Civil Procedure Ordinance, but that Ordinance and the Rules are in general, and O. 20, r. 4 is in particular, taken from the Indian Civil Procedure Code and Rules, and no doubt accounts for the requirement in r. 4 that a judgment should contain reasons. The cases referred to turned on the wording of O. 20, r. 4, and cannot govern the construction of the word “judgment” in the Order in Council. And even in *Ranjibhai’s* case (5) it was said

“In the instant case the judge certainly pronounced judgment at the close of the hearing, and it is only because we make the presumption that the ‘reasons’ were subsequently delivered in open court, that we are prepared to incorporate these reasons in the judgment pronounced at the close of the hearing.”

It is clear that the court regarded the decision pronounced as the “judgment”, though it held that the reasons delivered later might be regarded as incorporated in it.

Finally, the word “judgment” is defined in the Order in Council itself in s. 2 as follows:

“ ‘judgment’ includes decree, order, sentence or decision.”

It will be noted that reasons for a decision are not included in the definition. The definition is entirely consistent with the meaning of the word as normally understood in England. In the instant case I am clearly of opinion that the “judgment” on the appeal was the decision given on October 8, 1958, which was also embodied in a formal order of the same date, extracted on November 12, 1958. The fact that the document giving the reasons of the court for its judgment was headed “Judgment” cannot alter the fact that judgment on the appeal had been given on October 8, and that the document merely set out reasons for that judgment and was not itself the judgment.

I am accordingly of opinion that the time limited by s. 4 of the Order in Council must be calculated from October 8, 1958.

Section 4 requires application for leave to appeal to the Privy Council to be made by motion or petition “within sixty days from the date of the judgment to be appealed from”. As I have already said, this court has held that it has no discretion to extend this period; and in the instant case the period expired on a Sunday.

Counsel for the applicant conceded, in my opinion, rightly, that at common law Sundays are not excluded in calculating a period of time limited by statute (*Ex parte Simpkin* (7) (1860), 29 L.J. M.C. 23). He also conceded that s. 53 (b) of the Interpretation and General Clauses Ordinance, 1956 (No. 38 of 1956), which provides that if the last day of a period is a Sunday or public holiday, the period shall include the next following day, cannot apply to the construction of the Order in Council by reason of s. 2 of that Ordinance. He argued, however, that the English Rules of the Supreme Court contain similar provision

(O. 64, r. 3); that these rules have the force of a statute; and that the English practice as contained in these rules should be applied to the procedure prescribed by the Order in Council.

I do not think that this argument is sound. It is true the English Rules have the force of statute, but they apply only to the procedure of the court in England. Subject to local legislation the practice of the court in England is introduced into Kenya in so far as the Supreme Court is concerned by s. 4 of the Kenya Colony Order in Council, 1921. There is, however, no provision of which I am aware which could be said to apply the English Rules of Court to the procedure for appeals from this court to the Privy Council. That procedure is governed by the Order in Council, and I think that, in the absence of any statutory provision to the contrary in this respect, the provisions of the Order in Council must be interpreted by reference to the common law. Accordingly, I am of opinion that the application for leave to appeal in this case should have been made on or before December 7, and, as it was not made till December 8, it is out of time notwithstanding the fact that December 7 was a Sunday. I am, accordingly, of opinion that the application must fail.

In view of the conclusion I have reached on this objection, I do not think it necessary to consider the objection that notice of the intended application was not given to the intended respondent. I would say, however, that it did not seem to me that counsel for the applicant succeeded in establishing his contention that *Hubble's* case (1) had been decided per incuriam.

I would dismiss the application with costs.

Gould JA: I agree.

Windham JA: I also agree.

Application dismissed.

For the applicants:

JEL Bryson and RK Mitra

RK Mitra, Mombasa

For the respondents:

TJ Inamdar QC and NM Brahmabhatt

Inamdar & Inamdar, Mombasa

The Custodian of Enemy Property v C R Coulson and others [1959] 1 EA 505 (CAN)

Division:	Court of Appeal at Nairobi
Date of Judgment:	1 June 1959
Case Number:	81/1959
Before:	Forbes V-P, Gould and Windham JJA
Sourced by:	LawAfrica

Appeal from: H.M. Supreme Court of Kenya—Miles, J

[1] Enemy – Administration of estates – Deceased not an enemy but residuary legatee and persons entitled to portions of estate enemies – Orders vesting property in Custodian – Whether orders void since deceased not an enemy – Trading with the Enemy Ordinance, 1939, s. 2, s. 4 and s. 9 (K.) – Indian Succession Act, 1865, s. 212 – Trading with the Enemy Act, 1939, s. 7.

Editor's Summary

The deceased, T. W. a Polish citizen who owned property at Lumbwa in Kenya died in Germany in 1938. In August, 1939, letters of administration with two wills annexed were granted to the first respondent as attorney for the adopted son and residuary legatee of the deceased. On September 1, 1939, the Custodian of Enemy Property appointed the first respondent to be manager of the Lumbwa property. After the war, questions of inheritance to the deceased's estate arose. It was suggested that the devolution of all his moveable estate was governed by the law of Poland, but that the immoveable property in Kenya devolved according to the law of intestacy, i.e. according to the Indian Succession Act, 1865. The persons interested in an intestacy comprised the mother of the deceased, who died in 1942, a subject of Lichtenstein, two sisters both German subjects, one of whom had died in 1950, two nephews and a niece, children of another sister who had predeceased the deceased, all German subjects, a sister who was a Swiss subject, and the widow of the deceased who was either Polish or stateless. The deceased also left a former wife, the third respondent, whose marriage to the deceased was dissolved in 1924, after which she reassumed her Swiss nationality of origin and in 1952 re-married a Frenchman. By an order made under the Trading with the Enemy Ordinance on March 30, 1951, the immoveable property of the deceased as described in a schedule to the order, was vested in the custodian and by a further order made on March 31, 1951, the custodian vested in the first respondent an undivided half share of the immoveable property held by the custodian by virtue of the order of March 30, 1951, whilst by a further order dated March 31, 1951, the moveable property of the deceased was vested in the custodian who by an order dated March 15, 1952, vested in the second respondent certain portions of the moveable estate. By a maintenance agreement the deceased had bound himself and his successors to pay to his first wife an annuity. This had not been paid and a claim was made against the estate after the war for arrears amounting to about £13,200. By a contract of inheritance made between the deceased and his widow, the second respondent, she had waived all right of inheritance on his death and by the contract, the deceased ordered his heirs to pay her a life annuity and by his will provided for an increase in the amount of this annuity. Since this also had not been paid a further claim against the estate of some £88,000 had been made in 1955. Faced with these competing claims which amounted to more than the value of the assets of the estate in Kenya the administrator took out a summons to determine the position. The judge held that s. 9 of the Trading with the Enemy Ordinance only empowered the custodian to make orders in respect of enemy property, that the deceased was the only person mentioned in the orders and he was never an enemy subject;

accordingly all the orders purporting to vest the estate of the deceased in the custodian were void. On appeal by the custodian.

Held –

- (i) whilst a valid vesting now can only be made in respect of enemy property there is nothing in the Ordinance requiring that the enemy to whom any property specified in an order belongs must be mentioned by name and there was no reason to suppose that the reference to the deceased in the orders of the custodian was made for other than descriptive purposes.
- (ii) for the purpose of considering whether an estate is “enemy property” the claims of creditors against that estate are irrelevant.
- (iii) having obtained a grant of administration as attorney for the adopted son and residuary legatee, who at the outbreak of war became an enemy within the meaning of the Ordinance, the administrator also became tainted with “enemy” status for the purposes of the Trading with the Enemy legislation.
- (iv) the vesting orders made by the custodian were valid, the release orders whereby a portion of the immoveable estate was vested were also valid, and any payment out of the property remaining vested in the custodian to either the widow or the first wife were matters of discretion.

Appeal allowed. Order of the Supreme Court set aside.

Cases referred to in judgment

- (1) *Bank voor Handel v. Administrator of Hungarian Property*, [1954] 1 All E.R. 969.
- (2) *In re Ling and Duhr*, [1918] 2 Ch. 298.
- (3) *In re Rendell, Wood v. Rendell*, [1901] 1 Ch. 230.
- (4) *In re Dewell*, 62 E.R. 104.
- (5) *In re Achillopoulos, Johnson v. Mavromichali*, [1928] Ch. 433.
- (6) *Webb v. Kirby*, 44 E.R. 147.
- (7) *Re Fischer*, [1940] 2 All E.R. 252.
- (8) *In the Estate of Jacob Schiff*, [1915] P. 86.
- (9) *In re Munster*, [1920] 1 Ch. 268.
- (10) *Harvell v. Foster and Another*, [1954] 2 All E.R. 736.

June 1. The following judgments were read:

Judgment

Forbes V-P: This is an appeal from an order of the Supreme Court of Kenya dated June 23, 1958, made upon an application in chambers by the second and third respondents (originally the first and second defendants) in the course of proceedings on an originating summons taken out by the first respondent as administrator of the estate of Court Claus Hubert Wilhelm von Tiele-Winckler, deceased (hereinafter

referred to as the deceased) for the determination of certain questions arising in the course of the administration of that estate.

The application sought, *inter alia*, a declaration that certain orders made under s. 9 of the Trading with the Enemy Ordinance, 1939 (Ordinance No. 21 of 1939) were void. The validity of these orders had been considered by the learned judge of the Supreme Court in an earlier application in chambers in the same matter, and in his ruling, dated October 22, 1957, upon that application he had expressed the opinion, for the reasons there given, that the orders in question were void. This decision was not, however, necessary for the determination of the first application, and the order made thereon did not

contain any declaration in regard to the disputed orders. The second application was brought for a formal declaration that the orders were void. No further legal argument on the subject was addressed to the learned judge, since he took the view that it would be improper for him, upon this application, to express a view contrary to that expressed on the first application even if satisfied that the previous opinion was erroneous, and he ruled:

“I accordingly hold for reasons which I have stated in my order dated October 22, 1957, that the following orders, namely:

- “(i) The Trading with Enemy (Vesting of Enemy Property) Order, 1951, published as Government Notice No. 367 of 1951; (ii) The Trading with the Enemy (Vesting of Enemy Property) (No. 2) Order, 1951, published as Government Notice No. 369 of 1951, (iii) The Trading with the Enemy (Release of Enemy Property) Order, 1951, published as Government Notice No. 368 of 1951; and (iv) The Trading with the Enemy (Release of Enemy Property) Order, 1952, published as Government Notice No. 324 of 1952, are void and of no effect to create assign or otherwise deal with any interest in the moveable or immoveable estate of the deceased.”

The appeal is against this decision.

The following statement of facts is taken from the ruling of the learned judge dated October 22, 1957:

“The facts, so far as material to the present application, are that the deceased died at Moschen in Germany on November 14, 1938. On August 15, 1939, the Supreme Court of Kenya, in Probate and Administration Cause No. 34 of 1939, granted letters of administration of the estate of the deceased with two wills dated respectively August 28, 1937, and October 7, 1937, annexed, to the plaintiff as attorney for a certain Count Hans Werner von Tiele-Winckler, the adopted son and residuary legatee. On August 29, 1939, a notice was published in the *Gazette* calling for claims against the estate. The plaintiff, on September 1, 1939, was appointed manager by the custodian of the deceased’s estate at Lumbwa in Kenya.

“So far as is known the deceased was a Polish national. It is stated on behalf of the custodian that the two wills referred to would be valid by the *lex domicilii* of the deceased, which was Polish, but that they are invalid according to the law of Kenya for lack of due attestation.

“Matters apparently stayed in abeyance during the war, but after the war the question of inheritance to the deceased’s estate arose. It was suggested that, since the *lex domicilii* of the deceased was Polish, the devolution of all his moveable estate was governed by the law of Poland and passed to Baron Hans Werner, but that the immoveable property in Kenya, devolved according to the law of intestacy, which is, of course, the Indian Succession Act.

“The persons who would take under the Indian Succession Act were the following:

- (1) Countess Jelka von Tiele-Winckler, the mother of the deceased, who died in Switzerland, on September 5, 1942 a subject of Lichtenstein.
- (2) Countess Valeska von Kanitz, a sister of the deceased, who died in 1950, apparently a German subject.
- (3) Huberta, Princess Reuss, a sister of the deceased, who is still living and is a German subject.

- (4) Count Frans Hubert von Kanitz, a son of Countess Jelka von Kanitz, a sister of the deceased, who died in 1922. He is a German subject.
- (5) Count Ultz von Kanitz, a son of the last-named deceased Countess Jelka, also a German subject.
- (6) Countess Konradine von Kanitz, another daughter of the deceased Countess Jelka, a German subject.
- (7) The widow of the deceased who is the first defendant. She may be either Polish or a stateless person.
- (8) Mrs. Wendula Eichmann, the sister of the deceased, who is the fourth defendant, and a Swiss subject.

“Under the Indian Succession Act the four sisters of the deceased would take a one-tenth share each, and the widow one-half share of the immoveables. On the death of Countess Jelka in 1942, intestate, her one-tenth share passed to the four sisters of the deceased, increasing their proportion from one-tenth to one-eighth.

“The first defendant, the widow of the deceased, was married to him on February 7, 1933. It appears that on December 2, 1932, the deceased and the first defendant entered into what has been called a ‘Contract of Inheritance’ by which the first defendant waived all right of inheritance in the event of the deceased’s death. By cl. 3 of this Contract of Inheritance the deceased ordered his heirs to pay after his death to the first defendant, if then his widow, a life annuity of RM. 50,000 per annum.

“By the will of August 28, 1937, the deceased made a number of provisions for his widow, which need not be recited here, and he also directed that the annuity referred to should be increased to RM. 60,000 per annum.

“By his will of October 7, 1937, the deceased appointed Baron Hans Werner to be his sole heir, subject only to the disposition in favour of his widow, created by the Contract of Inheritance and the will. On February 11, 1939, a certificate of inheritance was issued at Katowice in Poland declaring Baron Hans Werner to have inherited the count’s whole estate.

“The second defendant was married to the deceased on January 27, 1919. This marriage was dissolved by a German court on March 6, 1924, from which time the second defendant reassumed her maiden name and Swiss nationality of origin. The second defendant subsequently remarried a Frenchman on April 3, 1952.

“By a maintenance agreement made at Berlin on February 2, 1924, between the deceased and the second defendant, the deceased bound himself and his legal successors to pay to the second defendant an annuity of 120,000 gold marks for life by monthly instalments of 10,000 marks.

“By a further agreement made in Berlin on August 25, 1927, between the deceased and the second defendant, this annuity was reduced to 60,000 gold marks and the monthly instalments to 5,000 gold marks. On January 3, 1935, a further agreement was made between the deceased and second defendant in Berlin, whereby it was agreed, *inter alia*, that the annuity and monthly instalments due to the second defendant under the agreement of August 25, 1927, were to be reduced to 4,500 gold marks from December, 1934, to March, 1935, inclusive and to 3,200 gold marks as from April 1, 1935. This agreement, which has been referred to as the ‘compromise agreement’, further provided that in the event of remarriage, the deceased would pay to the second defendant a monthly life annuity of 1,000 gold marks, subject to the deceased’s right to commute the sum for a lump sum settlement of 120,000 gold marks.

“On March 21, 1953, Messrs. Kaplan and Stratton, acting on behalf of the second defendant, wrote to the plaintiff putting in a claim against the estate under these various agreements. The claim not having been accepted, an action was commenced (Civil Case No. 172 of 1955) by the second defendant as plaintiff against the present plaintiff as defendant. The sum claimed in the action was Shs. 264,482.76 with interest. The plaint in this action is dated February 25, 1955.

“On December 15, 1955 [this date should, I think, be September 15, 1955—see p. 160 of the Record] Messrs. Robson and O’Donovan, acting on behalf of the widow, the first defendant, wrote to Messrs. Hamilton, Harrison and Mathews, who were then acting on behalf of the present plaintiff, making a claim on behalf of the widow under the will of August 28, 1937. The claim put forward by Messrs. Robson and O’Donovan amounts to something in the region of £88,000. This letter has not, as yet, been followed up by the institution of a suit.

“The position on August 17, 1956, when this originating summons was taken out, therefore, was that the plaintiff, as administrator, was faced with two substantial claims against the estate. I am informed that the value of the Kenya assets is insufficient to satisfy both these claims, so that the question of priority becomes of the highest importance as far as the plaintiff is concerned.

“At this stage, it will be convenient to describe the manner in which the Custodian of Enemy Property comes into the picture. By an Order made, or purporting to be made, and I use this phrase advisedly for a reason that will be apparent later on, under s. 9 of the Trading with the Enemy Ordinance, 1939, the immoveable property of the deceased as described in the Schedule to the Order was vested in the Custodian of Enemy Property. This order is contained in Government Notice No. 367/51 dated March 30, 1951. This order was subsequently amended by Government Notice No. 508/1951.

“By a further order made under s. 9 of the Ordinance dated March 31, 1951 (Government Notice No. 368/51), the Custodian of Enemy Property vested in the plaintiff the undivided half share of the immoveable property held by the Custodian by virtue of the previous order of March 30, 1951.

“By Government Notice No. 369 dated March 31, 1951, an order was made under s. 9 vesting the moveable property of the deceased in the Custodian of Enemy Property.

“By a further order under s. 9 of the Ordinance dated March 15, 1952, Government Notice No. 324/52 the Custodian of Enemy Property vested in the plaintiff as attorney-administrator of the deceased:

- (a) in favour of the first defendant as personal representative of the late Jelka, Countess von Tiele-Winckler, the undivided one-fortieth share of the property due to the first defendant [this should read ‘fourth defendant under’] and by virtue of the intestacy of Jelka Countess von Tiele-Winckler deceased, and
- (b) the undivided one-tenth share in the property due to the fourth defendant under the intestacy of the deceased. The property referred to in this order was the immoveable property held by the custodian by virtue of the order of March 30, 1951.

“Vesting deeds were executed in 1951 by the custodian at the request of the plaintiff vesting the half share of the immoveable property referred to in Government Notice 368/51 in the first defendant, and in 1952, in pursuance of Government Notice No. 324, further vesting deeds were

executed, vesting the property referred to in the order of March 15, 1952, in favour of the first and fourth defendant as provided in the said order.”

The learned judge’s reasons for the decision appealed against are contained in the following passage in his ruling of October 22, 1957:

“On behalf of the first and second defendants the answer made to Mr. Georgiadis’s contention is that the present plaintiff has no assets in his hands and that the various orders made under s. 9 of the Trading with the Enemy Ordinance are void. In my opinion, this contention is right. Section 9 of the Ordinance only empowers the vesting in the Custodian of ‘Enemy Property’. By sub-s. (8) (a) of s. 9, the expression ‘enemy property’ is defined as ‘any property for the time being belonging to or held or managed on behalf of an enemy or an enemy subject.’ An ‘enemy subject’ is defined by s. 2 (1) (a) as ‘an individual who . . . possesses the nationality of a State at war with His Majesty.’ An ‘enemy’ is defined by s. 4 (1) (b) as ‘any individual resident in enemy territory.’ ‘Enemy territory’ is defined by s. 2 (1) as ‘any area which is under the sovereignty or in the occupation of a power with whom His Majesty is at war.’ It is conceded that the deceased was a Polish subject so that he was never ‘an enemy subject’ within the meaning of s. 2 (1); he had not resided during his lifetime in enemy territory as defined by s. 2 (1) so that he never became an ‘enemy’ within the meaning of s. 4 (1). Mr. Georgiadis has argued that the mention of the deceased in these orders is only for purposes of description and identification of the property and that since at any rate a portion of the property in question would devolve upon persons who were German subjects the order was validly made. But the answer to this is, that an order under s. 9 can only be made in respect of enemy property and the enemy must be specified in the order. The only person mentioned in the order is the deceased. I am of the opinion, therefore, that all the orders purporting to vest the estate of the deceased in the Custodian of Enemy Property are void. The effect of this will have to be considered at a later stage, either in the course of the originating summons, or in the course of the action, if the latter proceeds. It is immaterial so far as the present application is concerned, except in so far as it disposes of Mr. Georgiadis’s argument that the plaintiff could have set up the plea of *plene administravit*.”

The grounds of appeal stated in the memorandum of appeal are:

- “1. The learned judge erred in law when he decided in an order dated the 22nd day of October, 1957 (referred to in the said order dated June 23, 1958) that the said four orders made under s. 9 of the Trading with the Enemy Ordinance, 1939 (No. 21 of 1939) are void as they were not made in respect of enemy property.
- “2. The learned judge erred in law in deciding in the said order dated the 22nd day of October, 1957, that an order under s. 9 of the Trading with the Enemy Ordinance, 1939 (No. 21 of 1939), can only be made in respect of enemy property, and that the enemy must be specified in the order.”

The material parts of s. 9 of the Trading with the Enemy Ordinance, 1939 (hereinafter referred to as the Ordinance) under which the disputed orders purport to have been made, read as follows:

“9 (1). With a view to preventing the payment of money to enemies and of preserving enemy property in contemplation of arrangements to be made at the conclusion of peace, the Governor may appoint custodians of enemy property and may by order:

.....

- (b) vest in the prescribed custodian such enemy property as may be prescribed, or provide for, and regulate, the vesting in that custodian of such enemy property as may be prescribed;

.....

- (d) confer and impose on the custodians and on any other person such rights, powers, duties and liabilities as may be prescribed as respects:

- (i) property which has been, or is required to be, vested in a custodian by or under the order,

.....

and any such order may contain such incidental and supplementary provisions as appear to the Governor to be necessary or expedient for the purposes of the order.

.....

“(3) Where, in pursuance of an order made under this section:

.....

- (b) any property, or the right to transfer any property is vested in a custodian,

.....

neither the . . . vesting . . . nor any proceedings in consequence thereof shall be invalidated or affected by reason only that at a material time:

- (i) some person who was or might have been interested in the money or property, and who was an enemy or an enemy subject, had died or had ceased to be an enemy or an enemy or an enemy subject, or
- (ii) some person who was so interested, and who was believed by the custodian to be an enemy or an enemy subject, was not an enemy or an enemy subject.

(8) In this section:

- (a) the expression ‘enemy property’ means any property for the time being belonging to or held or managed on behalf of an enemy or an enemy subject;
- (b) the expression ‘property’ means real or personal property, and includes any estate or interest in real or personal property, any negotiable instrument, debt or other chose in action, and any other right or interest, whether in possession or not; and
- (c) the expression ‘prescribed’ means prescribed by an order made under this section.”

In s. 2 and s. 4 the terms “enemy subject”, “enemy territory” and “enemy” are defined, so far as is material, as follows:

“ ‘enemy subject’ means:

- (a) an individual who, not being either a British subject or a British protected person, possesses the nationality of a State at war with his Majesty . . .”

“ ‘enemy territory’ means an area which is under the sovereignty of, or in the occupation of, a power with whom His Majesty is at war, not being an area in the occupation of His Majesty or of a power allied with His Majesty . . .”

“ ‘enemy’ means:

.....
(b) any individual resident in enemy territory.
.....”

As already mentioned in the extract from the learned judge’s ruling, the vesting orders purporting to vest the estate of the deceased in the Custodian of Enemy Property are Government Notice No. 367/51 (as subsequently amended) and Government Notice No. 369/51. The former was dated March 30, 1951, and purported to vest in the custodian

“the immoveable property of the late Count Claus Hubert Wilhelm von Tiele-Winckler, deceased”,

the property being described in detail in a schedule to the order. The latter, dated March 31, 1951, purported to vest in the custodian

“the moveable property of the late Count Claus Wilhelm von Tiele-Winckler, including livestock, agricultural implements and machinery and other assets.”

At the hearing of the appeal Mr. Georgiadis for the appellant (hereinafter referred to as the custodian) argued *inter alia* that the reference in the vesting orders to the deceased was for the purpose of description of the property and did not indicate any delusion that the deceased himself was an enemy or an enemy subject; that there was no provision in the Ordinance which required the enemy owner of the property to be specified in a vesting order; that the grant of letters of administration to the first respondent (hereinafter referred to as the administrator) was as attorney or agent of Hans Werner Lothar Baron von Tiele-Winckler (hereinafter referred to as Baron Hans Werner) who was, or at least was believed to be, a German national and therefore an enemy subject; that the property was accordingly held or managed on behalf of an enemy subject and was “enemy property” which was properly vested in the custodian by the vesting orders; that the vesting orders temporarily extinguished the titles of the beneficiaries in the deceased’s estate, but that some interests were re-created by virtue of the “release” orders of March 31, 1951, and March 15, 1952 (*Bank voor Handel v. Administrator of Hungarian Property* (1), [1954] 1 All E.R. 969 at p. 991); that in any event the property now vested in the custodian, that is to say, the moveable property and the three-eighths share of the immoveable property so far as is known in enemy property; that to this extent at least the vesting orders are valid; and that it is for the second respondent (hereinafter referred to as the widow) and the third respondent (hereinafter referred to as the first wife) to establish their claim and that they have a right to trace the property in the hands of the custodian.

Mr. Harris, for the administrator, made it clear that, as between the claimants to the estate, the administrator’s position was neutral, but he supported the learned judge’s decision that the vesting orders were void.

Mr. O’Donovan, for the widow, Mr. Mackie-Robertson, for the first wife and Mr. Le Pelley for the fourth respondent all strongly supported the learned judge’s decision on the grounds which appear below.

It is common ground that the deceased was never an “enemy” or an “enemy subject” as defined in the Ordinance, since he had died before the outbreak of war. The learned judge’s decision that the orders were void was based on the view

“that an order under s. 9 can only be made in respect of enemy property and the enemy must be specified in the order. The only person mentioned in the order is the deceased.”

Before us Mr. O'Donovan did not contend that it was legally compulsory that the enemy be named in a vesting order. He did contend, however, that in their context the learned judge's words were apt, since he argued that the property in question was vested in the custodian because the custodian was under the mistaken impression that the property in some way was enemy property by reason of the fact that it was comprised in the deceased's estate, although the deceased had died before the outbreak of war; that that was the reason for the mention of the deceased's name in the orders; that accordingly the use of his name was not merely for descriptive purposes; and that the property in fact never was "enemy property".

It is convenient to deal here with the question of the standard of construction to be applied to the Trading with the Enemy legislation. It was argued that the Ordinance is a statute encroaching on the rights of the subject and must therefore be strictly construed; and reference was made to Maxwell on the Interpretation of Statutes, (10th Edn.), p. 285 and the authorities there cited. I would agree that the Ordinance is one to be strictly construed, but subject to the qualification expressed in the following paragraph from the same page of Maxwell:

"The effect of the rule of strict construction might almost be summed up in the remark that, where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself. But it yields to the paramount rule that every statute is to be expounded according to its expressed or manifest intention and that all cases within the mischiefs aimed at are, if the language permits, to be held to fall within its remedial influence."

I stress the last sentence. The expressed intention of s. 9 of the Ordinance is to prevent the payment of money to enemies and to preserve enemy property in contemplation of arrangements to be made at the conclusion of peace, and this intention must be borne in mind in considering and construing any provision of the section.

To revert to the disputed orders, I agree that, subject to the provisions of sub-s. (3) of s. 9 of the Ordinance, a valid vesting order can only be made in respect of enemy property. There is, however, no provision in the Ordinance requiring that the enemy to whom the property belongs be specified in the order. With great respect to the learned judge, I do not think that such a requirement is to be read into the Ordinance. It must often happen in war that the enemy owner of property is not precisely known though there may be no doubt that the property is enemy owned. It seems to me that if the property to which the order is intended to apply is sufficiently described, and that property is in fact "enemy property" the order will be valid although it may not name the enemy to whom the property belongs; or indeed if, in error, it names the wrong person as owner. I am fortified in this view by the phrasing of sub-s. (3) of s. 9, which refers to "a person who was or might be interested in the money or property", and not to "a person specified in the order." As regards the disputed orders, I see no reason to suppose that the reference to the deceased in them was made other than for descriptive purposes. The order relating to immoveable property indeed sets out in the schedule a detailed description of the property and could, no doubt, have been framed without mention of the deceased, but in the case of the moveable property it would be difficult to frame a concise description of the property without mention of the fact that it formed part of the estate of the deceased. In my view if the orders in fact relate to enemy property they are valid.

In considering the question whether the subject-matter of the orders was or was not enemy property, it appears to me that three matters arise for consideration, namely, the status of the administrator as attorney-administrator, the interest of creditors in enemy property under the Ordinance, and the status of the beneficiaries entitled to the estate. It is convenient to deal with the creditors first.

The first wife's claim, a very substantial claim against the deceased's estate, is a claim as creditor under the maintenance agreements alleged to have been made with the deceased. The widow's claim is stated in Messrs. Robson and O'Donovan's letter of December 15, 1955, referred to above, to be under the deceased's will. It is not clear, however, that reliance may not at some stage be put upon the contract of inheritance entered into between the widow and the deceased. For the moment I am concerned only with any possible claim the widow may have as a creditor of the deceased's estate under the contract of inheritance. As I understood them, the arguments of both Mr. O'Donovan and Mr. Mackie-Robertson against the validity of the orders were based in part on the fact that there was at least one creditor, not an enemy subject, who was or might be entitled to a very large part of the estate. Mr. O'Donovan, for instance, remarked that the beneficiaries who were enemies were only entitled to such residue as there might be after the administration of the estate was concluded. Mr. Mackie-Robertson complained that the Crown had taken over the assets but not the liabilities, and that, in making the vesting orders, no regard had been had to possible liabilities to creditors. No doubt both these assertions are true, though it may be remarked that the vesting orders were only made some eleven and a half years after publication of the notice calling for claims against the deceased's estate. It might reasonably be supposed that all outstanding claims had been received. But in my opinion the question of the validity or otherwise of the vesting orders must be considered without regard to the claims of creditors. It is to be noted that in s. 9 of the Ordinance, which is identical with s. 7 of the English Trading with the Enemy Act, 1939 (except for the substitution of the Governor for the Board of Trade as the authority for the making of orders under the section), there is no mention of creditors. There is nothing anywhere to suggest that creditors are to be considered. The corresponding section of the Trading with the Enemy (Amendment) Act, 1914 (s. 4), however, provided that:

"The High Court or a judge thereof may, on the application of any person who appears to the court to be a creditor of an enemy or entitled to recover damages against an enemy, or to be interested in any property, real or personal . . . belonging to or held or managed for or on behalf of an enemy, or on the application of the custodian or any Government Department, by order vest in the custodian such real or personal property as aforesaid . . ."

Notwithstanding the express mention of creditors in that section, it was held in *In re Ling and Duhr* (2), [1918] 2 Ch. 298 at p. 300 that:

"... this Act is not an Act primarily for the benefit of creditors at all; its main purpose is to create a fund to be protected and preserved in accordance with the terms of the preamble, with a view to such arrangements after the war as may seem good to His Majesty in Council, and the intermediate payments out of the fund to creditors are merely incidental and discretionary."

A fortiori, under the 1939 Act payments by the custodian to creditors are "incidental and discretionary"; though there is no reason to suppose that the Crown would not meet the claims of non-enemy creditors upon an enemy estate if satisfied that the claims were genuine. But for the purpose of

considering whether or not an estate is “enemy property” the claims of creditors against the estate are irrelevant. More particularly in a case such as this where, at the date of the vesting orders, the claim now made was unknown. I would hold, therefore, that the claim of the first wife against the deceased’s estate, and the claim of the widow so far as it may be founded on contract, must be ignored in deciding whether the property described in the vesting orders was or was not property “belonging to or held or managed on behalf of an enemy or an enemy subject.”

The next question is the status of the administrator as attorney-administrator. For the custodian it was argued that the grant of letters of administration to the administrator was in the capacity of attorney for Baron Hans Werner; that Baron Hans Werner was an enemy within the meaning of the Ordinance; and that accordingly the first respondent was “holding or managing” the estate of the deceased on behalf of an enemy.

Mr. O’Donovan conceded for the purposes of the appeal that Baron Hans Werner was an “enemy”, but I think Mr. Mackie-Robertson contended that there was insufficient evidence to establish this as a fact. I think there was ample evidence to justify the inference that Baron Hans Werner was an “enemy”—he was resident in Germany shortly before the outbreak of war—but in any case it is clear that the custodian believed and had good cause for believing that he was an enemy, and accordingly the provisions of sub-s. (3) (ii) of s. 9 of the Ordinance would apply.

For the respondents it was contended that the grant of letters of administration to the administrator was a grant to him and to nobody else; that there is no provision in the Indian Succession Act (which applies in Kenya) for the grant of administration as attorney for another; that because the court was induced by the existence of a power of attorney executed by Baron Hans Werner to make the grant to the administrator, it does not follow that he is administering on behalf of an enemy; that he is the court’s officer; that administration and the appointment of administrator is subject to the control and discretion of the court; that the rights and duties of administrator cannot be described as “property” within the meaning of s. 9; that the vesting orders purport to vest the beneficial interest in the estate of the deceased and not merely the right or interest of the administrator; and that accordingly the custodian cannot rely on the fact or belief that Baron Hans Werner was an “enemy”.

Section 212 of the Indian Succession Act, 1865, provides for the grant of letters of administration with the will annexed:

“to the attorney of the absent executor, for the use and benefit of his principal, limited until he shall obtain probate or letters of administration granted to himself;”

and the grant in the instant case is to the administrator “as attorney” of Baron Hans Werner, and is limited until Baron Hans Werner “shall obtain probate or letters of administration granted to himself.” The words in s. 212 of the Indian Succession Act, 1865, are the common form of words used for similar grants in England. In regard to such grants in England it has been held that an attorney-administrator is full administrator and is directly responsible to persons who are entitled to claim against the estate (*In re Rendell, Wood v. Rendell* (3), [1901] 1 Ch. 230). Nevertheless it would seem that an attorney-administrator is still to some extent the agent of his principal. In *Re Dewell* (4), 62 E.R. 104, which case was relied on in *In re Rendell* (3), the learned Vice-Chancellor said:

“It is exactly the same as if a person entitled to administration, being abroad, appoints an agent, authorizing the court to grant administration to that person. There the form is—(His Honour referred to *Chambers v.*

Bicknell (2 Hare, 537)—and the form of the administration granted to the nominee of the Crown is, it seems, the same. That is the exact form of letters of administration to the nominee of the Crown, when the Crown is beneficially entitled. Now it has been determined that, when administration is granted to a person as nominee of a party abroad, who is entitled to administration, such administrator is, as to the claims of third parties, administrator to all intents and purposes, exactly as if the person entitled to administration had himself obtained it. (His Honour here referred to the judgment in *Chambers v. Bicknell* (2 Hare, 538).) That is a clear decision that the person to whom administration is granted, on the nomination of the party entitled to it, is full administrator, exactly as if he had obtained administration in his own right, as regards the claims of other persons.

“It appears to me that that foundation being laid, I cannot distinguish between that case and this, where administration is granted to Reynolds, as nominee of the Crown, the form of administration being the same, the purpose being the same. When the administrator is once constituted, he is liable to all claims by persons who are entitled to claim against the estate.

“That foundation being then laid, we come now to the circumstances of this case. At the time this administration was granted it was supposed that there were no next of kin, and on that assumption the Crown was beneficially entitled to this estate; and, being so entitled, the Crown was entitled to nominate an administrator. In point of law the sovereign was himself the party entitled to administer; and in this particular case, at that time, the sovereign was personally interested; the public had no concern in the matter; but that makes no difference in the principle. Now, the Crown being so entitled, it is argued that Reynolds was merely the agent of the Crown, and in one sense he was so; the Crown, being entitled to administer as being beneficially entitled, appoints this person, and he is accountable to the Crown; and if it turned out that there were really no next of kin, the Crown might treat him as accountable as its agent.”

In *In re Achillopoulos, Johnson v. Mavromichali* (5), [1928] Ch. 433 at p. 445, Tomlin, J., said:

“I take the view that the duty of an attorney-administrator for a foreign principal, who is the executor of the law of the domicil, is that he is to take the necessary steps for ascertaining and paying the English debts or the debts payable in the United Kingdom, but having done that, he is free to hand over the surplus (unless he has notice of some foreign debt) without the necessity of foreign advertisements or taking any active steps abroad to ascertain the position in regard to the debts. He is free to hand over the surplus to his principal—being the executor or person in the position of executor under the law of the domicil—because that person is the person directly responsible for the payment of foreign debts. Therefore, if up to the date of handing over he has no notice of any foreign debts, he is justified in handing over the surplus.”

And it is clear that a grant to an attorney-administrator ceases to be of any force on the death of the principal or on any other event which would operate as a revocation of the power of attorney (Halsbury, *Laws of England* (3rd Edn.) Vol. 16, p. 241; *Webb v. Kirby* (6), 44 E.R. 147; and see note to s. 28 (which corresponds to s. 212 of the Indian Succession Act, 1865) at p. 65 of Kinney, (Indian) Probate and Administration Act, 1881 (2nd Edn.)).

It is of interest also to note the terms of a practice note issued by the senior registrar of the Principal Probate Registry in England with regard to the estates of deceased persons coming within the provisions of the Trading with

the Enemy Act, 1939. The note is printed at the end of the report of *Re Fischer* (7), [1940] 2 All E.R. 252 at p. 253, and reads as follows:

“Consent by Custodian of Enemy Property to Grants of Representation.

“The consent in writing of the Custodian of Enemy Property, whose office is situate at that of the Public Trustee, Kingsway, London, W.C.2, must be obtained and produced before a grant of representation can issue (i) in respect of the estate of a deceased person of whatever nationality who was resident in enemy territory, such territory being defined by the Trading with the Enemy Act, 1939, s. 15 (1) (b), (ii) in respect of the estate of a deceased German national, who was resident in neutral territory, (iii) to a German national residing in neutral territory in respect of the estate of any deceased.

“Such consent is necessary whether the deceased died before or after the outbreak of war.

“No grant of representation can issue to any person resident in enemy territory as defined by the aforesaid Act or to his attorney.

“Any case in which there is doubt should be referred to the Custodian of Enemy Property for his decision as to the necessity for his consent.”

In the instant case, of course, the grant to the administrator was made before the outbreak of war, but it is clear from the practice note that in England the attorney of an executor resident in enemy territory was regarded as tainted with “enemy” status for the purposes of the Trading with the Enemy legislation.

No case was cited to us, and I have been unable to find any case that is directly in point. Such cases as I have found relate to grants of administration after the outbreak of war; e.g. *In the Estate of Jacob Schiff* (8), [1915] P. 86, where it was laid down, in relation to the 1914 Trading with the Enemy legislation, that the public trustee, as custodian under that legislation, was the proper person to take a grant of administration; and *Re Fischer* (7), where a grant was made to the son of a deceased German national, resident in England, subject to an undertaking to comply with the Board of Trade’s directions as to that part of the estate demised to, or held for the benefit of, members of the family resident in enemy territory.

The matter is not entirely free from doubt, but I think that the agency of the administrator as attorney-administrator for Baron Hans Werner was sufficient to bring the estate of the deceased within the definition of “enemy property” in s. 9 of the Ordinance. On the authority of *In re Achilopoulos* (5), it would appear that, after payment of debts and apart from the existence of a state of war, the administrator could have got a good discharge by handing over the surplus of the estate to Baron Hans Werner. If this is correct I think this alone is sufficient to bring the estate in the hands of the administrator within the definition of “enemy property”. Further, the definition of “property” in s. 9 is very wide and includes “any . . . right or interest, whether in possession or not”. Baron Hans Werner undoubtedly had the right (apart from the existence of a state of war) to secure the issue to himself of a grant of administration of the deceased’s estate in Kenya and to have the property vested in him as administrator. This also would appear to bring the deceased’s estate within the definition of “enemy property”. Accordingly I think that a vesting order in respect of the estate or any part of it would be valid. If I am right as to this, it seems to me that the position of beneficiaries who were not enemies or enemy subjects would then be analogous to that of creditors, and that payments to them would be a matter of discretion (*Bank voor Handel v. Administrator of Hungarian Property* (1); *In re Munster* (9), [1920] 1 Ch. 268); though there is no reason to suppose that the Crown would not make available to such beneficiaries the part of the estate to which they are

entitled. This was clearly the intention when the “release” orders were made, the effect of which was to recreate the interest of the beneficiaries concerned in the released portion of the deceased’s estate.

Although, on the basis indicated, I am prepared to hold that the vesting orders and release orders in question are valid, I think it is as well to consider also the position as between the custodian and the beneficiaries without regard to the title of the administrator, or Baron Hans Werner’s right to a grant of administration.

At the time the vesting orders were made the widow’s claim against the estate had not been made and there was no reason to expect it. At that time the administration of the estate must have been complete in the sense that all known debts had presumably long been discharged, and the administrator had for a considerable time been managing the estate, if not on behalf of Baron Hans Werner, then on behalf of the beneficiaries. While he did not lose his character as administrator (*Harvell v. Foster and Another* (10), [1954] 2 All E.R. 736 at p. 745), it is, I think, clear that on this basis, he was holding the estate for the benefit of the beneficiaries, and that, in so far as the beneficiaries were enemies or enemy subjects, their shares in the estate were “held” by the administrator on their behalf within the meaning of that word in the definition of enemy property in s. 9 of the Ordinance (cf. *Re Fischer* (7)). So far as these shares were concerned, I think there can be no doubt that the custodian was entitled to have them vested in himself. What was done, and was done with the consent of the advocates then representing both the administrator and the widow, was that the two vesting orders were made, one relating to the immoveable property in the deceased’s estate, and the other to the moveable property.

So far as the moveable property was concerned, it was believed at that time that by virtue of the wills the beneficial interest in it vested in the residuary legatee, Baron Hans Werner, i.e. an “enemy”. The claim now put forward by the widow had not then been formulated. That claim is contested and has not yet been established. So far as the claim may be based on contract, I have already indicated my view that it is irrelevant. If, however, the widow succeeds in establishing her claim under the will, it may be that she will be entitled to recover the moveable property from the custodian on the basis that it never has been enemy property; if, that is, the estate is not “enemy property” in the hands of the administrator. Unless and until she establishes her claim, however, I do not think the question arises. The position is that at the date the vesting order in respect of the moveable property was made, the beneficial interest in that property was believed to belong to an enemy, a fact which, if correct, would justify the making of the order. It has not yet been established that that belief was wrong. Until that is established, I am not prepared to say that the vesting order is other than valid and effective.

As regards the order relating to the immoveable property, the same considerations apply as regards any claim by the widow under the will. Until the contrary is established I think the facts believed to have existed at the date of the orders must be taken to be correct. On those facts I do not think a vesting a three-eighths share of the immoveable property in the custodian could have been challenged, since that represented the share of the property held on behalf of enemies or enemy subjects. The course actually adopted, however, was to vest the whole of the immoveable property comprised in the estate of the deceased in the custodian, and later to divest in favour of the non-enemy beneficiaries the proportionate shares to which they were believed to be entitled. This, as I have already remarked, was done with the consent of the advocates for the administrator. If I am right in my view that the custodian was entitled to have the whole estate vested in him by virtue of the administrator’s position as attorney-administrator for Baron Hans Werner,

then the course adopted was unobjectionable. If I am wrong, the question arises whether the vesting order which purported to vest the whole of the immoveable property in the custodian was valid and effective at least as to the three-eighths share of the immoveable property which undoubtedly fell within the definition of enemy property, or whether it was wholly void and of no effect.

It was argued that the terms of the order were such that it applied to the physical immoveable assets and not to beneficial interests; that the order referred to the whole of the physical assets and was indivisible; that the order must be invalid in so far as the interests of non-enemies were concerned, and that if any part of the order was invalid the whole order must fail.

No authority was cited on this point, and I am unable to see why a vesting order, made in respect of specified property, should not be valid in respect of such items of the property as are “enemy property” notwithstanding that other items may prove not to be “enemy property”; or, as in this case, why such an order should not be valid as respects the interests in the property of persons who are enemies or enemy subjects, notwithstanding the fact that non-enemy persons may also hold interests in the property. It is true that the vesting orders purport to vest the whole of the legal title to the property in the custodian. If the property, apart from certain beneficial interests in it, is not “enemy property”, the orders would, no doubt, be ineffective to transfer the title to the whole property from the administrator to the custodian. But it seems to me that the order would be effective to vest in the custodian such interest in the property as, by virtue of the beneficial interests, was “enemy property”. To hold otherwise in this case would be to defeat the express object of the legislation. In my opinion the vesting order of March 30, 1951, as amended, was effective at the least to vest in the custodian the shares of the beneficiaries who were enemies or enemy subjects. On this basis—that is, on the basis that the custodian was not entitled to have the whole estate vested in him, but only the shares held on behalf of enemies or enemy subjects—the course adopted is open to criticism in that the correct procedure would have been to vest in the custodian only that part of the estate to which enemies or enemy subjects were beneficially entitled, namely, as regards the immoveable property at the date the order was made, a three-eighths share. As has been said, the course actually adopted was to purport to vest the whole of the property in the custodian and then immediately to divest him of a half-share in favour of the widow and, subsequently, of a one-eighth share in favour of the fourth respondent. It may be that the vesting order was effective only to vest a three-eighths share of the immoveable property in the custodian, and that the release orders were therefore ineffective and mere surplusage, but from a practical point of view the result achieved was exactly the same; and, if I am right in my view that the custodian was entitled to have the whole estate vested in him quite apart from the question of the beneficial interests, the steps taken by the Crown were correct and necessary to re-vest in the administrator the beneficial interests to which non-enemies were entitled.

In the result I would hold that the vesting orders were valid; that the whole of the beneficial interest in the estate of the deceased vested in the custodian at the date of the orders; that the release orders were also valid and that under them five-eighths of the beneficial interest in the immoveable estate of the deceased has been re-vested in the administrator; and that, so far as the custodian is concerned, any payment, out of the moveable property or out of the three-eighths share of the immoveable property still vested in him, to the first wife in respect of her claim under contract, or to the widow in respect of her claim either under the will or under contract, is a matter of discretion.

I should mention that the custodian sought to rely on s. 9 (3) of the Ordinance. Except to the extent that I have already mentioned I do not think that the sub-section helps him. The effect of para. (ii) of the

sub-section, as I read it,

is to validate the vesting of property in the custodian if it should subsequently appear that the custodian's belief that the person interested in the property was an enemy or enemy subject was mistaken. Here the dispute is as to the person beneficially entitled and not the status of such person as an enemy or otherwise.

Mention was made during the hearing of the fact that the custodian had purported to appoint the administrator as manager of the deceased's estate by letter written before the Ordinance came into force, and it was contended that this appointment was ineffective. Whether or not this is so, I do not think it has any relevance to the matters in issue on this appeal and it is therefore unnecessary to consider it.

In the result I would allow the appeal and set aside that part of the order of the Supreme Court dated June 23, 1958, which declares that:

- “(i) The Trading with the Enemy (Vesting of Enemy Property) Order, 1951, published as Government Notice No. 367 of 1951;
- (ii) The Trading with the Enemy (Vesting of Enemy Property) (No. 2) Order, 1951, published as Government Notice No. 369 of 1951;
- (iii) The Trading with the Enemy (Release of Enemy Property) Order, 1951, published as Government Notice No. 368 of 1951; and
- (iv) The Trading with the Enemy (Release of Enemy Property) Order, 1952, published as Government Notice No. 324 of 1952;

are void and of no effect to create assign or otherwise deal with any interest in the moveable or immoveable estate of the deceased.”

I think it right to add a word regarding a vigorous attack upon the conduct of the Crown and the custodian in this matter which was made by counsel for the first wife and counsel for the widow. It was suggested that the Crown was seeking to perpetrate the wholesale plunder of property of persons who were not enemy subjects; that the custodian had unjustifiably taken the beneficial interest in all the property; and that the Crown had misapplied the Ordinance. In my view there is no justification for this attack. This was a complicated matter, and the duty of the custodian was to secure any “enemy property” that might be comprised in the deceased's estate. The view was taken, I think rightly, that the custodian was entitled to have vested in him the whole of the estate of the deceased in Kenya. But steps were taken immediately to divest the custodian of the beneficial interest in the estate to which, on the facts as then ascertained, it was believed that non-enemies were entitled. I have already indicated that under the Trading with the Enemy legislation the custodian is under no legal duty to have regard to the claims of creditors, but in any case, at the time the vesting orders were made, the claim of the first wife against the estate was not known. Neither was the claim of the widow, either under the will or under contract. At that time the widow was apparently content to accept the half-share in the immoveable property of the deceased to which it was believed she was entitled. This half-share was made available to her. It seems to me that, from the moral point of view, on the facts as then known, the action of the Crown was scrupulously correct. There seems no reason to suppose that, if claims against the deceased's estate by person who were non-enemies is established, the Crown will ignore such claims, even though it is a matter of discretion whether they are met or not.

Gould JA: I agree.

Windham JA: I also agree.

Appeal allowed. Order of the Supreme Court set aside.

For the appellant:

Byron Georgiadis

B Georgiadis, Nairobi

For the first respondent:

GEL Harris

Hamilton, Harrison & Mathews, Nairobi

For the second respondent:

Bryan O'Donovan QC and *AW Tagart*

AW Tagart, Nairobi

For the third respondent:

JA Mackie-Robertson

Kaplan & Stratton, Nairobi

For the fourth respondent:

P le Pelley

Archer & Wilcock, Nairobi

Hassanali Kurji Kanji v Gailey and Roberts Limited [1959] 1 EA 521 (PC)

Division:	Privy Council
Date of Judgment:	20 April 1959
Case Number:	4/1957
Before:	Lord Radcliffe, Lord Keith of Avonholm and Mr L M D de Silva
Sourced by:	LawAfrica
Appeal from:	E.A.C.A. Civil Appeal No. 9 of 1956; H.M. High Court of Tanganyika–Cox, C.J

[1] Contract – Undertaking to assume responsibility for debt – No affirmative evidence establishing consideration given at trial – Appellant’s contention that consideration not given – Trial judge’s inference from facts that consideration given – Indian Contract Act, 1872, s. 25.

Editor’s Summary

The respondents obtained judgment against the appellant for Shs. 206,429/09 representing moneys outstanding on the trading account of two businesses, one named “Hassan Trading Stores” of which the appellant was registered proprietor, and the other named “Hassanali & Co.”, the registered proprietor of

which was one H. K. Premji. The Court of Appeal dismissed the appeal from this decision and the appellant appealed again. The appellant did not dispute that he had given the respondents an undertaking to pay these sums, but it was argued on his behalf that the evidence in the action did not support the view that any consideration had been afforded by the respondents in exchange for the undertaking and that therefore the undertaking itself was void under the provisions of s. 25 of the Indian Contract Act 1872.

Held –

- (i) the trial judge was justified in drawing the inference from the facts before him that the appellant received consideration from the respondents; *Crears v. Hunter* (1887), 19 Q.B.D. 341, applied.
- (ii) it would be wrong for an appellate court to upset the judgment of the trial judge on the ground that it was not open to him to arrive at the conclusions of facts which he did.

Appeal dismissed.

Case referred to in judgment

- (1) *Crears v. Hunter* (1887), 19 Q.B.D. 341.

Judgment

Lord Radcliffe: In this appeal the appellant challenges the decision of Her Majesty's Court of Appeal for Eastern Africa to the effect that he is liable to pay to the respondents a principal sum of Shs. 206,429/09 representing moneys outstanding on the trading account of two businesses, one entitled Hassan Trading Stores, of which the appellant was registered proprietor, and the other entitled Hassanali & Co., the registered proprietor of which was one H. K. Premji. It was not in dispute in the appeal that the appellant had in fact given the respondents an undertaking to pay these sums; what was argued on his behalf was that the evidence in the action did not support the view that any consideration had been afforded by the respondents in exchange for the undertaking and that therefore the undertaking itself was void in law under the provisions of s. 25 of the Indian Contract Act, 1872, which rules in Tanganyika.

In their lordships' opinion this argument cannot be supported. Since it turns wholly on the question what facts were proved at the trial of the case in the

High Court of Tanganyika and on the further question what legitimate inferences could be drawn from those facts as to the true nature of the arrangement come to between the parties, it is more convenient to notice the course of the trial itself and the form which the evidence took than to attempt any independent narrative of the facts.

The respondents, it appears, carry on business in Tanganyika at Moshi and elsewhere. In February, 1954, they launched the present action against the appellant under the name of the Hassan Trading Stores, claiming a sum of Shs. 97,936/54 in respect of goods supplied by them to the stores and a sum of Shs. 121,462/07 in respect of the account of Hassanali & Co. for which, they said, the appellant had undertaken liability. In his defence the appellant denied that he ever undertook the liability of Hassanali & Co., a position which he maintained throughout the trial and tried to support by the evidence which he gave. His evidence on this point was not believed by the learned judge (Cox, C.J.) who tried the case, and their lordships are satisfied that there was ample material by way of subsequent conduct and admissions to justify the judge in his finding that the appellant had in fact given the undertaking alleged. This was conceded at the present hearing and the appellant's case accepted the month of December, 1951, as the month in which the undertaking was given.

The material point is therefore to see how far the evidence established the circumstances attendant upon that undertaking. As to this, it appeared that there was at the material time a third customer of the respondents, one Mohamedali Jafferli, in their debt to the extent of Shs. 109,345/70. He was the appellant's nephew and the son of Premji's brother-in-law. All three had the same postal address, P.O. Box 48 Moshi. According to the learned Chief Justice their business relationship and family relationship were such as to make their three concerns "almost integrated one with the other". It was objected that there was no evidence to support this finding. Certainly no evidence is recorded to this effect; but a considerable part of the hearing is only covered by the judge's notes, which are not intended to be exhaustive, and their lordships do not think it likely that the trial judge would have stated that he was satisfied as to certain incidental matters of fact if he had not had some material before him to support his conclusion.

The respondents' statement of the case was that the appellant's undertaking to cover the Hassanali account arose out of an arrangement by which the sums owing to them on the Jafferli account were transferred in part to the appellant's account and in part to the Hassanali account and Jafferli's account with the respondents was then closed. Paragraph 5 of their amended plaint runs as follows:

"In or about December, 1951, it was agreed orally between Mr. F. A. Green the then manager of the plaintiffs at Moshi and the defendant and H. K. Premji that Shs. 400,000/- should be transferred from the account of Mohamedali Jafferli to the account of Hassanali & Co. . . ., and it was agreed at the same time that the balance of the said account of Mohamedali Jafferli some Shs. 9,334/70 should be transferred to the account of Hassan Trading Stores . . ., and it was further agreed between the afore-mentioned parties that the defendant would undertake the responsibility for the payment of the account of Hassanali & Co., which at the time of the said undertaking included the amount transferred from the account of Mohamedali Jafferli".

The evidence produced at the trial left no doubt that the Jafferli account had in fact been treated in the way alleged. It was clear from the account books kept by the respondents that this account was shown as closed by December 31, 1951, and that the Shs. 109,345/70 owing on it were divided as

stated as debits to the accounts of Hassan Trading Stores and Hassanali & Co., respectively. This is not now in dispute.

It would be difficult to say that the trial elicited any further facts than these relevant to the circumstances in which the appellant's undertaking was given. Mr. Green, the respondent's manager at Moshi in 1951–52, was called: but he had left that employment in 1953 and it is plain that by the time of the trial he had very little recollection of what arrangements he had made with the appellant, except so far as he had some contemporary record or document to act as the foundation for anything to which he testified. The most that he seems to have been able to contribute was that in December, 1951, Jafferli was not in a position to pay what he owed, that he (Green) had had a meeting in the same month with the proprietor of Hassanali & Co. "to get the money", that the Shs. 100,000 were transferred to the company's account because they had agreed to take over that liability and that his impression was that the appellant himself had agreed in 1951 to undertake liability for the Hassanali account. He founded his impression principally on the fact that he had obtained and held a series of post-dated cheques drawn by the appellant to the precise amounts owing on that account. These cheques, which were never honoured, appear to have been made out in favour of Hassanali & Co., and endorsed by them to the respondents.

The respondents' two succeeding managers at Moshi were also called as witnesses, since they had taken over responsibility for the respondents' dealings with the appellant. While they could add nothing of their own knowledge as to the circumstances in which the arrangement or arrangements of December, 1951, were come to, they did make it quite clear that between 1952 and 1954 the appellant had consistently treated himself as liable to the respondents for what was owing on the Hassanali account as well for what was owing from Hassan Trading Stores and had never, until the defence was filed in the action, disclaimed the liability.

Both he and Premji were called at the trial. Premji, while agreeing that he had arranged with Mr. Green to take over Shs. 100,000/- of Jafferli's debt, denied that, so far as he knew, there had been any suggestion of the appellant becoming responsible for the Hassanali account. The appellant, while agreeing that he had arranged with Mr. Green to take over Shs. 9,000/- of the Jafferli debt, denied that he had assumed responsibility for the Shs. 100,000/- or for the liability of Hassanali & Co. in any form. As has been said, the trial judge stated that he rejected the story told by the witnesses for the defence where it was in conflict with that of the plaintiffs' witnesses. While this does not add any element of proof to the respondents' evidence that was not there before it does mean that the facts and circumstances which were established by their evidence stand without any acceptable explanation from the side of the appellant.

On this state of the record the appellant argues that he was entitled to succeed at the trial with regard to all that part of the claim that related to the Hassanali account because there was no consideration given by the respondents for the undertaking which he gave to them. This point as to lack of consideration was not raised by the defence nor, when the issues came to be settled, was any issue asked for with regard to it. It appears to have been raised by the appellant's counsel in his address to the court at the close of the hearing. It is possible that, had it been brought forward earlier, the evidence adduced at the trial would have been more explicit in this connection; but, having regard to the general course that the evidence took and the vagueness of Mr. Green's personal recollection, the possibility is only a thin one and their lordships do not give any weight to it in their appreciation of the evidence.

Consideration is defined by s. 2 of the Indian Contract Act in the following terms:

“When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise.”

This definition does not offer any distinction that is material for the purposes of the present appeal between consideration as ruled by the Indian Contract Act and consideration in the law of England. Now it is true that there is no part of the evidence for the respondents which states with any clarity what was agreed between Mr. Green on their behalf and appellant; nor is there in it any statement at all to the effect that any promise which the appellant gave to hold himself responsible for the Hassanali account was made at the same time as and in exchange for the respondents’ closure of the Jafferli account. This is the point upon which the appellant’s counsel stands. It is not impossible, as he says, that the undertaking to cover the Hassanali account was given independently of the arrangement to close the Jafferli account and divide the sums owing on it between Premji and himself. If so, the undertaking would stand as nudum pactum. At any rate, he says, it was never affirmatively proved that the undertaking and the arrangement were so much part of one transaction as to be, in effect, mutual promises; and, if so, then the respondents’ case lacked an essential element of proof.

In their lordships’ view the question resolves itself into that of deciding how far it was open to the High Court to supply by inference from facts proved or admitted a material fact that was not so proved. In effect, did the circumstances known to the court justify the inference that when the appellant gave the respondents his undertaking to be responsible for the Hassanali account he obtained consideration from them in return in the form of something that he wanted them to do or abstain from or to promise? There is no doubt that it is open to a court to find a fact by inference in this way without having direct proof before it and the giving of consideration is sometimes so found—see *Crears v. Hunter* (1) (1887), 19 Q.B.D. 341. The test seems to be whether the inference drawn arises with reasonable cogency from the surrounding circumstances.

The learned trial judge’s treatment of the facts is expressed as follows:

“In the middle of 1951 and before that Mohamedali Jafferli had incurred a considerable liability with the plaintiffs, and one of the local managers of the plaintiffs, being concerned about it and the fact that he himself would be pressed from his head office in connection with this outstanding account, acquiesced in a proposal by the defendant that the liability of this third concern to the plaintiffs should be divided between Hassan Trading Stores and Hassanali & Co., and at the request of the defendant Mohamedali Jafferli’s account was closed . . .”

Later, he states:

“I am quite satisfied from the evidence that the defendant accepted liability for the whole of Mohamedali Jafferli’s liability to the plaintiffs and that that liability was divided between Hassan Trading Stores and Hassanali & Co. as requested by the defendant, with effect from December 31, 1951.”

Plainly, with facts so found, the appellant obtained consideration from the respondents by their closure of the Jafferli account and all that was done and promised on both sides was part of one interconnected arrangement. Their lordships do not think that this was an impermissible deduction from the known facts. It is common ground that both the appellant’s undertaking, and the closure and transfer of the Jafferli account took place in the same month, December, 1951. If the Jafferli account was closed and its debits

transferred in the way proved, it seems not only a possible but in fact the most reasonable inference that the respondents would not have so acted unless they were to get something in exchange for the release of their debtor. Since it is known that in the same month the appellant assumed liability for the Hassanali account as between himself and the respondents, thereby becoming its guarantor, it is similarly the reasonable inference that he took this responsibility upon himself in exchange for the Jafferli release, a release to which he had at any rate some reason for wishing to contribute. When the facts and inferences can be set out in this way, their lordships are satisfied that it would be wrong for an appellate court to upset the judgment of the trial judge on the ground that it was not open to him to arrive at the conclusions of fact which have been referred to above.

Their lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondents' costs.

Appeal dismissed.

For the appellants:

RI Threlfall (of the English Bar)

Gibson & Weldon, London

For the respondents:

RJ Parker (of the English Bar)

Linklaters & Paines, London

George Woodgate v R **[1959] 1 EA 525 (CAK)**

Division:	Court of Appeal at Kampala
Date of Judgment:	20 April 1959
Case Number:	40/1959
Before:	Sir Kenneth O'Connor P, Forbes V-P and Windham JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court, Uganda—Bennett, J

[1] *Criminal law – False accounting – Intent to defraud – Whether appellant's purpose in making false entries to show a higher profit than was actually made established an intention to defraud – Penal Code, s. 305 (U.) – Criminal Procedure Code, s. 337 (U.).*

Editor's Summary

The appellant, who was a club manager was convicted by a magistrate on three counts of fraudulent false

accounting contrary to s. 305 of the Penal Code. The club's stocks of liquor, mineral waters and cigarettes were under his control and he kept books of account in respect of stocks of liquor and cigarettes purchased for the club, and daily cash sheets in respect of bar takings. The club's financial year begins on July 1 each year, and the appellant's duties then were to take stock of the contents of the bar and the store and to enter the results of this stocktaking in an annual bar account. The first count charged the appellant with making false entries in the bar account for the year 1956-57 which purported to over-value the stock held on July 1, 1957 by Shs. 4,090/88 with intent to defraud his employers. The other two counts charged the appellant with making false entries in the bar account sheets for August and October, 1957, which purported to show that the total bar sales for those months amounted to Shs. 12,828/20 and Shs. 8,562/- respectively whereas the correct figures were Shs. 11,929/41 and Shs. 7,520/10. The appellant's appeal to the High Court having been dismissed, he appealed again. At the hearing, counsel for the appellant conceded that the entries made by the appellant were in fact false, but argued that the trial court erred both in law and upon the facts, in finding that the appellant knew the entries to be false and that he made them with a fraudulent intent.

Held –

- (i) on a second appeal, it was not open to the court to interfere with the findings of fact; nevertheless the findings were reasonable upon all the evidence.
- (ii) on the first count the magistrate had erred on a vital point in holding that the appellant would be guilty of an intent to defraud if his only purpose in making false entries was to show a higher bar profit than was actually made: this amounted to no more than deceit.
- (iii) the magistrate's findings in respect of the other two counts and his conviction of the appellant on those counts should be supported.

Appeal allowed on one count but dismissed on the other two counts.

Cases referred to in judgment

- (1) *Re London and Globe Finance Corporation Ltd.* (1903), 1 Ch. 728.
- (2) *R. v. Bassey*, 22 Cr. App. R. 160; (1931) 47 T.L.R. (R.) 222.
- (3) *R. v. Sayed Hayed Hussein Shah* (1941), 8 E.A.C.A. 36.
- (4) *R. v. Kritz*, [1949] 2 All E.R. 406; 33 Cr. App. R. 169.
- (5) *R. v. Hawkins*, [1959] E.A. 47 (C.A.).
- (6) *R. v. Wines*, [1953] 2 All E.R. 1497.
- (7) *R. v. Potter*, [1958] 2 All E.R. 51.

April 20. The following judgment was read by direction of the court:

Judgment

This matter comes before us by way of second appeal, being against a judgment of the High Court of Uganda dismissing an appeal against a conviction in the resident magistrate's court on three counts of fraudulent false accounting contrary to s. 305 of the Penal Code of Uganda. The appellant, who was the manager of the Uganda Club, Kampala, was acquitted on two further counts, charging him with theft by a servant, upon a submission at the close of the prosecution case that there was no case to answer on those counts.

The appellant's position and duties in the club, and the nature of the three counts on which he was convicted, are set out in the following passages from the judgment of the High Court:

"The appellant was employed as manager of the Uganda Club from 1954 until the end of 1957. The club's stocks of liquor, mineral water, and cigarettes were under his control. He kept the key of the store in which liquor and cigarettes were stored for safe custody. The barman was answerable to him. The appellant kept books of account in respect of stocks of liquor and cigarettes purchased for use in the club, and daily cash sheets in respect of takings from the bar. He was responsible to the management committee of the club. The club's financial year began on July 1, and it was one of the appellant's duties to take stock of the contents of the bar and the store as at July 1 in each year. It was his duty to enter the results of this stock-taking in an annual bar account which contained a quantitative list of stock held on July 1. The first count charged the appellant with making false entries in the bar account for the year 1956-57 which purported to over-value the

stock held on July 1, 1957, by Shs. 4,090/88, with intent to defraud his employers. . .

“. . . The second count charged the appellant with making a false entry in the bar account sheet for the month of August, 1957, which purported to show that the total of bar sales for that month amounted to Shs. 12,828/20. The fourth count charged him with making a false entry in the bar account sheet for the month of October, 1957, which purported to show that the total of bar sales for that month was Shs. 8,562/-. According to the auditors the correct figures were Shs. 11,929/41 for the month of August, and Shs. 7,520/10 for the month of October.”

The section under which the appellant was charged and convicted on these three counts was s. 305 of the Penal Code of Uganda, of which the relevant part reads as follows:

“305. Any person who, being a clerk or servant, . . . does any of the acts following with intent to defraud, that is to say:

- (a) . . . falsifies any . . . document, valuable security or account which belongs to or is in the possession of his employer, . . .; or
- (b) makes, . . . any false entry in any such book, document or account;

.....

is guilty of a felony, and is liable to imprisonment for seven years.”

It was common ground before us, and was appreciated both by the court of trial and the High Court, that in order to convict the appellant upon these three charges under s. 305 it was necessary for the Crown to prove three things: first, that the entries were in fact false; secondly, that the appellant made them knowing them to be false; thirdly, that he made them with intent to defraud. Both courts were satisfied, in the case of each of the three counts, that all three elements had been proved. It was rightly conceded by learned counsel for the appellant before us, and was admitted by the appellant in evidence, that the entries were made by the appellant and were in fact false. But it was argued on the first appeal, and has been argued again before us, that the trial court erred, both in law and upon the facts, in finding (a) that the appellant knew the entries to be false and (b) that he made them with a fraudulent intent. A criminal appeal lies to this court from an appellate judgment only on points of law (Criminal Procedure Code, s. 337), and accordingly it is not open to us to interfere with any finding of fact by the trial court or the High Court unless there was no evidence to support it, in which case the point becomes one of law.

Bearing this in mind, we turn first to the contention that the appellant was not aware of the falsity of the three entries in question. The entries which are the subject-matter of count 1 relate to 32 items of drink and cigarettes entered in the annual bar account for the year July 1, 1956 to June 30, 1957, as having been in stock on July 1, 1957, whereas in fact those items were only received by the club between July 2 and 6, 1957. The total value of these items was Shs. 4,090/88 the result of their entry was thus to over-value by Shs. 4,090/88 the stock held by the club on July 1, 1957. The finding of the first appellate court upon the appellant’s knowledge of the falsity of these entries, upholding that of the magistrate and epitomizing the evidence on which it was based, is set out in the following passage from the judgment:

“It was proved by the prosecution that the appellant had entered in the bar account for 1956–57, thirty-two items of stock which had been received by the club after July 1, 1957. The value of these thirty-two items was Shs. 4,090/88. The appellant admitted, when giving evidence, that these thirty-two items had been incorrectly entered in the annual bar account for 1956–57, and that the stocks to which they related had been received by the club after July 1, 1957. He alleged that he had prepared the annual bar account on or about July 6, 1957, and that he had included items received after July 1, 1957, by inadvertence. On behalf of the appellant, it is contended that on a physical stock-taking it would not be difficult to overlook the fact that certain items of stock in the store had arrived after July 1. It is apparent from a perusal of the relevant invoices (Exs. 10–17) that all the items of stock to which the false entries related were received by the club between July 2 and July 6, that is to say, a few days prior to the date upon which the accused, according to his own evidence, prepared the annual

bar account. One invoice is dated July 6, 1957. Moreover, all these items of stock were correctly entered by the appellant in the bar inventory (Ex.8). In these circumstances it is not easy to see how the appellant, when making out the annual bar account on July 6, could have been unmindful of the fact that since July 1, very large quantities of stocks to the value of over Shs. 4,000/- had been received by the club. There was abundant evidence, in my opinion, to support the finding of the learned magistrate that the false entries relating to these thirty-two items of stock were made by the accused deliberately and with knowledge of their falsity.”

With regard to the appellant’s knowledge of the falsity of the entries in the bar account sheets for August and October, 1957, which were the subject-matter of counts 2 and 4 respectively, the finding of the first appellate court, similarly upholding that of the magistrate and briefly epitomizing the evidence on the point, is contained in the following passage from the judgment:

“The appellant’s figures of cash received during the months of August and October were admittedly obtained from books and documents made by himself, namely, the daily cash sheets (Ex.2), and the cash book (Ex.1) in which the totals of the daily cash sheets were entered up by the appellant. There is no suggestion that the daily cash sheets or the cash book contained incorrect entries or mathematical errors which were repeated by the appellant in the monthly bar account sheets for August and October. In view of the absence of any explanation by the appellant as to how he arrived at his figures and his admission that he understood the system of accounting there was, in my judgment, sufficient evidence to support the finding of the learned magistrate that the appellant deliberately entered false figures of cash received in the bar account sheets for the months of August and October, 1957.”

In dealing, as a second Court of Appeal, with the above findings regarding the appellant’s knowledge of the falsity of the entries that are the subject-matter of the three counts on which he was convicted, findings which are concerned purely with questions of fact, it is unnecessary for us to do more than to state that in our view there was evidence to support them and that it is not therefore open to us to interfere with them. We would, however, go further and say that we consider that those findings were reasonable upon all the evidence. It is accordingly established that the appellant when he made the entries knew that they were false. And that brings us to the second and far more cogent ground of appeal, namely that the magistrate and the first appellate court erred in going on to hold that the appellant made the entries with intent to defraud.

The classic definitions of “to deceive” and “to defraud”, showing the distinction between the two things, are contained in a passage from the judgment of Buckley, J., in *Re London and Globe Finance Corporation Ltd.* (1) (1903), 1 Ch. 728, at page 732-3. This passage, which has constantly been referred to as the locus classicus on the point by the courts in England and more than once by this court, and which was quoted in the judgment of the first appellate court in the present case, reads as follows:

“To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action.”

In the above passage the explanations of the meaning of “to defraud” which constitute a definition, and which have been relied on as such by the courts,

are those which describe it as “to deprive by deceit” or “by deceit to induce a man to act to his injury”. The remainder of the passage, from the words—“More tersely” to the end, describes “to deceive” and “to defraud” generically, and obviously does not purport to define them specifically nor to enlarge the definition which has just preceded it. Clearly these remaining words do not mean, nor have the courts taken them to mean, that to defraud is by deceit to induce *any* course of action, even if it does not fall within the preceding definition, any more than they mean that to deceive is by falsehood to induce *any* state of mind; for that would include the incredulous state of mind of a person to whom a falsehood was told and who disbelieved it and was thus not deceived by it at all. To be defrauded, then, a person must either have been deprived, which has been held to mean deprived of something having some economic value (however small), or he must have been induced to act to his own injury, not necessarily an economic injury; and both from common-sense and from the decided authorities it seems clear that, for this purpose, being induced to act would include being induced to remain inactive. A careful reading of the cases cited on the meaning of “to defraud” in the judgments of the magistrate’s court and of the first appellate court in the present case, and of other decisions which appear to us to be relevant, would appear to establish these propositions as the accepted position in law. In *R. v. Bassey* (2), 22 Cr. App. R. 160; (1931) 47 T.L.R. (R.) 222, where the benchers of the Inner Temple were induced to admit the accused as a student by a forged certificate stating that he had passed the necessary qualifying examinations and was of good character, the benchers were held to have been defrauded because they had been induced to act to their own injury, namely in admitting as a student one whom, had they known the facts, they would have had the right and the duty to exclude. The report of *Bassey’s* case (1) in the Times Law Reports shows that the benchers did, in fact, suffer an economic loss, since Bassey had, on the faith of the forged certificate, been admitted on payment of a fee of £108 13s. 3d. instead of £208 13s. 3d. which would otherwise have been charged. In *R. v. Sayed Hadi Hussein Shah* (3) (1941), 8 E.A.C.A. 36, a case of fraudulent false accounting by a bank teller, this court allowed the appeal in respect of three counts on the ground that there had been no false accounting at all on those counts, but dismissed it in respect of the remaining counts on the ground that the finding of the trial court that the false accounting was with intent to defraud was justified. The trial court had held that the accused had by his act attempted to conceal the fact that he had been using the bank’s money for his own purposes, and this fact was not merely conjectured by the trial court but was held to be proved by circumstantial evidence, which included evidence that at the time of the false accounting the accused was heavily in debt and had but little money of his own. This court upheld the finding of an intent to defraud on the strength of the fact, to which those circumstances irresistibly pointed, that the appellant was by his false accounting attempting to conceal his defalcations. In *R. v. Kritz* (4), [1949] 2 All E.R. 406; 33 Cr. App. R. 169, the accused drew money from a bank upon worthless cheques and thereupon paid the money into the accounts of the drawers of those cheques and so enabled them to be met. The case has no direct relevance to the one now before us; it merely applied the well established proposition that one may defraud a person of money even though one intends at the time to repay him in the near future and in fact does so,—a proposition which was recently emphasised by this court in *R. v. Hawkins* (5), [1959] E.A. 47 (C.A.). The next case to which we turn, *R. v. Wines* (6), [1953] 2 All E.R. 1497, has more relevance to the present one. There the accused, a shop employee, falsified the shop accounts. It was held on appeal, upholding his conviction, that whether his object in doing so was (as the prosecution suggested) to cover up his own previous proved depredations into the stock of the shop, or whether it was (as he had himself alleged) to make

the gross profit appear higher than it really was and thereby to induce the shop to keep him on and continue to pay him wages, instead of dismissing him which they would otherwise have done, in either case his intent was to defraud. In so holding, the Court of Criminal Appeal appears to have applied the first part of the definition of “to defraud” contained in the passage from the judgment of Buckley, J. in *Re London and Globe Finance Corporation Ltd* (1), which has been set out earlier and which they quoted; for to be prevented from discovering the theft of one’s property and from perhaps recovering it, and to be deceived into paying wages that one would not otherwise have paid, both entail economic loss. Lastly, in *R. v. Potter* (7), [1958] 2 All E.R. 51, both parts of the definition were applied and both were held to have been satisfied. In that case A, by impersonating B, obtained a driving licence for him and signed it in his name. It was held that A had defrauded the licensing authorities in two ways; first by inducing them to take a course of action which, while not economically detrimental to them, was to their injury in that it would have been their right and their duty not to take it if they had known the true facts; secondly, by causing them “economic deprivation” also, in that the paper and print constituting the driving licence which they were induced to issue and to part with was a chattel of some trifling economic value in itself.

We turn, then, to the judgments of the magistrate’s court in the present case, and of the first court of appeal, to see what facts, if any, established in their view the appellant’s intent to defraud in the three counts on which he was convicted, and to consider whether such facts could in law constitute an intent to defraud, and, if they could, whether there was any evidence to support them.

The learned trial magistrate in his judgment, after reviewing the evidence and the legal authorities cited to him on the subject of what is sufficient to constitute an intention to defraud, continued and concluded as follows:

“Even if, therefore, accused’s employers had suffered no financial loss by reason of the false entries and that the only purpose in making them was to show a higher bar profit than was actually made, this would be sufficient on the cases cited to prove a fraudulent intention. I accept the evidence of the auditors and am satisfied beyond all reasonable doubt that the false entries were made by the accused with knowledge of their falsity, that the thirty-two items of stock delivered after July 1, 1957 were included in the bar account sheet 1956-57 in order to induce the committee to believe that the profits were higher for that year than was actually the case, and that the two false entries in the bar account sheets for August and October were made in order to cover up apparent shortages for the bar takings during those months. The accused is convicted on all three counts of fraudulent false accounting contra to s. 305 P.C.”

We would observe that, in our view, the learned magistrate erred in law on a vital point in holding that, on the authorities, the appellant would be guilty of an intent to defraud if his only purpose in making the false entries was to show a higher bar profit than was actually made. If his ulterior object, in showing such a higher bar profit, was to cover up earlier deficiencies for which he was responsible, or to be retained in employment and paid wages instead of being dismissed, then in either of those cases he would be guilty of a fraudulent intention, as the decisions in *R. v. Shah* (3) and *R. v. Wines* (6), respectively, have shown. But as no more was found than that the accused by his false accounting wished to show that a higher profit had been made than had in truth been made, this amounts to no more than deceit. It has been suggested that the appellant’s object really was to avoid being dismissed as a result of disclosures which true accounting would have revealed, and thus to be paid further wages, just as in *R. v. Wines* (6). But not only does the evidence not

support such a conclusion; for the appellant's contract with the club was due to expire and did expire at the end of 1957 and there was evidence that he did not seek its renewal; but also the court of trial made no finding of fact to the effect that his reason was to avoid dismissal, and it would not be open to us to make one on such inconclusive evidence.

The learned magistrate's conclusion, then, that the appellant was guilty on count 1 merely because the false entries which he made under that count were made with fraudulent intent in that he made them

"in order to induce the committee to believe that the profits were higher for that year than was actually the case"

was bad in law, and on that ground alone the conviction on that count cannot stand.

With regard to the convictions on counts 2 and 4, the learned magistrate held that the fraudulent intent, on these counts, was established in that these two false entries in the bar account sheets for August and October, 1957, were made

"in order to cover up apparent shortages for the bar takings during those months".

Now if that was the case, a fraudulent intent would, as we have seen, have been established in law. For to prevent the committee from discovering a shortage and thereby from being given some opportunity of recovering it would, as we have seen, be to cause them to act to their own injury, since causing them to act must be deemed to include causing them to remain inactive. And if there was any evidence before him, direct or circumstantial, upon which the magistrate could properly find that an intention to cover up shortages had been established, then it would not be open to us, upon a second appeal, to interfere with his finding on the point.

The paragraph in the learned magistrate's judgment setting out briefly the facts regarding the discrepancies in the bar account sheets for August and October, 1957, reads as follows:

"Turning now to the bar account sheets for August and October, 1957, these were also checked by Mr. Downs who endeavoured to reconcile the figure shown for the estimated value of the bar sales with the actual total cash paid figure. To do this he extracted the amounts shown in the daily cash sheets for bar receipts and adjusted the total figure in each case by allowing for sale on credit. These extracts (Exs. 19 and 20) reveal that the total cash receipts from bar sales were Shs. 11,929/41 during August and Shs. 7,520/10 for October, whereas the amounts inserted by accused in the bar account sheets under the heading "Paid Cash" were Shs. 12,828/20 and Shs. 8,562/- respectively. These last-mentioned figures show almost complete reconciliation with the amounts of Shs. 12,833/55 and Shs. 8,571/40 inserted in the bar account sheets as representing the value of the stocks sold during these months. When these discrepancies were discovered the manager was asked to explain how he arrived at his "Paid Cash" figures, but despite being given plenty of time and opportunity both by the auditors and the club committee, he was unable to do so."

It is true that there was no evidence upon which it could be held that the shortage in the bar receipts for the months of August and October must necessarily be ascribed to any criminal activities, whether on the appellant's part or anyone else's. And the learned magistrate at the close of the Crown case, in ruling that there was no case for the appellant to answer on the two charges of theft against him, rightly held—

“There is no evidence to show that any moneys received by the accused as manager were misappropriated or converted by him.”

Nor was there, of course, any shortage of stock, since the stock disposed of was accurately entered in the monthly bar sheets. But the fact established by the evidence was that there was a serious shortage in actual receipts at the bar, as compared with the stock disposed of, a shortage which remained unexplained.

A person is presumed to intend the natural and probable consequences of his acts, and, in the circumstances of a particular case, the natural and probable consequences of an act of false accounting may be such as to show an intent to defraud. The general principle, we think, is clearly expressed in the following passage from Archbold’s Criminal Pleading, Evidence and Practice, (33rd Edn.), at p. 366:

“Where the essence or a necessary constituent of the offence is a particular intent, that intent must be proved by the Crown just as much as any other fact necessary to constitute the offence, and the burden of proving that intent remains throughout on the Crown. If the Crown prove an act the natural consequence of which would be a certain result, and no evidence or explanation is given, then the jury may, on a proper direction, find that the prisoner was guilty of doing the act with the intent alleged; but if on the totality of the evidence there is room for more than one view as to the prisoner’s intent, the jury should be directed that it is for the Crown to prove the intent to the jury’s satisfaction and if, on the whole of the evidence, the jury either think that the intent did not exist or they are left in doubt as to the intent, the prisoner is entitled to be acquitted.”

In the present case the natural and probable consequence of the appellant’s act in deliberately inserting a false figure for the actual cash receipts in the bar accounts for August and October, 1957, was, in our view, as it was also in that of the learned trial magistrate by clear implication from his judgment, that the committee of the club would not realize that there were substantial discrepancies between the actual bar receipts and the expected bar receipts. The committee were intended to be deceived and to be deprived of information, which it was the duty of the appellant to supply, and which would, in the natural course of things, have led to an investigation into the reasons for the abovementioned discrepancies and to steps being taken to remedy a state of affairs detrimental to the club. After a very careful review of the record and the exhibits in the case and of all the arguments advanced by learned counsel for the appellant, we are of opinion that the learned magistrate’s findings in respect of counts 2 and 4, and his conviction of the appellant on those counts should be supported.

We accordingly uphold the conviction of the appellant on counts 2 and 4, and the concurrent sentences of 6 months’ imprisonment imposed in respect thereof; but, for the reasons we have given earlier, we quash the conviction on count 1, in respect of which the appellant was sentenced to imprisonment for 18 months.

Appeal allowed on one count but dismissed on the other two counts.

For the appellant:

PJ Wilkinson

PJ Wilkinson, Kampala

For the respondent:

MT Maloney (Crown Counsel, Uganda)

The Attorney-General, Uganda

B K M Kiwanuka v Yosefu Wasswa and others
[1959] 1 EA 533 (HCU)

Division: HM High Court of Uganda at Kampala
Date of Judgment: 9 April 1959
Case Number: 225/1958
Before: Sir Audley McKisack CJ
Sourced by: LawAfrica

[1] Native law and custom – Mailo land – Sale by African vendor to African purchaser – Breach of contract – Whether Principal Court or High Court has jurisdiction – Buganda Courts Ordinance (Cap. 77), s. 7, s. 11 (U.) – Registration of Titles Ordinance (Cap. 123), Part VII (U.).

Editor’s Summary

The first defendant, W, owned land on the Mailo Register, which was mortgaged to the third defendant, a bank. The plaintiff claimed that when the bank advertised the land for sale owing to the default of W under the mortgage, he, the plaintiff had agreed with W and the bank to purchase the land and to repay (and had repaid) the bank’s advance as part of the price, and that subsequently W in breach of contract sold the land to the second defendant, M, at a higher price. The plaintiff sought injunctions to restrain W and M from dealing with the land and to restrain the bank from handing over to anyone except the plaintiff the release of the mortgage. The court held that on the evidence the action against the bank failed and then considered the remaining issues between the plaintiff, W and M.

Held – since the land was Mailo land, the Buganda Courts Ordinance s. 11 (1) applied, and, as the case did not arise under Part VII of the Registration of Titles Ordinance, the High Court had no jurisdiction and the case must be transferred to the Principal Court of Buganda for adjudication.

Order accordingly.

Judgment

Sir Audley McKisack CJ: after considering and disposing of the case against the bank continued: There remain the issues concerning the sale, or alleged sale, of the land to the plaintiff and the subsequent sale of the same land to Mpanga. The land being Mailo land, s. 11 (1) of the Buganda Courts Ordinance (Cap. 77) is relevant. That sub-section is as follows:

“11 (1) A case involving questions of title to or any interest in land registered in the Mailo Register under the Registration of Titles Ordinance or any Ordinance amending or replacing the same shall be tried only by the Principal Court, except a case arising under Part VII of the said Ordinance.”

This is clearly not “a case arising under Part VII” of the Registration of Titles Ordinance (Cap. 123). That part of that Ordinance deals with the lodging of caveats and proceedings for the removal of caveats,

and the instant case is not concerned with such matters.

Section 7 of the Buganda Courts Ordinance provides that (subject to an exception which is not relevant to the present case) where any proceedings which a Buganda court has jurisdiction to try are commenced in a subordinate

court or the High Court, they shall be transferred to a Buganda court having jurisdiction.

The parties now remaining in this case after the bank has disappeared from it are all subject to the jurisdiction of the Principal Court, since they are “Africans” as defined in the Buganda Courts Ordinance. Whether or not the facts averred in the plaint were sufficient to justify the joinder (under O. 1, r. 3 of the Civil Procedure Rules) of the bank as a defendant, it has now been found, after the hearing of evidence, that there was in fact no cause of action against that defendant. Having arrived at that conclusion, I consider I am now bound, by reason of s. 7 and s. 11 of the Buganda Courts Ordinance, to transfer what is left of this case, that is, the issues concerning the title to the land, to the Principle Court, and that I am precluded from adjudicating upon them myself.

In the result, the plaintiff’s claim against the bank is dismissed with costs, and I order that the suit against the remaining two defendants be transferred to the Principal Court. As the question of jurisdiction was not raised by either of these two defendants, I make no order as to their costs.

Order accordingly.

For the plaintiff:

AWK Mukasa

BKM Kiwanuka, Kampala

The first defendant in person.

For the second defendant:

GL Binaisa

GL Binaisa, Kampala

For the third defendant.

PJ Wilkinson

PJ Wilkinson, Kampala

Parkars Music and Sports House v Motorex Limited
[1959] 1 EA 534 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of Judgment:	14 May 1959
Case Number:	1512/1958
Before:	Rudd J
Sourced by:	LawAfrica

[1] *Sale of goods – Manufacturer’s agent forwarding indent on own stationery to principal for*

acceptance – Goods found unsatisfactory – Whether agent as agent for a foreign principal liable to purchaser – Indian Contract Act, 1872, s. 230 (1).

Editor's Summary

The plaintiff sued the defendant company for damages for breach of contract on the ground that the goods supplied did not correspond to description or sample. The defendant company were manufacturers' representatives and were the local agents of a Belgian firm which manufactured Tudor wireless batteries. The plaintiff placed a substantial order for Tudor batteries and signed two indents for these and gave them to the defendant company. The indents were made out on stationery which bore the defendant company's business letterheads on which the following appeared:

“This Indent is taken by Motorex Ltd. for transmission to suppliers on the following terms:

- “(1) Upon acceptance of this Indent by suppliers and/or shippers it establishes an irrevocable and absolute contract subject to the suppliers resp. shippers terms and conditions of sale on the part of the Indentor to make payment as mentioned in the Indent.
- “(2) The suppliers and/or shippers acceptance of this Indent will be subject to raw materials being available and shipping conditions being normal and subject to 'force majeure' conditions. Neither suppliers/shippers or their

agents can be responsible for delays through strikes, fire, floods or other unforeseen circumstances.”

When the batteries arrived the plaintiff alleged that they were unsatisfactory and sought to claim damages against the defendant company which denied liability on the contracts created when the indents were accepted. The defendant company’s case was that it did not contract with the plaintiff at all, that the contracts were between the supplier, the shipper and the plaintiff, and that it was merely a conduit pipe for communication between the plaintiff and the supplier. The plaintiff contended that the contract was made between the plaintiff and the defendant company and that the defendant company as the local agent for a foreign supplier, was, in the absence of a contract to the contrary, to be presumed to have made itself personally liable for the performance of the contract as provided in s. 230 (1) of the Indian Contract Act, 1872.

Held – the contract in this case was not made by the defendant company even as agent and it could not on the evidence be considered to have been a party to the contract.

Action dismissed.

Cases referred to in judgment

- (1) *Dar v. Thomsen and Another* (1934), 16 K.L.R. 10.
- (2) *Rusholme Bolton and Roberts Hadfield Ltd. v. S. G. Read & Company (London) Ltd.*, [1955] 1 All E.R. 180.
- (3) *Tutika Basavaraju v. Parry & Co.* (1903), 27 Mad. 315.

Judgment

Rudd J: This is an action for damages for breach of contract on the ground that goods, the subject-matter of the contract, did not correspond to description or sample.

The plaintiff is the proprietor of a business called Parkars Music and Sports House and, although his real name is Tenaga, he has, for convenience, been referred to in evidence as Mr. Parkar. He does business in wireless sets, gramophone records and other musical instruments, and had a wholesale and retail trade in wireless batteries. The defendant is a company which, according to its letter heading, does business as manufacturers’ representatives and distributors. It was the local agent of a Belgian firm which manufactured Tudor wireless batteries.

A broker employed by the defendant approached the plaintiff with a view to getting an order for Tudor batteries. He left a sample battery with the plaintiff. This battery was intended to be usable in place of a well-known battery on the local market known as the Berec B. 103. The plaintiff satisfied himself that the sample Tudor battery submitted to him was at least equal in performance and use life to the Berec B. 103, which has a use life of at least 100 hours and a shelf life of one year. The plaintiff, on the strength of the result of the performance of the sample battery, decided to see if he could become the agent in Kenya for the sale and distribution of this type of battery made by the Tudor firm and it was agreed between him and the defendant that this might be done provided he gave a substantial order for Tudor batteries. In the result the plaintiff signed two indents for Tudor batteries and gave them to the defendant. The indents were made out on forms which bore the defendant’s business head and, omitting irrelevant details, were as follows:

(1)

“MOTOREX LTD.

Manufactures Representatives and Distributors.

Indent No. 1336.

Date: January 22, 1957.

Name of Indentor: Messrs. Parker's Music and Sports House, P.O. Box 10580, Nairobi.

Supplier: Messrs. S.A. Accumulateurs Tudor, 60, Chausse de Charleroi, Brussels, Belgium.

Shipper: Messrs. Levetus Limited, 194, Bishopsgate, London, E.C.2.

Indenter's Bank: National Bank of India Ltd., Nairobi.

Conditions: 2½ per cent. Buying Commission—ninety days after the arrival of carrying steamer.

This Indent is taken by Motorex Ltd. for transmission to suppliers on the following terms:

- (1) Upon acceptance of this Indent by suppliers and/or shippers it establishes an irrevocable and absolute contract subject to the suppliers resp. shippers terms and conditions of sale on the part of the Indentor to make payment as mentioned in the Indent.
- (2) The suppliers and/or shippers acceptance of this Indent will be subject to raw materials being available and shipping conditions being normal and subject to 'force majeure' conditions. Neither suppliers/shippers or their agents can be responsible for delays through strikes, fire, floods or other unforeseen circumstances.

TRIAL ORDER: 'TUDOR' DRY RADIO BATTERIES: EX BELGIUM.

Article: 'TUDOR' Dry Radio Battery 90 HT/1½ Lt. (Tropicalized), No. 0.110202 (Similar to Berec B. 103).

Quantity: Ten cases (each case containing fifteen batteries).

Price: Shs. 12/- per battery F.O.B. European Port.

Packing: Included, fifteen batteries packed in a seaworthy case.

Shipment: Five cases—soonest possible.

Five cases—four/six weeks after the first lot.

Remarks: This trial order is placed on the understanding that the suppliers will ensure all batteries are fully charged and they will replace any battery which is found dead on arrival.

PARKAR'S MUSIC AND SPORTS HOUSE.

(Sgd.) (?) Tenaga."

(2) "MOTOREX LTD.

Manufacturers Representatives and Distributors.

Indent No. 1370.

Date: February 6, 1957.

Name of Indentor: Messrs. Parkar's Music and Sports House, P.O. Box 10580, Nairobi.

Supplier: Messrs. S.A. Accumulateurs Tudor, 60, Chausse de Charleroi, Brussels, Belgium.

Shipper: Messrs. Levetus Limited, 194, Bishopsgate, London, E. C. 2. England.

Conditions: As usual.

This Indent is taken by Motorex Ltd. for transmission to suppliers on the following terms:

- (1) Upon acceptance of this Indent by suppliers and/or shippers it establishes an irrevocable and absolute contract subject to the suppliers resp. shippers terms and conditions of sale on the part of the Indentor to make payment as mentioned in the Indent.

- (2) The suppliers and/or shippers acceptance of this Indent will be subject to raw materials being available and shipping conditions being normal and subject to 'force majeure' conditions. Neither suppliers/shippers or their agents can be responsible for delays through strikes, fire, floods or other unforeseen circumstances.

'TUDOR' DRY RADIO BATTERIES. EX BELGIUM.

Article: 'Tudor' Dry Radio Batteries, Ref. No. 0.110202, 90 HT/1½ Lt. exactly as per your sample.

Quantity: Three hundred cases. (Each case containing fifteen batteries).

Price: Shs. 12/1d. per battery F.O.B. European Sea Ports.

Packing: Included—fifteen batteries packed in a seaworthy case.

Shipment: Fifty cases per shipment with a minimum interval of fifteen days.

PARKAR'S MUSIC AND SPORTS HOUSE.

(Sgd.) (?) Tenaga."

After the Tudor batteries arrived in Mombasa the plaintiff proceeded to put them on sale, but complaints were received and the batteries were found to be unsatisfactory in the following respects. The plug socket which was obviously intended to take a standard four pin plug was not correctly proportioned, with the result that very heavy pressure had to be used to insert such a plug in the sockets in the batteries. This was tested in court and whereas the plug could be easily inserted and removed from a Berec B. 103 battery, it was very difficult to insert the plug into the Tudor battery and it was equally difficult to remove the plug from the Tudor battery once it had been inserted. It is also said that in use the Tudor batteries had a life of only ten to forty hours, instead of one hundred hours. I am not quite satisfied that this short life was due to weakness in the battery cells, because I think it may have been due to the fact that the force which was necessary to insert or remove a plug from the battery occasioned internal faults in the wiring. I broke up a Tudor battery, and a Berec, and I was of the opinion that the wiring in the Tudor was less substantial than it was in the Berec. Mr. Loebinger of the defendant company doubted that the Tudor batteries were defective as he said that he was informed by dealers that they were good batteries. He suggested that Parkar's found difficulty in selling the Tudor battery because the market was glutted with Berec batteries which were reduced in price. The defendant did not produce any witnesses who could say from experience that the batteries consigned to the plaintiff were good batteries. I am quite satisfied that in use the Tudor batteries actually had an unduly short performance life, and that they did not comply with the indent. The plaintiff complained of the batteries to Mr. Loebinger who suggested that the matter should be referred to the Belgian consul and that all available evidence should be produced. The plaintiff did not agree to this suggestion. Although the suggestion was not unreasonable I do not think that Mr. Loebinger's attitude was very sympathetic to the plaintiff's complaints.

The first question which the court has to decide is whether or not the defendant was liable to the plaintiff on the contracts which arose when the indents were accepted. The defendant's case is that it did not contract at all with the plaintiff, that the contracts were between the supplier and the shipper and the plaintiff, and that the defendant was merely a conduit pipe for communication between the plaintiff and the supplier. On the other hand, the plaintiff contends that the contract was in fact made between the plaintiff and the defendant and that the defendant as the local agent for a foreign supplier, was, in the absence

of a contract to the contrary, to be presumed to have made himself personally liable for the performance of the contract as is provided for in s. 230 (1) of the Indian Contract Act, which reads:

“In the absence of any contract to that effect an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them. Such contract shall be presumed to exist in the following cases:

- (1) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;

This section was considered by this court in the case of *Dar v. Thomsen and Another* (1) (1934), 16 K.L.R. 10, in which it was held that the presumption raised by the section that where a contract is made by an agent for the sale or purchase of goods for a merchant resident abroad the agent can personally enforce and is personally bound by it is a rebuttable presumption and such presumption is rebutted when a contrary intention plainly appears from evidence contained in the document itself as when the foreign principal is made the contracting party and the contract is in his name or in the surrounding circumstances. In my opinion the indents in this case did not become binding contracts until they had been accepted by the supplier and/or shippers, either by notification to the plaintiff or by delivery of the goods. Until acceptance had taken place the indents were no more than an offer or order. This is in accordance with the view taken by Pearce, J., in the English case of *Rusholme Bolton and Roberts Hadfield Ltd. v. S.G. Read & Company (London) Ltd.* (2), [1955] 1 All E.R. 180. So far as the present case is concerned I have not been informed as to the precise way and terms in which acceptance on the part of the supplier was notified to the plaintiff. There is no doubt, of course, but that the indents were accepted, but I make the point that there is no evidence to indicate that acceptance was communicated to the plaintiff in terms which made the defendant personally liable apart from the terms of the indent.

The general procedure of contract in the case of contracts arising under this type of indent is as follows. No contract arises upon the mere giving of the indent. The local representative of the supplier or merchant abroad transmits the indent to the supplier for acceptance and it is only upon such acceptance that a contract arises. The supplier's duty is then to deliver the goods in accordance with the indent, in this case f.o.b. European port. The shipper is the person who pays the supplier, and normally he deals with the goods as instructed by the purchaser. The shipper arranges for the transmission of the goods to the purchaser and recovers his expenses and charges from the purchaser. In the normal course the supplier's local agent in Kenya plays no part in the delivery of the goods, nor does he receive the price of the goods from anyone. I do not wish to be taken as saying that the local agent could not contract in terms which would render him personally liable for the due performance of the contract, but I think that normally such a contract does not impart a personal liability upon him. In my opinion the form in which the contract is expressed is crucial to the decision of the point in each particular case.

In the present case the indent as such is not a contract until it is accepted. Acceptance was to be made by the supplier and/or shipper and not by the defendant. There is in my opinion nothing in the terms of the indent which shows that the defendant was to be made personally liable upon the contract. The most that can be said against the defendant's contention is that the indent was made on its business paper containing its business heading and that the defendant was for some purposes at least, including the purpose of obtaining indents, an agent for a foreign principal. Had he contracted expressly as such an agent and in the name of his principal, he would not be personally

liable, notwithstanding the provisions of s. 230 (1) of the Indian Contract Act—*Dar v. Thomsen* (1) and *Tutika Basavaraju v. Parry & Co.* (3) (1903), 27 Mad. 315.

The presumption enacted by s. 230 (1) of the Indian Contract Act in my opinion only arises where the local agent can be said to have made the contract. That is to say where he has contracted himself either as a principal or as agent. Thus where he makes the contract he is presumed to have done so as a principal and not as a mere agent unless the terms or the circumstances clearly show a contrary intention.

If the indent could be treated as the whole contract which was completed as soon as the defendant received it then there might be a plausible argument in view of s. 230 of the Indian Contract Act that the defendant was to be responsible for the proper fulfilment of the contract.

But in my view the terms of the indent show that it was not such a contract. The defendant's duty according to the terms of the indent was to forward it to the supplier for acceptance by the supplier. It was not an offer that was to be accepted by the defendant. On the contrary it was to be transmitted for acceptance to the supplier. Contract depends on offer and acceptance and, in my opinion, there was no acceptance here by the defendant. The defendant did not accept the offer as principal and did not even accept the offer as agent. The defendant merely undertook to transmit the indent to the supplier on the terms that if the supplier accepted it there would then be a binding contract. In my opinion the contract in this case was not made by the defendant even as agent. Certainly it has not been proved that the defendant made the contract. In my opinion the defendant cannot on the evidence be considered to have been a party to the contract.

In the result the defendant must succeed and the suit must be dismissed with costs.

Ordinarily I would assess damages notwithstanding that I dismiss the suit but in this case I shall not do that. In the first place, I am not in doubt but that my decision is correct in law on the facts proved. Secondly, and this is my main reason for not assessing damages, I do not consider that there is enough material before me to enable me to arrive at a correct assessment as to quantum. Even if I considered that the plaintiff was entitled to succeed against the defendant I would have considered further enquiry necessary.

At most I think that the plaintiff could only get the cost of replacing the Tudor batteries by Berec B. 103 batteries. But I am not satisfied that that would be a completely proper assessment of damages. In some cases the plaintiffs did not replace the Tudor batteries with Berec batteries. I do not consider that the other contracting party should be required to reimburse the plaintiff for something which the plaintiff was unwilling to do for himself. I do not think that the fact that the plaintiff may have found himself in somewhat straitened financial circumstances which prevented him from doing all that he might have wished to do is a ground for requiring the other party to give full compensation for something which the plaintiff decided not to do.

If my decision is wrong and if on appeal it is found that there should be damages awarded to the plaintiff then I think there should be further enquiry as to quantum of damages.

Action dismissed.

For the plaintiff:

HP Hearn

Gledhill & Co, Nairobi

For the defendant company:

DJH Roche

Stephen & Roche, Nairobi

Barclays Bank DCO v Gulu Millers Limited
[1959] 1 EA 540 (CAK)

Division: Court of Appeal at Kampala
Date of Judgment: 23 April 1959
Case Number: 8/1959
Before: Sir Kenneth O'Connor P, Forbes V-P and Windham JA
Sourced by: LawAfrica
Appeal from: H.M. High Court of Uganda–Lyon, J

[1] Mortgage – Equitable mortgage by deposit of title deeds – Memorandum that mortgagee entitled to legal mortgage on demand – Action by mortgagee for sale without demand for legal mortgage – Whether action premature – Whether court has power to order sale or foreclosure – Registration of Titles Ordinance, s. 3, s. 9 (3), s. 30, s. 113, s. 114, s. 115, s. 116, s. 117, s. 130, s. 131 and s. 138 (U.) – Uganda Order in Council, 1902, s. 15 (2) (U.) – Uganda Land Regulations, 1897 (U.) – Registration of Documents Ordinance, 1904 (U.) – Registration of Land Titles Ordinance, 1908, s. 6 (11) (U.) – Equitable Mortgages Ordinance, 1912 (U.) – Registration of Titles (Amendment) Ordinance, 1931, s. 2, s. 3 and s. 4 (U.) – English Conveyancing Act, 1881 – English Chancery Procedure Act, 1852, s. 48.

Editor's Summary

The respondent company had deposited with the appellant bank certain documents of title to leasehold land at Gulu and had at the same time executed a “Memorandum of Deposit of Documents/Title” in which it stated that it had deposited the title deeds “with intent to create a Lien/Equitable Mortgage/Charge” upon all the property comprised therein for securing the payment on demand of all the moneys due from the respondent company to the appellant bank. By para. 2 of the memorandum the respondent company undertook to execute on demand a legal mortgage with such powers of sale as the appellant bank might require. In consequence of a failure by the respondent company to pay the appellant bank the moneys due under the mortgage, the appellant bank sued in the High Court for a declaration that it was entitled to be considered as the legal mortgagee of the land comprised in the Certificate of Title deposited, that the principal sum and the interest then due and accruing due were a charge on the said land, an order for payment of the amount due and in default that the land be sold and for possession of the land. The defence was that the claim was unnecessary and premature, that the appellant bank's only remedy was to require the company to execute a legal mortgage, which the respondent company had always been ready and willing to give and that the appellant bank had no right to a sale or foreclosure or any other relief. The trial judge dismissed the action holding that the English Conveyancing Act, 1881, and in particular s. 25 (2) (which empowers the court to order an immediate sale of mortgage property)

did not apply in Uganda. He further held that where a clause such as para. 2 of the memorandum exists and no request has been made for a legal mortgage to be executed, the mortgagee cannot in the first instance ask the court for an order for sale and the remedy was to obtain and enforce a legal mortgage. On appeal by the bank it was argued that the Conveyancing Act, 1881, applied in Uganda and that in absence of local provisions for the enforcement of such mortgages, s. 25 of the Act should be called in aid, and that the trial judge was wrong in holding that the appellant bank should have first called for a legal mortgage. Alternatively, it was contended that even if the Conveyancing Act, 1881, did not apply, one of the remedies of an equitable mortgagee under the doctrines of equity was sale by order of the court, and that the court should apply the doctrines of equity and order a sale.

Held –

- (i) under the doctrines of equity and irrespective of s. 25 of the Conveyancing Act, 1881, where there is an equitable mortgage by deposit of documents of title accompanied by a memorandum by the depositor agreeing to execute a legal mortgage with an unqualified power of sale, the court has power to order a sale and also a foreclosure;
- (ii) it could not have been the intention of the legislature that equitable mortgages created under s. 138 of the Registration of Titles Ordinance should be unenforceable, and as no method of enforcement was enacted, it must have been the intention that an equitable mortgagee should have any remedies open to him under the general law, so far as these were not inconsistent with the Registration of Titles Ordinance or other local enactment;
- (iii) the doctrines of equity are part of the law of Uganda and when equitable mortgages were permitted to be created, the doctrines of equity would regulate the enforcement of such mortgages in the absence of express provision for their enforcement;
- (iv) the primary remedy of an equitable mortgagee is foreclosure under order of the court;
- (v) the provisions of s. 130 of the Registration of Titles Ordinance dealing with foreclosure, were primarily intended to apply to mortgages made under s. 114, and not to equitable mortgages under s. 138;
- (vi) the issue of a plaint in a suit to enforce an equitable mortgage would be sufficient notice to satisfy the requirements of s. 115, s. 116 and s. 30 of the Registration of Titles Ordinance.

Appeal allowed.

Cases referred to in judgment

- (1) *Jones v. Gordhan Bogha* (1923), 3 U.L.R. 131.
- (2) *Khoja Shia Ishnasheri Jamat v. Norman Godinho* (1939), 6 U.L.R. 47.
- (3) *Birch v. Ellames*, 145 E.R. 924.
- (4) *Parker v. Housefield*, 39 E.R. 1004.
- (5) *Jones v. Bailey*, 51 E.R. 1161.
- (6) *Carver v. Wake* (1877), 4 Ch. D. 605.
- (7) *Cox v. Toole*, 52 E.R. 558.
- (8) *James v. James* (1873), L.R. 16 Eq. 153.
- (9) *Russel v. Russel*, 28 E.R. 1121.
- (10) *Pain v. Smith*, 39 E.R. 1003.
- (11) *Lewis v. John*, 47 E.R. 375.
- (12) *Price v. Carver*, 40 E.R. 884.
- (13) *Thorpe v. Gartside*, 160 E.R. 587.

- (14) *Meller v. Woods*, 48 E.R. 212.
- (15) *Brocklehurst v. Jessop*, 58 E.R. 906.
- (16) *Perry v. Keane* (1836), 6 L.J. Ch. 67.
- (17) *Lister v. Turner*, 67 E.R. 919.
- (18) *Woof v. Barron*, [1873] W.N. 71.
- (19) *York Union Banking Co. v. Artley* (1879), 11 Ch. D. 205.
- (20) *Matthews v. Goodday* (1861), 31 L.J. Ch. 282.
- (21) *London Monetary Advance Co. v. Brown* (1865), 12 L.T. 199.
- (22) *Yeatman v. Reed* (1866), 36 L.J. Ch. 136.

April 23. The following judgments were read by direction of the court:

Judgment

Sir Kenneth O'Connor P: This is an appeal from a decision of the High Court of Uganda dismissing with costs a claim by the appellant (plaintiff in the High Court) for:

- (a) a declaration that under and by virtue of the said memorandum of deposit the plaintiff is entitled to be considered as being a legal mortgagee of the lands comprised in the certificate of title referred to in the said memorandum of deposit;
- (b) a declaration that the said sum for principal and interest now due and interest accruing due by the defendant to the plaintiff is to be considered as being a charge on the lands comprised in the certificates of title referred to in the said memorandum of deposit;
- (c) an order for payment of the said sum and in default that the said mortgage may be enforced by foreclosure or sale of the lands comprised in the said certificates of title;
- (d) delivery by the defendant to the plaintiff of possession of the said mortgaged property;
- (e) further or other relief;
- (f) costs.

Prayer (a) was abandoned at the trial.

It was admitted that on March 17, 1958, when the plaint was filed, the sum owed by the respondent to the appellant, and secured as above, amounted to Shs. 162,262/40 inclusive of interest up to January 31, 1958.

The facts, which are not in dispute, are that on August 20, 1955, the respondent (hereinafter referred to as the company) deposited with the appellant (hereinafter called the bank) certain documents of title to leasehold land at Gulu, issued under the Registration of Titles Ordinance, together with an insurance policy and, at the same time, the company executed a “Memorandum of Deposit of Documents/Title” dated August 20, 1955 (a printed form) in which it stated that it had deposited the title deeds:

“with the intent to create a lien/equitable mortgage/charge upon all the . . . property . . . comprised therein . . . for securing the payment on demand of all moneys now or hereafter due from . . . (the company) to (the bank) upon any account or in any manner whatever . . .”

and the company undertook to pay all such moneys on demand.

Paragraph 2 of the memorandum reads:

- “2. I/We hereby undertake that I/we and all other necessary parties (if any) will on demand at my/our own cost make and execute to you or your nominees a valid legal mortgage or charge of or on the said hereditaments and property or any part thereof in such form and with such provisions and powers of sale leasing consolidation and appointing a receiver as you may require.”

It will be observed that this clause would enable the bank to require execution of a legal mortgage containing an unqualified power of sale.

It was stated at the bar in the court below that the main objective of the bank in the suit was to obtain an order for the sale of the property.

It was agreed that the bank has not, at any time, requested the company to execute a legal mortgage.

The defence in the court below was that the claim was unnecessary and premature: the bank’s remedy, and its only remedy, was to request the company to execute a legal mortgage, which the company had always been ready and willing to do; the bank had no right to a sale or foreclosure or any of the other relief asked for.

Section 138 of the Registration of Titles Ordinance allows equitable mortgages to be made by deposit by a registered proprietor of his certificate of title with intent to create a security and with or without a memorandum. But there is nothing in the Ordinance to indicate how equitable mortgages are to be enforced.

The learned judge, after reviewing the authorities cited to him, held that the English Conveyancing Act, 1881, and in particular s. 25 (2) (which empowers the court, in an action for foreclosure or redemption or sale or for raising and payment of mortgage money, at the request of the mortgagee or other person interested, to order an immediate sale of the mortgaged property, notwithstanding the dissent of any other person) did not apply in Uganda. He held further that where a clause such as para. 2 above exists in the memorandum of deposit and no request has been made for a legal mortgage to be executed, the mortgagee cannot in the first instance ask the court for an order for sale: the remedy was to obtain and enforce a legal mortgage; the situation might be different if the plaintiff had asked for a legal mortgage to be executed and the defendant had refused. The learned judge held also that the plaintiff was not entitled to an order for foreclosure, for that was a remedy open to a legal mortgagee, and before such an order could be made all the provisions of s. 130 of the Registration of Titles Ordinance would have to be complied with. He also held that he had no power at that stage to order delivery of possession of the property to the bank and that the declaration asked for was superfluous. As already stated, he dismissed the claim with costs, holding that the bank's proper course was to ask the company to execute a legal mortgage which the company had always been prepared to do.

The bank appeals.

Mr. Hughes, for the bank, argued that the English Conveyancing Act, 1881, was a
“statute of general application in force in England on the 11th day of August, 1902”

and was, therefore, applied in Uganda by s. 15 (2) of the Uganda Order in Council, 1902. He said that it had been held by the High Court of Uganda in two cases that the Conveyancing Act, 1881, did apply in Uganda and that those decisions, having stood for a number of years and regulated the course of conduct of the commercial community, should not now be upset. He relied upon the power to order a sale at the instance of an equitable mortgagee given to the court by s. 25 (2) of the Conveyancing Act, 1881, and argued that because the Registration of Titles Ordinance (Cap. 123 of the Laws of Uganda) permitted, by s. 138, the creation of equitable mortgages by deposit of certificates of title, but contained no provisions for enforcement of such mortgages, it was necessary to turn to s. 25 of the Conveyancing Act, 1881, to see how they were to be enforced. He contended that the learned judge was wrong in holding that the fact that the memorandum contained a provision by which the company undertook to execute a legal mortgage disentitled the bank from asking for a sale in the first instance: he stressed the words “on demand” in para. 2 of the document and argued that the bank was not bound to demand a legal mortgage before coming to court to enforce its security, though circumstances might arise when it would suit it to make such a demand. Mr. Hughes pointed out that the stamp duty on an equitable mortgage or charge was only Shs. 20/-, whereas the duty on a legal mortgage was Shs. 2/50 on every Shs. 1,000/- ad valorem. In the alternative, Mr. Hughes contended that even if s. 25 of the Conveyancing Act, 1881, did not apply, one of the remedies of an equitable mortgagee under the doctrines of equity was sale by order of the court, that the court should apply the doctrines of equity and order a sale,

and that there was no obligation on the bank first to call upon the mortgagee to execute a legal mortgage.

Mr. James, for the company, argued that the company had been dragged into court unnecessarily; it was not disputed that it had always been willing, on demand, to execute a legal mortgage which would have given the bank all the remedies it needed, but the company had not been asked to do this. He said that the Conveyancing Act, 1881, was not a “statute of general application” within s. 15 (2) of the Uganda Order in Council, 1902, and, whether it was a statute of general application or not, it could not apply now in Uganda where a system of registration of title to land is in force. If there was a gap in the Registration of Titles Ordinance relating to enforcement of equitable mortgages, that gap could not be filled by recourse to the Conveyancing Act, 1881, but must be filled, if it could be filled, by recourse to the doctrines of equity. He conceded that the court would have had power under its equitable jurisdiction to order a sale; but said that, as a matter of discretion, it should not have made such an order in this case; such an order should not be made where there was an express undertaking to execute a legal mortgage with an unqualified power of sale, unless a demand had been made by the mortgagee to have a legal mortgage executed and the mortgagor had refused: in this case the only order the court could properly have made was an order directing the company to execute a legal mortgage and, in default, directing foreclosure or sale. Mr. James argued that such an order was unnecessary: the company should never have been “dragged through the courts” and the case had been rightly dismissed.

The cases relied upon by Mr. Hughes in support of his proposition that the Conveyancing Act, 1881, applies in Uganda were *Jones v. Gordhan Bogha* (1) (1923), 3 U.L.R. 131; and *Khoja Shia Ishnasheri Jamat v. Norman Godinho* (2) (1939), 6 U.L.R. 47. In the first of these cases, which was decided in 1922, Guthrie, C.J., applied a section of the Conveyancing Act, 1881, assuming that it was applicable in Uganda and without, so far as can be ascertained from the report, any discussion or consideration as to whether that Act was, or how it could properly be, applicable in the territory. In the second of these cases, decided in 1938, Whitley, C.J., said:

“It has been held in *Jones v. Gordhan Bogha* (1) . . . that that Act [i.e. the Conveyancing Act, 1881] does apply here.”

As I have already pointed out, it had merely been assumed in *Gordhan Bogha*’s case (1) that the Act applied, though it is true to say that this was an integral part of the decision and was not obiter. It seems to me that that was a doubtful assumption. But it is unnecessary to decide this point, since I am satisfied that, apart from s. 25 of the Conveyancing Act, 1881, the High Court had power under the doctrines of equity to order foreclosure or a sale of the property the subject of the equitable mortgage in this case.

Under the doctrines of equity, a deposit of deeds by way of security was taken to be equivalent to an agreement to execute a legal mortgage: *Birch v. Ellames* (3), 145 E.R. 924; *Parker v. Housefield* (4), 39 E.R. 1004; *Jones v. Bailey* (5), 51 E.R. 1161; and to carry with it all the remedies incident to a legal mortgage: *Carver v. Wake* (6) (1877), 4 Ch. D. 605. The primary remedy was foreclosure, not sale: *Birch v. Ellames* (3); *Cox v. Toole* (7), 52 E.R. 558; *James v. James* (8) (1873), L.R. 16 Eq. 153, but the court had power in a proper case to order a sale *Russel v. Russel* (9), 28 E.R. 1121; *Pain v. Smith* (10), 39 E.R. 1003; *Lewis v. John* (11), 47 E.R. 375; *Price v. Carver* (12), 40 E.R. 884; subject to the mortgagor being given six months in which to redeem: *Thorpe v. Gartside* (13), 160 E.R. 587; *Meller v. Woods* (14), 48 E.R. 212; *Parker v. Housefield* (4). *Pain v. Smith* (10) was disapproved by Shadwell, V.-C., in *Brocklehurst v. Jessop* (15), 58 E.R. 906, but the learned

Vice-Chancellor in that case nevertheless made an order for sale of the mortgaged property at the suit of an equitable mortgagee, the mortgagor being dead. Probably the clearest statement in the earlier cases of the way in which courts of equity regarded equitable mortgages by deposit of title deeds and of the remedies open to an equitable mortgagee before the enactment of s. 48 of the Chancery Procedure Act, 1852 (the fore-runner of s. 25 of the Conveyancing Act, 1881) is contained in the judgment of Pepys, M.R., in *Parker v. Housefield* (4). The immediate contest in that case was whether the plaintiff, an equitable mortgagee by deposit of title deeds, was entitled to an immediate sale of the property, or whether the mortgagor should be given six months in which to redeem. But the case contains a useful statement of the principles upon which equity proceeds. The Master of the Rolls said at p. 1004:

“The question was, whether, in the case of an equitable mortgage by a deposit of title deeds, the decree ought to give to the mortgagor six months to redeem, as in cases of legal mortgages. To determine this, it is material, in the first place, to consider in what light courts of equity view such equitable mortgages; and it appears that a deposit of title deeds has always been considered an imperfect mortgage, which the mortgagee is entitled to have perfected, or rather as a contract for a mortgage, which, according to the well-known doctrine of courts of equity, would give to the party claiming the benefit of such contract all such rights as he would be entitled to if the contract had been completed. Accordingly, in the very commencement of the doctrine of equitable mortgages, viz., in the cases of *Featherstone v. Fenwick*, in the year 1784 and *Harford v. Carpenter*, in the year 1785, both cited in *Russell v. Russell* (1 Bro. C.C. 269) we find Lord Thurlow saying, that a deposit of deeds entitled the holder to have a mortgage, and to have his lien effectuated. In *Birch v. Ellames* (2 Anst. 428) the Chief Baron of the Exchequer says: ‘A deposit of title deeds as security for a debt is now settled to be evidence of an agreement to make a mortgage, and such agreement is to be carried into execution by the court.’ The decree in that case was that the defendant should pay, or stand foreclosed and convey. In *Ex parte Wright* (19 Ves. 255) Lord Eldon says, that a deposit of title deeds was evidence of an agreement for a mortgage, and that an equitable title to a mortgage was, in equity, as good as a legal mortgage. Such being the light in which courts of equity view equitable mortgages by deposit of title deeds, it would seem to follow that the remedy to be afforded to such mortgagees should, as nearly as possible, correspond with that to which legal mortgagees are entitled; and, accordingly, from the search which I have directed to be made as to the form of decrees upon such subjects, I find that such has been the principle adopted. In *Newton v. Aldous* (July 18, 1804), the decree, which appears to have been penned by Lord Eldon himself, was as follows:”

The learned Master of the Rolls read a decree for a declaration, account and foreclosure and continued:

“In *Lavender v. Roberts* (June 28, 1806), *Warren v. Barling* (April 10, 1818) and *Langdon v. Wilmot* (February 25, 1828), the decree was in the same form.

“In *Meux v. Ferne* (February 5, 1818) and *Spring v. Allen* (February 12, 1830) a sale was directed instead of a foreclosure: but in both these cases the mortgagor was allowed six months to pay the debt.”

The learned editor adds a note as to the form of the decree in *Meux v. Ferne* and *Spring v. Allen*, as follows:

“In these two cases the decree was as follows: defendant to pay in six months after report, and, in default, the estate, or a sufficient part, to be sold, etc., money to be paid into the bank. Further directions reserved.”

If the agreement was to execute a legal mortgage with a power of sale, then the court might order sale as an alternative remedy to foreclosure: Fisher and Lightwood’s *Law of Mortgage* (7th Edn.), p. 422; and the court would not (if this was not asked for) merely decree the execution of a legal mortgage to the exclusion of a remedy by foreclosure or sale: *Perry v. Keane* (16) (1836), 6 L.J. Ch. 67; *Lister v. Turner* (17), 67 E.R. 919; *Woof v. Barron* (18), [1873] W.N. 71 cited in Seton’s *Judgments and Orders*, Vol. III (7th Edn.) p. 1976 and p. 1983; *York Union Banking Co. v. Artley* (19) (1879), 11 Ch. D. 205; *Matthews v. Goodday* (20) (1861), 31 L.J. Ch. 282.

In *Perry v. Keane* (16) the plaintiffs filed a bill praying for foreclosure or sale. Deeds had been deposited as security and the mortgagors had undertaken that they would (if necessary) execute a mortgage to the plaintiffs, such mortgage to contain a power of sale. The Master of the Rolls (Lord Langdale) said that there could be no doubt that the plaintiffs were entitled to a decree to have a mortgage executed to them; but, as they had asked for foreclosure, they were entitled to it. They were not given an order for sale, though they would have preferred to have a sale.

In *Lister v. Turner* (17) there was an equitable mortgage by deposit of title deeds with an agreement in writing by the depositor, upon the request of the mortgagee, to execute a formal mortgage to the mortgagee. It was decreed *inter alia* that, in default of payment, the mortgaged property should be sold. Wigram, V.-C., said at p. 922 that the claim of the plaintiff for what was due and to have the same raised in the ordinary manner upon the property comprised in the security was clear. Having decided certain issues not relevant to this case, the learned Vice-Chancellor continued:

“The next question is as to the form of the remedy to which the plaintiff is entitled: whether the decree is to give the plaintiff the benefit of a legal mortgage or to direct a sale. The decisions with regard to the right of an equitable mortgagee are not uniform: but in this case the express terms of the contract are that Slater shall convey the premises by way of legal mortgage, and that such mortgage shall contain a full and absolute power of sale; and to make the suit available for its objects it is necessary that there should be a decree for sale. There is no reason, therefore, why such a decree should not be made.”

Perry v. Keane (16) and *Lister v. Turner* (17) were both decided before the entry into force of the Chancery Procedure Act, 1852 and were, accordingly, decided under the doctrines of equity irrespective of s. 48 of that Act or s. 25 of the Conveyancing Act, 1881.

In *Matthews v. Goodday* (20), a lease was deposited as an equitable security for the repayment of money and the depositor agreed to execute a valid legal mortgage on the premises comprised in the lease when called upon to do so. It was held that the mortgagee had a right in equity to enforce a sale and was not compelled to take a legal mortgage. Kindersley, V.-C., said at p. 283:

“But if there is a written contract by which there is first a charge and in addition to that a contract that, if the party in whose favour it is made requires it, a legal mortgage should be given, that is a charge which might be enforced in equity by sale or mortgage; and a contract that, if it be required, a legal mortgage shall be executed. That is the case here; Goodday borrowed of Matthews £500, it being agreed that the land in the occupation of Goodday should be held by Matthews on an equitable security for the payment by Goodday to Matthews, on a certain day, of

£500, with interest at £5 per cent. That is an express contract, charging the land, and clearly conferring the right to have the charge raised by sale or mortgage. But Goodday also further agreed with Matthews to execute a valid deed of mortgage, with all usual powers and covenants, when required. The charge gave the clear right to a sale; but, in addition to that he said, 'I will, if you require it, and only if you require it, give you a legal mortgage.' Under these circumstances, the plaintiff has a right to have a sale, and is not compelled to take a legal mortgage. There must be the ordinary decree"

The learned trial judge distinguished *Matthews v. Goodday* (20) from the present case because of the words "The charge gave the clear right to a sale". He said that there was no provision in the memorandum of deposit in the instant case clearly conferring the right to have the charge raised by sale. With the greatest respect, I think that the learned judge has misunderstood what Kindersley, V.-C., said. He did not say that the charge in *Matthews v. Goodday* (20) gave an express right to a sale. It did not, any more than does the memorandum in the present case. It did, however, give a clear right to a sale because, as was pointed out in the judgment of the Vice-Chancellor, an agreement by a party that his lands should stand charged with the payment of a sum of money to A., gives A. the right to come into equity and have the charge raised by sale. That was the clear right to have the charge raised by a sale to which the learned Vice-Chancellor referred. I am unable to distinguish *Matthews v. Goodday* (20) from the present case. It was, however, decided in 1862, ten years after s. 48 of the Chancery Procedure Act, 1852, came into force, though the judgment does not appear to have depended on that section.

In *Woof v. Barron* (18) cited in Seton's Judgments and Orders (7th Edn.), Vol. III at p. 1983 and p. 1976 (the report is not available here) a sale was ordered where there was a deposit of deeds accompanied by an agreement to execute a legal mortgage. That order was made under s. 48 of the Chancery Procedure Act, 1852; but I do not think that that is important. The report makes it clear that whether, apart from s. 48 of the Chancery Procedure Act, 1852, the equitable mortgagee was or was not entitled to an order for sale, he would have been entitled to foreclosure and would not have been entitled only to an order that the equitable mortgagor execute a legal mortgage.

In *York Union Co. v. Artley* (19), it was held that a mortgagee under an equitable mortgage by deposit of title deeds accompanied by an agreement to execute a legal mortgage is entitled either to a sale or foreclosure. That again was decided under s. 48 of the Chancery Procedure Act, 1852.

The case principally relied upon by the learned judge was *London Monetary Advance Co. v. Brown* (21) (1865), 12 L.T.R. 199. In that case the plaintiffs lent money to the defendant on the security of a promissory note, and of a deposit of title deeds. The memorandum of deposit specified the deeds, and the depositor undertook and agreed in case of default of payment of the money secured by the note to execute a legal mortgage. When the bill was dishonoured plaintiffs filed a bill to enforce their security over the property comprised in the deeds deposited. Plaintiffs asked for an order of sale; but the learned Vice-Chancellor held:

"I have had occasion recently to consider this question, and the conclusion at which I have arrived on the authorities is that the decree ought not to direct a sale, but should contain an order upon the defendant to execute a legal mortgage, with the usual provision for foreclosure. Where deeds are deposited as security but without any memorandum of agreement, the deposit may be entitled to a decree for sale; but here the memorandum of deposit states what the agreement between the parties was. If, as will very likely be the case, the defendant neglects to execute any legal mortgage,

the plaintiff may then have some remedy against him under the recent statutes. That however, is a matter for after consideration.”

The ratio decidendi of that case was that the memorandum stated what the agreement between the parties was, namely that the depositor undertook in case of default to execute a legal mortgage. The parties had, therefore, indicated what was to happen, in case of default. The memorandum in the present case does not specify what is to be done in case of default: it merely says that the depositor will on demand execute a legal mortgage. A legal mortgage might be demanded quite irrespective of default; for instance if the depositor without default desired to raise more money from a second mortgagee. And, even after default, a legal mortgage might never be demanded. The terms of the memorandum in the present case are distinguishable from the terms of the memorandum in the *London Monetary Advance Co.* case (21). Moreover, Kindersley, V.-C., in the *London Monetary Advance Co.* case (21) cannot have intended (and would have had no power) to overrule the line of cases referred to above which had established that where there is an equitable charge accompanied by an agreement to execute a legal mortgage with a power of sale, the court may order foreclosure or sale. The *London Monetary Advance Co.* case (21) was followed in *Yeatman v. Reed* (22) (1866), 36 L.J. Ch. 136. In the report of *Yeatman v. Reed* (22) it is not stated that the undertaking was to execute a legal mortgage with a power of sale. Moreover the mortgagor was not represented; the *London Monetary Advance Co.* case (21) was the only authority cited; and the attention of the court was not drawn to *Perry v. Keane* (16), *Lister v. Turner* (17) or *Matthews v. Goodday* (20). I think that the *London Monetary Advance Co.* case (21) and *Yeatman v. Reed* (22) are distinguishable. But if not, I prefer to follow *Lister v. Turner* (17), *Perry v. Keane* (16), *Matthews v. Goodday* (20) and *York Union Banking Co. v. Artley* (19). The *York Union* case, (19) decided in 1879, is a later authority than the *London Monetary Advance Co.* case (21) or *Yeatman v. Reed* (22).

I am satisfied, on the authority of *Perry v. Keane* (16) and *Lister v. Turner* (17), that, under the doctrines of equity and irrespective of s. 25 of the Conveyancing Act, 1881, where there is an equitable mortgage by deposit of documents of title accompanied by a memorandum by the depositor agreeing, at the request or demand of the mortgagee, to execute a legal mortgage with an unqualified power of sale, the court would have power, at the instance of the mortgagee, order a sale of the property. It would also have power to make a foreclosure order.

It remains to be considered whether the remedies available in England in 1902 under the doctrines of equity for enforcement of equitable mortgages made by deposit of title deeds were before 1902, or have since been “modified, amended or replaced” by any local Ordinance within s. 15 (2) of the Uganda Order in Council, 1902. They have not, so far as I know, been modified by any subsequent Order in Council, neither, in my opinion, is their application prevented or qualified by the proviso to s. 15 (2).

I am indebted to the Registrar of Titles for some copies of early enactments relating to land in the Uganda Protectorate. These do not appear to be complete. For instance, I have no copy of the Registration of Documents Ordinance, 1904. But, so far as I can ascertain upon the material available to me, there is nothing in the Land Regulations or Ordinances enacted before 1908 dealing with or affecting equitable remedies of a mortgagee by deposit of documents of title.

In 1908, The Registration of Land Titles Ordinance, 1908, was passed establishing a land registry. The land officer was to prepare in duplicate in the prescribed forms all Crown grants of land thereafter made and all final certificates of title thereafter issued by Government to native owners. The title was to be registered and thereafter all transactions affecting the land or

purporting to confer any right, title or interest to, in or over it and all mutations of title by succession were to be registered. A system of registration of title, as opposed to the previous system of registration of documents of title, was introduced into the Protectorate by this Ordinance.

Section 6 (II) of this Ordinance provided that no evidence should be receivable in any civil court (otherwise than in an action for rectification of the register) of a mortgage or charge of land the registration of which was directed by the Ordinance, unless the mortgage or charge was created by an instrument in writing and the instrument or notice thereof had been entered on the register. It is, therefore, clear that in 1908 and thereafter until this provision was modified, no mortgage of registered land could be made purporting to create an interest in the land, and no evidence of any such mortgage could be received by the court, unless the mortgage was created by an instrument in writing and the instrument or notice of it was registered. Thus, at this date, an equitable mortgage could not be created merely by deposit of document of title. There must be a registered instrument. Even if the Conveyancing Act, 1881, was a statute of general application, applied in 1902 by s. 15 (2) of the Uganda Order in Council, its provisions in so far as they related to equitable mortgages in Uganda merely by deposit of title deeds must have been abrogated by the Registration of Land Titles Ordinance, 1908, and would not be revived by implication when that Ordinance was later modified as hereinafter mentioned.

The position created by the Registration of Land Titles Ordinance, 1908, regarding equitable mortgages was reversed by the Equitable Mortgages Ordinance, 1912, which provided that, notwithstanding anything to the contrary contained in the Uganda Land Regulations, 1897, or the Uganda Registration of Documents Ordinance, 1904, or Registration of Land Titles Ordinance, 1908, an equitable mortgage of land might be made by delivery of a document of title with intent to create a security thereon whether accompanied or not by a note or memorandum of deposit, and evidence of such equitable mortgage might be given in any court subject to the provisions thereafter contained. Provision was thereafter made for registration of memoranda or notice in writing of equitable mortgages and it was further provided that holders of equitable mortgages made prior to that Ordinance might cause memoranda or notice of these mortgages to be registered. By s. 6 it was provided that equitable mortgages—arising from unregistered transactions—might be enforced against the mortgagor in respect of his estate and interest in the land, but no unregistered equitable mortgage should prevail against the title of any bona-fide transferee, mortgagee, lessee or “encumbrancee” (sic) for valuable consideration duly registered. It will be noted that it was not stated how equitable mortgages were to be enforced; but it is clear that they were to be enforced somehow.

In 1922 the Registration of Titles Ordinance (Cap. 102 of the 1923 Revised Edition of the Laws and now Cap. 123 of the 1951 Revised Edition) was enacted which introduced a complete Torrens system of registration of title. This repealed the Registration of Titles Ordinance, 1908, and the Equitable Mortgages Ordinance, 1912, and, by s. 3, provided that, except so far as was expressly enacted to the contrary, no Ordinance or rule so far as inconsistent with the Ordinance should apply to land whether freehold or leasehold which was under the operation of the Ordinance. Part III provided for the bringing of land under the Ordinance and by s. 9 (3) it was enacted that no dealing with any land however held prior to that Ordinance should, after its commencement, operate to pass any estate or interest whatever until such dealing was registered as therein provided. Section 113 and subsequent sections dealt with mortgages. Mortgages were to be created by the signature by the proprietor of a mortgage in a scheduled form. There was no provision permitting a mortgage to be made by another means. Again, having regard to s. 9 (3), it would appear

that, at this date, equitable mortgages merely by deposit of documents of title could not be created so as to pass any estate or interest in land. Once more this was reversed and, by Ordinance 9 of 1931, provisions on the lines of s. 138 of the present Registration of Titles Ordinance were enacted. No copy is available here of Ordinance 9 of 1931; but it appears from the marginal note to s. 138 of the present Ordinance that the provisions of that section derive from s. 2, s. 3 and s. 4 of Ordinance 9 of 1931. Section 138 provides that notwithstanding anything in the Registration of Titles Ordinance contained, an equitable mortgage of land may be made by deposit by the registered proprietor of a certificate of title with intent to create a security thereon whether accompanied or not by a note or memorandum of the deposit, subject to the provisions thereafter contained. It is thereafter provided that every equitable mortgage as aforesaid shall be deemed to create an interest in land and that every equitable mortgage shall cause a caveat to be entered. It was conceded, and the learned judge has found, that a caveat was entered in the present case.

It cannot have been the intention of the legislature in enacting s. 138 and its predecessors enabling equitable mortgages by deposit to be created, that an equitable mortgage should be unable to enforce his security. As no method of enforcement was enacted, it must have been the intention that an equitable mortgagee should have any remedies open to him under the general law, so far as these were not inconsistent with the Registration of Titles Ordinance or other local enactment. Hogg in his work on Registration of Land Title Throughout the Empire at p. 284 says:

“In most jurisdictions the proper remedy of the equitable mortgagee by deposit of certificate of title appear to be foreclosure, effected by an order of the court for the land to be transferred by the debtor to the creditor free from any right of redemption; if a proper transfer cannot be a vesting order may be made.”

and he adds, at p. 285:

“There seems to be no reason why an equitable mortgagee by deposit should not have the ordinary remedies of an equitable mortgagee under the general law; for instance, he would probably be entitled to have a receiver appointed.”

and at p. 205:

“It has, however, been said that the old procedure of foreclosure is still applicable to equitable or non-statutory mortgages.”

The doctrines of equity are, by virtue of s. 15 of the Order in Council, part of the general law of Uganda and I think that when equitable mortgages were permitted to be created, the doctrines of equity would regulate the enforcement of such mortgages in the absence of express provision for their enforcement in any enactment which applies locally.

As has already been said, the primary remedy of an equitable mortgagee is foreclosure under order of the court; and in a proper case, the court might, as an alternative, make an order for sale. Section 130, however, which is the only express provision in the Registration of Titles Ordinance dealing with foreclosure, makes it clear that an attempt by a mortgagee to exercise his power of sale by public auction must already have been made before a foreclosure order can be applied for. It would seem that that section was primarily intended to apply to mortgages made under s. 114 (which I will call “registered mortgages”) and not to equitable mortgages under s. 138; but it is nevertheless an indication that in enforcing mortgages under the Registration of Titles Ordinance, sale, and not foreclosure, is intended to be the first remedy to be tried. Section 131 seems to support that inference. It would be anomalous

if it were to be held that the reverse order of remedies applies to equitable, as compared with registered, mortgages. Perhaps, at some time, the legislature will intervene and give some express remedies to equitable mortgagees and state how they should be exercised. In the meantime I incline to the view that an order that the property be put up for sale should precede an order for foreclosure. Since the principle upon which the court acts in enforcing an equitable mortgage is that it is as good as a legal mortgage and carries similar remedies (*Parker v. Housefield* (4); *Carver v. Wake* (6)). I think that the remedies of an equitable mortgagee under the Uganda Registration of Titles Ordinance should be assimilated by the court as closely as may be to the remedies provided by that Ordinance for a registered mortgagee, and that this principle would apply to the period which should be allowed for an equitable mortgagor to redeem, no less than to the order of remedies available to him. Accordingly, I think that the court should not make an order for sale until it is satisfied that steps have been taken and periods of default have elapsed which would make a registered mortgagee's power of sale applicable (see s. 115, s. 116 and s. 117) and should not make a foreclosure order until conditions obtain which would justify the making of a foreclosure order under s. 130 if the mortgage were a registered mortgage. The issue of a plaint in a suit to enforce an equitable mortgage would be sufficient notice to satisfy the requirements of s. 115, s. 116 and s. 30 of the Registration of Titles Ordinance. Provided that these conditions have been complied with, I do not think it essential that a foreclosure order in respect of an equitable mortgage of registered land in Uganda should as in England give the mortgagor six months from the date of the order in which to redeem. A reasonable time should be allowed having regard to the periods of default which have already occurred.

I was not impressed by Mr. James's argument that the company had been "dragged through the courts unnecessarily" and that the court, even if it had power to order a sale, should not do so, but should, in the first instance, order a legal mortgage to be executed. It was the duty of this debtor to pay his creditor on demand. Failure to pay on demand is admitted. The company should have paid what was due, whether by arranging a transfer to a new mortgagee or otherwise, and, if it did not do so, cannot complain if the bank seeks to realize its security in any way open to it. The ordinary way of enforcing an equitable mortgage is by foreclosure or sale under order of the court, and I see nothing which should deter the court from making such an order in this case.

I would allow the appeal with costs here and below. I would remit the matter to the court below with a direction to make an order on the following lines, but subject to any variations agreed by counsel for the parties and the court or which the circumstances may presently require:

- (1) an order for an account to be taken of what is due by the company to the bank for principal and interest secured by the memorandum of deposit;
- (2) a declaration that the bank is entitled to a charge on the lands comprised in the certificates of title referred to in the memorandum of deposit to secure the amount found due on the taking of such account plus accruing interest till payment, together with the costs of the suit and of the appeal to be taxed;
- (3) an order that upon payment by the company to the bank of the amount certified to be due by the registrar's certificate at such time and place as shall be thereby appointed, the bank do deliver all documents of title to the company; but
- (4) in default of the company paying what shall be due to the bank at the time and place aforesaid the property to be put up for sale by

public auction with the approbation of the judge at a reserve price to be fixed by him (being the amount due together with the estimated expenses of the sale) the money to arise from the sale to be lodged in court to the credit of the suit to abide the direction of the judge; but if the highest bidding at such sale be not sufficient to satisfy the reserve price, then

- (5) an order that the company do transfer the said lands to the bank and do from henceforth stand absolutely debarred and a foreclosed from all right, title, interest and equity of redemption thereto and therein;
- (6) liberty to apply.

Forbes V-P: I agree and have nothing to add.

Windham JA: I also agree.

Appeal allowed.

For the appellant:

DH Hughes

Hunter & Greig, Kampala

For the respondent:

AI James

Baerlein & James, Jinja

Daudi Ndibarema and others v The Enganzi of Ankole and others [1959] 1 EA 552 (HCU)

Division: HM High Court of Uganda at Kampala

Date of judgment: 28 May 1959

Case Number: 634/1958

Before: Sheridan J

Sourced by: LawAfrica

[1] *Constitutional law – Protectorate – Agreement between Crown and African ruler – Act of State – Jurisdiction of court to consider whether legislation is ultra vires Act of State – The Ankole Agreement, 1901 (U.) – Uganda Order-in-Council, 1902, s. 2, s. 7, s. 13, s. 14, s. 15 (U.) – Foreign Jurisdiction Act, 1890 – District Administration (District Councils) Ordinance, 1955, as amended, s. 25 A, s. 69 (U.) – Crown Lands Ordinance (Cap. 117), s. 2, s. 24, s. 35 (a) (U.) – Crown Lands (Declaration) Ordinance (Cap. 118), s. 2 (U.) – Suits By or Against the Government Ordinance (Cap. 7), s. 2 (U.) – Ankole Constitutional Regulations, 1955 (U.) – Crown Lands (Adjudication) Rules, 1958, r. 3, r. 14 and r. 17 (U.) – Buganda Native Laws (Declaratory) ordinance (Cap. 71), s. 3 (U.) – The Buganda Agreement, 1955, First Schedule, Second Schedule (U.) – Buganda Agreement, 1955, Order in Council, 1955, s. 2 (2)*

(U.) – *Evidence Ordinance* (Cap. 9), s. 43, s. 46 (U.) – *Civil Procedure Rules*, O. 16, r. 2 (U.).

Editor's Summary

By the Ankole Agreement, 1901, H.M. Government recognised the supreme and divisional chiefs of Ankole, allowed them to nominate their successors who would also be recognised provided they adhered to the terms of the Agreement and it was also agreed *inter alia* that (a) all waste and uncultivated land, all forests, mines, minerals and salt deposits should be the property of H.M. Government the revenue from which should be included in the general revenues of the Uganda Protectorate (b) the natives of Ankole should have the same forest privileges as applied elsewhere in Uganda and (c) Ankole should be subject to the laws in force throughout Uganda. Prior to 1901 the Omugabe of Ankole appointed chiefs on the advice of his elders and Saza chiefs. After 1901 chiefs were appointed as before except that the names of candidates were forwarded by the administration to the Governor for approval. In 1955

regulations were introduced by which thirteen chiefs were to be appointed by the Omugabe in conformity with the advice of an appointments committee which was to consist of twelve Saza chiefs and the elected members of the District Council of Ankole. In March, 1958, the general purposes committee of the district council resolved to approve of an appointments committee being set up. In August the district council purported to meet and pass resolutions without a quorum of members being present. One resolution was to set up an appointment committee and another approved a proposal to introduce land titles on a pilot scheme. In October, 1958, the plaintiffs sued for declarations that *inter alia* these two projects were ultra vires the Ankole Agreement, 1901, the first because it usurped the Omugabe's right of appointing chiefs and the second because it would enable the Governor under the Crown Lands (Adjudication) Rules, 1958, to have dealings with the Omugabe's subjects without his consent. The plaintiffs' case was presented on the basis that the Ankole Agreement, 1901, is part of the law of Uganda. This was disputed by the defendants who included the Enganzi of Ankole, the District Commissioner and the Attorney-General of Uganda, for whom it was contended that the 1901 Agreement was an Act of State beyond the control of either municipal law or the jurisdiction of the courts.

Held –

- (i) the Ankole Agreement, 1901, has not been incorporated into the municipal law of Uganda and the court was not entitled to decide whether it conflicted with the District Administration (District Councils) Ordinance, 1955, as amended or the Crown Lands (Adjudication) Rules, 1958.
- (ii) the declaration sought that the Ankole Agreement, 1901, is still valid and subsisting was in the discretion of the court and since *inter alia* the Agreement had not the force of law there was no purpose in making such a declaration.
- (iii) the court would not grant other declarations sought because these were also matters of discretion and to grant these would either be pointless or affect persons or parties not joined in the proceedings.

Action dismissed.

Cases referred to in judgment

- (1) *R. v. Mohamedbhai Jiwabhai* (1956), 23 E.A.C.A. 517.
- (2) *The Iron and Steelwares Ltd. v. C. W. Martyr & Co.* (1956), 23 E.A.C.A. 175.
- (3) *Jerusalem-Jaffa District Governor and Another v. Suleiman Murra and Others*, [1926] A.C. 321.
- (4) *Mukwaba and Others v. Mukubira and Others*, Uganda High Court, Civil Case No. 50 of 1954 (unreported).
- (5) *Katikiro of Buganda v. The Attorney-General of Uganda*, [1959] E.A. 382 (C.A.).
- (6) *Rustomjee v. R.*, (1876), 2 Q.B.D. 69.
- (7) *Katosi v. Kahizi* (1907), 1 U.L.R. 22.
- (8) *Nasanairi Kibuka v. A. E. Bertie Smith* (1908), 1 U.L.R. 41.
- (9) *R. v. Anselmi Kiimba* (1910), 1 U.L.R. 79.
- (10) *R. v. Buganda Cotton Co.* (1930), 4 U.L.R. 34.

- (11) *Sedulaka Serwanga v. Edward Suleman Khaya* (1938), 6 U.L.R. 28.
- (12) *Zivadi Mukasa v. Musitafa Serwada* (1938), 6 U.L.R. 40.
- (13) *Attorney-General v. Prince Ernest Augustus of Hanover*, [1957] A.C. 436.
- (14) *Sobhuza II v. Miller and Others*, [1926] A.C. 518.
- (15) *Nyali Ltd. v. Attorney-General*, [1955] 1 All E.R. 646; [1956] 2 All E.R. 689; [1956] 1 Q.B. 1.

Judgment

Sheridan J: By an amended plaint dated October 29, 1958, the plaintiffs claim a number of declarations to the effect that (1) the establishment of an appointments board in Ankole under s. 25 A (1) of the District Administration (District Councils) Ordinance, 1955, as amended by the District Administration (District Councils) (Amendment) Ordinance, 1958 (hereinafter referred to as the “1955 Ordinance”); (2) the Crown Lands (Adjudication) Rules, 1958 (hereinafter referred to as the “1958 Rules”) are ultra vires the Ankole Agreement, 1901. I shall deal with the actual declarations sought later.

The first and second plaintiffs are ex-senior chiefs in Ankole, the first plaintiff being one of the signatories of the 1901 Agreement. The third and fourth plaintiffs are elected members of the Eishengyero or District Council of Ankole (hereinafter referred to as “the council”).

The first defendant is the Enganzi or Prime Minister of Ankole, and he is sued in his capacity as chairman of the council.

The second defendant, the District Commissioner of Ankole, is sued because of his decision under s. 8 of the 1955 Ordinance, which empowers him to settle disputes as to membership of the council, that there was a quorum at the meeting of the council held on August 8, 1958. Regulation 16 (1) of the Eishengyero of Ankole Constitutional Regulations, 1955 (hereinafter referred to as the “1955 Regulations”) made under s. 4 of the 1955 Ordinance provides that sixty members shall constitute a quorum for the transaction of business. In the amended written statement of defence it is admitted that there was not a quorum and it is unnecessary to go into the reasons why this was so. They are set out in para. 9 of the amended plaint. I will come back to this meeting.

The third defendant, the Attorney-General, is sued under s. 2 of the suits by or against the Government Ordinance (Cap. 7) being the officer against whom suits by or against the Government may be instituted. No point has been taken that the provisions of this Ordinance have not been complied with.

The relevant articles of the Ankole Agreement, 1901 (Laws of Uganda, Vol. VI) are:

- “3. By this Agreement the Chief Kahaya is recognised by His Majesty’s Government as the Kabaka or supreme chief over all that part of the Ankole district which is included within the limits of the above-mentioned administrative subdivisions. Buchunku is recognised as chief over the Mitoma subdivision; Masiko is recognised as the chief over the Nyabushozi subdivision; Rutasharara is recognised as the chief over the Nsara subdivision; Mazinyo is recognised as the chief over the Ishingiro subdivision; Dhuara is recognised as the chief over the Ruampara subdivision; Nduru is recognised as the chief over the Buzimba subdivision; Baguta Katikiro is recognised as chief over the Ngarama, and Shema, and Kashari subdivisions; Mkotani is recognised as chief over the Igara subdivision (to be temporarily administered by Regent Bakora until such time as Mkotani shall come of age); Rubarremma shall be recognised as chief over Buhwezo subdivision; and Kaihura shall be recognised as chief over Bunyaraguru subdivision.

“So long as the aforesaid Kabaka and chiefs abide by the conditions of this Agreement they shall continue to be recognised by His Majesty’s Government as the responsible chiefs of the Ankole district.

“They shall be allowed to nominate their successors in the event of their demise, and the successors thus nominated shall be in like manner recognised by His Majesty’s Government as the successors to the dignity of chieftainship, on the understanding that they equally abide by the terms of this Agreement.

“But should the Kabaka or the other chiefs herein named fail at any time to abide by any portion of the terms of this Agreement, they may be deposed by His Majesty’s principal representative in the Uganda Protectorate, and their titles and privileges will then pass to any such other chiefs as His Majesty’s principal representatives may select in their place.

“Should the Kabaka of Ankole–Kahaya or his successors–be responsible for the infringement of any part of the terms of this Agreement, it shall be open to His Majesty’s Government to annul the said Agreement, and to substitute for it any other methods of administering the Ankole district which may seem suitable.

“4. All the waste and uncultivated land which is waste and uncultivated at the date of this Agreement, all forests, mines, minerals, and salt deposits in the Ankole district shall be considered to be the property of His Majesty’s Government, the revenue derived therefrom being included within the general revenue of the Uganda Protectorate; but the natives of the Ankole district shall have the same privileges with regard to the forests as have been laid down and formulated in the regulations in force in the Uganda Protectorate as are applicable to the natives of each province or other administrative division of the Protectorate within such province or administrative division.

“His Majesty’s Government shall have the right of enforcing on the natives of the Ankole district, as elsewhere in the Uganda Protectorate, the protection of game; and in this particular it is hereby agreed that within the Ankole district the elephant shall be strictly protected, and that the killing or capture of elephants on the part of the natives of the Ankole district shall be regulated by the Sub-Commissioner of the Western Province.”

The following extract from art. 7 is also relevant:

“In all respects Ankole district will be subjected to the same laws and regulations as are generally in force throughout the Uganda Protectorate.”

The history of the matter is as follows. It is undisputed that before 1901 the Omugabe or King of Ankole appointed chiefs on the advice of his elders and Saza chiefs. After 1901 the procedure was the same with the addition that the candidates’ names were forwarded to the district commissioner and through him to the provincial commissioner for submission to the Governor for approval. By consent, I allowed evidence to be called as to the custom and practice before and after 1901, although I doubt if such evidence was strictly admissible under either s.43 or s.46 of the Evidence Ordinance. The witnesses admitted that sometimes the district commissioner suggested the names of suitable candidates and that sometimes the Governor’s approval was conditional in that a particular appointment might be made subject to a probationary period. If the Governor’s approval was necessary then presumably he had power to decline to approve an appointment. The 1955 Regulations introduced an innovation in that by reg. 13 chiefs were to be appointed by the Omugabe in conformity with the advice of the appointments committee. I am informed that this committee consisted of twelve Saza chiefs and the elected members of the council. Thus, for the first time, elected members participated in the appointment of chiefs.

On March 7, 1958, the general purposes committee of the council passed a resolution approving the setting up of an appointments board in Ankole. The amended plaint avers, and Mr. Kazzora, in addressing the court on behalf of the plaintiffs, argued that this resolution was invalid because of procedural defects but later, not having called any evidence as to what occurred at this

meeting, he abandoned this objection. As I understand his contention, the resolution became ipso facto invalid when the admittedly invalid resolution was passed at the meeting of the council on August 8.

Section 25 A of the 1955 Ordinance provides:

- “25A. (1) In every district in which a council has been established under the provisions of this Ordinance, there shall be established an appointments board which shall, on behalf of the council, be responsible for the appointment, dismissal and discipline of officers, chiefs and employees in the service of the council, in accordance with regulations made under the provisions of s. 69 of this Ordinance.
- “(2) The Governor shall, after there have been discussions with the council concerned, in respect of every district to which sub-s. (1) of this section applies, make regulations for establishing the appointments board and any such regulations may, without prejudice to the generality of the foregoing power—
- (a) prescribe the constitution of the appointments board and the number of the members thereof including the number of members that shall constitute a quorum of such board;
 - (b) provide for the appointment and remuneration of such members;
 - (c) specify the qualifications of persons entitled to be appointed as members of the appointments board and the period of their tenure of office;
 - (d) provide for a chairman of the appointments board;
 - (e) provide for the attendance at meetings of the appointments board of, and for participation in the deliberations of such board by, persons who are not members thereof”.

No regulations under s. 69 of the Ordinance have yet been made. The plaintiffs’ case is that the proposal to set up an appointments board following on the invalid resolution contemplates a breach of the 1901 Agreement, or alternatively that they are contrary to Ankole customary law because their application to Ankole would result in the usurpation of the Omugabe’s customary right of appointing chiefs. Here the plaintiffs seem to be anticipating events which may never occur. I am unable to say what form the regulations, if and when they are made, will take. It may be that they will provide for an appointments board which will be as unobjectionable as the present appointments committee. Section 25 A (2) provides that the Governor shall first have discussions with the council. I am unable to say what will be the outcome of those discussions.

At the meeting of August 8 the majority of the members also approved the proposal to introduce land titles on a pilot scheme in Ankole. This refers to the 1958 Rules. This resolution was also invalid for the lack of the necessary quorum. It was not very clear what was the plaintiffs’ objection to these Rules, but it appeared to be that they enabled the Governor to have direct dealings with the Omugabe’s subjects without his consent. It is objected that r.3 (1), (4) and (6) of the 1958 Rules empowered the district commissioner, as the Governor’s agent, to bypass the Omugabe and have direct dealings with the Saza or county chiefs, his subordinates. But what right has the Omugabe got in regard to land in Ankole?

Article 4 of the 1901 Agreement provides that all waste and uncultivated land in Ankole shall be at the disposal of His Majesty’s Government. From this it may be implied that occupied land was to be at the disposal of the occupiers. By virtue of s. 2 and s. 7 of the Uganda Order in Council, 1902, all this land became Crown lands. Section 14 of the Uganda Order in Council,

1920, empowered the Governor to make grants of Crown lands. This was confirmed by the Crown Lands Ordinance (Cap. 117) s. 2. Section 24 (2) of the same Ordinance provided that unless and until the Governor made other provision it would be lawful for Africans to occupy Crown lands outside townships and trading centres without lease or licence from the Crown and that compensation could be paid if the Crown took possession of such land. Section 35 (a) gave the Governor power to make rules for the procedure to be followed in the case of applications for a conveyance, lease, or licence for the temporary occupation of Crown lands. The Crown Lands (Declaration) Ordinance (Cap. 118) which is subsequent in time to Cap. 117, provides by s. 2 that all lands in the Protectorate shall be presumed to be the property of the Crown unless they are recognised by the Governor by document to be the property of a person, or by proving that a successful claim has been made to the land under the provisions of the Ordinance. This raises a presumption in favour of the Crown. See *R. v. Mohamedbhai Jiwabhai* (1) (1956), 23 E.A.C.A. 517. The 1958 Rules were made under s. 35 of Cap. 117. They provide for the setting up of adjudication committees by the district commissioner to decide what Africans have under native law and custom any right to occupy any piece of Crown lands. Rule 14 provides for an appeal to the chief native court in the district. Rule 17 provides for the issue of a certificate of title of such land. I am unable to see how these rules conflict with the 1901 Agreement. By promulgating them the Governor was rather seeking to give effect to the terms of art. 4. Further, if there were any conflict the Rules would prevail owing to the provision in art. 7 to which I have already referred. This was clearly a deliberate provision to which both parties assented and it is to be contrasted with art. 5 of the Uganda Agreement, 1900, which provided that the laws of the Protectorate should apply to Buganda except in so far as they conflicted with the terms of the Agreement. Before leaving this part of the case I should mention that by the time the amended plaint had been filed the 1958 Rules had been applied to Ankole by L.N. 233 of 1958. This was overlooked in the last sentence of para. 7 of the amended defence. I am satisfied that the 1958 Rules do not conflict with the 1901 Agreement. The laws of the Protectorate enable the Governor to dispose of Crown lands as he wishes.

Everything which I have said presupposes that the 1901 Agreement is part of the law of the Protectorate. The main plank of the defence is that it is not. In opening the case Mr. Kazzora seemed to assume that it was. He overlooked the fact that the defence, by electing to call no evidence, might deprive him of his right to reply: The Civil Procedure Rules O. 16 r. 2. However, in view of the weighty submissions made by the Attorney-General, and as he appeared to have been taken somewhat by surprise, I invited him to address me again in exercise of my discretion to waive the strict application of O. 16 r. 2: *The Iron and Steelwares Ltd. v. C. W. Martyr & Co.* (2) (1956), 23 E.A.C.A. 175. His contention then was that as the 1901 Agreement is mentioned in certain Ordinances it must form *part* of the municipal law. He relied on *Jerusalem-Jaffa District Governor and Another v. Suleiman Murra and Others* (3), [1926] A.C. 321, where it was held that an Ordinance must not be ultra vires the Order in Council which empowered the High Commissioner for Palestine to promulgate Ordinances for the peace, order and good government of the country subject to the proviso that no Ordinance should be passed which should in any way be repugnant to or inconsistent with the provisions of the Mandate. It was this provision which enabled the court to examine the terms of the Mandate. I fail to see the analogy between that case and the present one. There is, as far as I am aware, no Ordinance in Uganda which specifically provides that it shall be read subject to the terms of the 1901 Agreement. Mr. Kazzora also relied on *Mukwaba and Others v. Mukubira and Others* (4),

Uganda High Court Civil Case No. 50 of 1954 (unreported) (The Kabaka case) where one of the issues was how far the Uganda Agreement, 1900, formed part of the constitution of Uganda so as to create clearly enforceable rights and liabilities. The test, according to Griffin, C.J., was, have rights been incorporated in the municipal law? He was able to point to the Buganda Native Laws (Declaratory) Ordinance (Cap. 71) s. 3, which confirmed the Kabaka's power to make laws for natives in Buganda. There is no similar provision for Ankole. The distinction is clearly made in the judgment of Sir Kenneth O'Connor, P., in *Katikiro of Buganda v. Attorney-General* (5), [1959] E.A. 382 (C.A.), between those parts of the Buganda Agreement, 1955, namely the First and Second Schedules thereto, which were given the force of law by a proclamation made under s. 2 (2) of the Buganda Agreement, 1955, Order in Council, 1955, and those parts which were not.

Mr. Kazzora also relied on s. 32 (6) of the Royal Instructions (L.N. 247 of 1958) whereby the Governor undertook not to assent to any bill the provisions of which shall appear to be inconsistent with obligations imposed on Her Majesty by Treaty. I am not clear if the 1901 Agreement is a treaty in the true sense of the word. In the *Katikiro's* case (5) the East African Court of Appeal apparently held that the Buganda Agreement, 1955, was a treaty. If that is right the 1901 Agreement may be a similar document; but in any event the court went on to point out that the 1955 Agreement was an Act of State on a constitutional matter and that in making and performing it Her Majesty is beyond the control of the municipal law and her acts cannot be examined in her own courts: *Rustomjee v. R.* (6) (1876), 2 Q.B.D. 69 per Lord Coleridge, C.J., at p. 74 was cited with approval. It was held that the Protectorate courts cannot pronounce upon the performance of a treaty by Her Majesty. A further answer to Mr. Kazzora's point is that I would be unable to say whether, in accordance with the concluding words of s. 32 the Governor had not previously obtained instructions upon the relevant bills through the Secretary of State.

The Attorney-General has referred me to the following earlier decisions of the High Court in Uganda which might seem to lend support to the plaintiffs' contention: (1) *Katosi v. Kahizi* (7) (1907), 1 U.L.R. 22, where it was held that the jurisdiction of the High Court in Ankole was limited as to Ankole by the 1901 Agreement; (2) *Nasanairi Kibuka v. A. E. Bertie Smith* (8) (1908), 1 U.L.R. 41, where it was held that as under the Buganda Agreement, 1900, the Lukiko had legislative powers, therefore, in a case where, under native law the consent of the Lukiko to a transfer of land was necessary, specific performance of a sale of land would not be granted where such consent was shown not to have been given; (3) *R. v. Anselmi Kiimba* (9) (1910), 1 U.L.R. 79, where it was held that under the Uganda Agreement a chief was bound to give information to the British authorities respecting Hut and Poll Tax; (4) *R. v. The Buganda Cotton Co.* (10) (1930), 4 U.L.R. 34, where the question of interior, as distinct from exterior, taxation in relation to art. 12 of the Uganda Agreement was considered. The judgment in that case concluded with an important obiter dictum that the terms of a treaty are not part of the municipal law unless and so far as a statute contains an express reference to a treaty so as to incorporate it therein; (5) *Sedulaka Serwanga v. Edward Suleman Khaya* (11) (1938), 6 U.L.R. 28, where it was unsuccessfully argued that art. 6 of the 1901 Agreement, which deals with the jurisdiction of the native courts in Ankole, could override a proclamation made under an Ordinance which in turn was enacted under s. 18 (1) of the Uganda Order in Council, 1902; (6) *Zivadi Mukasa v. Musitafa Serwada* (12) (1938), 6 U.L.R. 40, is to the same effect. Thus it will be seen that the trend of more up to date authority is against the plaintiffs' contention. The earlier decisions must be considered to be of doubtful authority, if not by implication overruled.

The Attorney-General put up an argument in favour of the plaintiffs based on the preamble to the 1955 Ordinance only to knock it down. The preamble begins by stating that whereas the authority of the Omugabe of Ankole, and other native rulers, has been recognised in Agreements, and whereas such rulers are customarily advised by their councils, and it goes on to refer to the establishment of such councils and the desirability of devolving further responsibilities on them. This preamble, of course, extends to the 1958 Amendment Ordinance. The Attorney-General submits that the preamble is purely an historical account of how the Ordinance reached the statute book and that its terms cannot affect the clear and unambiguous provisions of the substantive law as set out in the Ordinances. He referred at some length to passages in the speeches of the Law Lords in *Attorney-General v. Prince Ernest Augustus of Hanover* (13), [1957] A.C. 436. It will be sufficient if I refer only to the opinion of Viscount Simmonds that assistance may be obtained from the preamble to a statute in ascertaining the meaning of the relevant enacting part, since words derive their colour and content from their context. But the preamble is not to affect the meaning otherwise ascribable to the enacting part unless there be a compelling reason. There is nothing in the body of the 1955 Ordinance which says that the 1901 Agreement is to form part of it. The preamble cannot qualify the clear and unambiguous words of s. 25 A. Before finally giving my view on this point I will go through the very helpful submissions of the Attorney-General. Also it seems probable that this case may go further.

The Crown exercises jurisdiction over the Uganda Protectorate, of which Ankole is a part, by virtue of the Foreign Jurisdiction Act, 1890. The Uganda Order in Council, 1902, was made under s. 1 of the Act. Section 15 (2) of the Order in Council provides what law shall apply. Its terms are so well known that it is not necessary to set it out. By virtue of s. 13 and s. 15 the only laws which the courts are empowered to enforce are laws made (1) by Act of Parliament; (2) by Order in Council under the Act of 1890; (3) by adaptation of the common law or by applicable Indian Acts; (4) by Ordinance enacted by the Legislature. It follows that unless the 1901 Agreement has been made part of the statute law it is not part of the law of Uganda. The leading authority for this proposition is *Sobhuza II v. Miller and Others* (14), [1926] A.C. 518; the headnote of which reads as follows:

“An extension of British jurisdiction in a British Protectorate by Orders in Council may be referred to an exercise of power by an Act of State, unchallengeable in any British court, or to statutory powers given by the Foreign Jurisdiction Act, 1890, under which the jurisdiction acquired by the Crown in a protected country is indistinguishable in legal effect from that acquired by conquest. The Crown cannot, except by statute, deprive itself of freedom to make Orders in Council, even such as are inconsistent with previous Orders.

“Before the conquest and annexation of the South African Republic Swaziland was an independent native State, treated as a protected dependency of that Republic, by which it was administered under a Convention made in 1894 between Great Britain and the Republic. The Convention provided for the preservation of native law, and the agricultural and grazing rights of the natives. The annexation did not extend to Swaziland. Subsequently under Orders in Council certain lands in Swaziland were expropriated to the Crown, to the extinguishment of the use and occupation of them by natives under native law certain lands being allotted exclusively to the natives.”

I will content myself with quoting the following passage from the advice of the Privy Council at p. 528:

“The principles of constitutional law laid down in the earlier part of their lordships’ judgment render it in their opinion impossible to maintain the argument submitted for the appellant. That argument is that the Crown has no powers over Swaziland, except those which it had under the conventions and those which it acquired by the conquest of the South African Republic. The limitation in the Convention of 1894 on interference with the rights and laws and customs of the natives cannot legally interfere with a subsequent exercise of the sovereign powers of the Crown, or invalidate subsequent Orders in Council. But if this be true it makes an end of the appellant’s case. For the Order in Council of 1907, after providing for power to set apart certain lands in Swaziland, the subject of concessions by the paramount chiefs, enabled the High Commissioner to acquire the remaining land and to deal with it. He had therefore full power to make the Crown Grant of March 16, 1917. The power of the Crown to enable him to do so was exercised either under the Foreign Jurisdiction Act, or as an Act of State which cannot be questioned in a court of law. The Crown could not, excepting by statute, deprive itself of freedom to make Orders in Council, even when these were inconsistent with previous Orders.”

The 1901 Agreement is in the same position and has no higher validity than the Convention in that case.

Sobhuza’s case (14) was cited with approval by the Court of Appeal in *Nyali Ltd. v. Attorney-General* (15), [1955] 1 All E.R. 646; [1956] 2 All E.R. 689; [1956] 1 Q.B. 1. There the court held that the jurisdiction of the Crown in the Protectorate of Kenya was to be ascertained by looking at the jurisdiction in fact exercised in that territory under Orders in Council and other Acts of the Crown which the courts would not allow to be challenged. The courts will not examine the treaty or grant under which the Crown acquired jurisdiction. My view is that the 1901 Agreement has not been incorporated into the municipal law of Uganda, and I am not entitled to decide whether or not it conflicts with the 1955 Ordinance or the 1958 Rules. That being so, it is sufficient to dispose of the case subject to consideration of the declarations sought.

The first is that the 1901 Agreement is still valid and subsisting. I have no doubt that it is, but that is not a reason per se for granting a declaration. The remedy is discretionary and to quote from Halsbury’s Laws of England (3rd Edn.) Vol. 22, p. 749:

“the discretion should be exercised with care and caution, and judicially, with regard to all the circumstances of the case, and, except in special circumstances, should not be exercised unless all parties interested are before the court. It will not be exercised where the relief claimed would be unlawful or unconstitutional, or inequitable for the court to grant, or contrary to the accepted principles upon which the court exercises its jurisdiction . . . The court will not make a declaratory judgment where the question raised is purely academic, or the declaration would be useless or embarrassing . . . and will be slow to make a declaration as to future or reversionary rights; a declaration that a person is not liable in an existing or possible action is one that will rarely be made.”

As I have already held that the 1901 Agreement has not got the force of law I do not see any purpose in making the first declaration sought.

The other declarations sought are as follows:

- “2 (a) A declaration that any act or omission which is inconsistent with the provisions of the aforesaid Agreement, or alternatively, with its spirit and intentment (e.g. the Crown Lands (Adjudication) Rules, 1958) is illegal and null and void.

- “(b) Alternatively, the plaintiffs will contend that Her Majesty’s Government is estopped from alleging that the Ankole Agreement of 1901 is not a valid document because the aforesaid Agreement having been interwoven into the fabric of the Constitution of Ankole Kingdom forms part of the constitution of the aforesaid Kingdom and as such does create enforceable rights.
- “3 (a) A declaration that the Omugabe and chiefs of Ankole are by virtue of s. 3 of the aforesaid Agreement as supplemented by or read together with the District Administration (District Councils) Ordinance, No. 1 of 1955, and the Eishengyero of Ankole Constitutional Regulations of 1955, the only legitimate and lawful persons entitled to appoint chiefs. Therefore the purported resolutions of the General Purposes Committee passed on or about March 7, 1958, and that of the Eishengyero of Ankole passed on or about August 8, 1958, both and each of them purporting to set up an appointments board in Ankole Kingdom are null and void as being ultra vires. Similarly, the resolution passed by the Eishengyero of Ankole on August 8, 1958, stating that Land Titles on a pilot scheme should be introduced in Ankole is invalid in as much as there was no quorum in the Eishengyero of Ankole on August 8, 1958, to pass such and/or any other resolutions.
- “(b) A declaration that unless and until the appointments of chiefs are made by the Omugabe and the Saza Chiefs of Ankole in accordance with the provision of s. 3 of the Ankole Agreement as supplemented by or read in conjunction with the District Administration (District Councils) Ordinance, No. 1 of 1955, and with the Eishengyero of Ankole Constitutional Regulations, 1955, any purported appointment or appointments made or to be made by the Appointments Board in Ankole Kingdom are unlawful and invalid and of no effect whatever, in as much as the Governor of Uganda has not, and had not at any material time any power to set up an appointments board for the purpose of appointing chiefs of the Kingdom of Ankole, nor did he or has he any overriding control over chiefs. Further, or in the alternative that the setting up of such board is in breach of the Ankole Agreement of 1901.
- “4. Alternatively, a declaration that the resolutions of the General Purposes Committee passed on March 7, were invalid and/or ultra vires in so far as (1) the requisite fourteen days notice was not given to all members of the Committee who are and/or were at all material time entitled to receive it notifying them the date on which the General Purposes Committee would meet, (2) in the further alternative, because the Protectorate Government’s proposals for the setting up of the Appointments Board, were, contrary to the rules of procedure voted upon twice, i.e. after the same meeting had decided by eight votes to five on the first ballot that the aforesaid proposals should be referred to the next meeting of the General Purposes Committee for consideration.
- “5. A declaration that the minutes, resolutions and/or proceedings of the Eishengyero of Ankole held on August 8, 1958, are invalid and of no effect whatever because the provisions of s. 10 of the District Administration (District Councils) Ordinance, No. 1 of 1955, not having been complied with the requisite quorum of sixty members was not present when the Eishengyero of Ankole purported to pass the aforesaid resolutions.
- “6. An injunction to restrain the Enganzi of Ankole and/or the District Commissioner of Ankole from acting on the aforesaid invalid resolutions, or from forwarding them to His Excellency the Governor.

- “7. Alternatively, an injunction to restrain the Appointments Board from being constituted, or functioning, or alternatively to declare the proceedings of the Appointments Board (if any) or its resolutions (if any) and/or its minutes null and void and of no effect whatever.
- “8. An injunction to restrain the Minister of Natural Resources and/or the Uganda Government from introducing the Crown Lands (Adjudication) Rules, 1958, in the Ankole Kingdom in as much as they are invalid and null and void as being ultra vires.
- “Alternatively, to declare land titles granted under the aforesaid rules invalid and of no effect whatever.”

My answers to these prayers are:

- 2 (a) It is too wide and vague and it would be a wrong exercise of my discretion to grant it.
- (b) Her Majesty’s Government has not been made a party to these proceedings.
- 3 (a) The Eishengyero, which was made a body corporate by s. 5 of the 1955 Ordinance, and which may sue and be sued in its corporate name, has not been made a party to these proceedings. It should have been if this prayer was to succeed, as the present defendants have no control over its actions.
- (b) I have already dealt with this. I cannot make a declaration binding on an appointments board which has not yet been established. As it is non-existent it could not be made a party to these proceedings. If the last three lines mean that the Governor is not entitled to set up the board owing to the 1901 Agreement, the answer is that Ordinance 1955 prevails over the 1901 Agreement which, I repeat, has not got the force of law.
4. No longer arises as the attack on the validity of the resolution of the General Purposes Committee has now been dropped.
5. There is no point in granting this declaration as the Eishengyero was merely being consulted in regard to the setting up of an appointments board and the introduction of land titles. The invalid resolutions had no effect on the responsibility of the Governor for making the necessary rules and regulations. The rules have already been made and no declaration of this court can have any effect on them or on the regulations which have not yet been made.
6. The Enganzi and the district commissioner have no function with regard to the invalid resolutions. At present appointments in Ankole are made by the appointments committee under s. 20 of the 1955 Ordinance. As the discussions envisaged by s. 25A (2) of the 1958 Ordinance have not yet taken place, and they must take place before the appointments board can be set up it would, to say the least, be unrealistic to make the declaration asked for.
7. This is covered by my comment on 3 (b).
8. The 1958 Rules are not ultra vires the 1901 Agreement for the reasons which I have attempted to give.

In the result the suit is dismissed with costs.

Action dismissed.

For the plaintiffs:

JWR Kazzora

JWR Kazzora, Kampala

For the defendants:

R Dreschfield (Attorney-General, Uganda) and MJ Starforth (Crown Counsel, Uganda)

The Attorney-General, Uganda

Jos Hansen and Soehne AmbH v G K Jetha Ltd
[1959] 1 EA 563 (HCT)

Division: HM High Court of Tanganyika at Dar-Es-Salaam
Date of judgment: 26 May 1959
Case Number: 76/1958
Before: Simmons J
Sourced by: LawAfrica

[1] Practice – Execution against sureties – Adjustment of decree – Indian Code of Civil Procedure, 1908, s. 47, s. 145 and O. 21, r. 2.

[2] Evidence – Guarantee – Letter of guarantee to have been signed originally by four – Signed by three with oral assurance that three signatures were sufficient security – Whether oral evidence admissible to establish the assurance – Indian Acts (Application) Ordinance (Cap. 2 Supp. 56), s. 4 (T.) – Tanganyika Order-in-Council, 1920, art. 17 (2) (T.) – Indian Contract Act 1872, s. 10, s. 144 – Statute of Frauds 1677, (29 Car. 2, c. 3), s. 4 – Indian Evidence Act, 1872, s. 92 – Indian Limitation Act, 1908, First Schedule, art. 174.

Editor’s Summary

The plaintiff decree-holder made an application under O. 21, r. 2 of the Indian Code of Civil Procedure for the recording of an adjustment of a decree and for its execution against three alleged sureties. The application was opposed by the sureties who were respondents to the application on the grounds that they had not completed the contract of guarantee and that the application was time-barred. The document relied upon as being the contract of guarantee was a letter to the plaintiffs dated October 8, 1958, the introductory paragraph of which began “We, the undersigned”. At the foot of the letter were the signatures of the three alleged sureties and an empty space for a fourth signature, namely, “Fatmakhanu, widow of the late G. K. Jetha”. The evidence before the court was that the draft letter of guarantee was handed to the three respondents in order that they should sign, procure the signature of the fourth surety and return the document to the decree-holder. The document was returned with the signatures of only three sureties who at the time stated that their signatures alone were sufficient security. On the question of limitation the respondents contended that article 174 of the First Schedule to the Indian Limitation Act 1877, which provides for a limitation period of ninety days “for the issue of a notice to show cause why any adjustment of the decree should not be recorded as certified”, applied and that therefore the application was time-barred.

Held –

- (i) the Statute of Frauds (1677) (29 Car. 2, c. 3) applies in Tanganyika and therefore contracts of guarantee are not enforceable unless evidenced by the written memorandum required by the Act.
- (ii) the letter of October 8, 1958, was silent upon the question whether the signatures of the four

sureties was a condition of the guarantee and therefore oral evidence was admissible under the proviso to s. 92 of the Indian Evidence Act, 1872.

- (iii) the oral statement of the three sureties that their signatures alone were sufficient security was not a subsequent modification of the guarantee but was a collateral, oral term.
- (iv) even accepting the sureties' contention that they signed the document on the basis that the fourth surety would sign, that was not the basis upon which they communicated their acceptance by delivering the signed document and so completing the contract of guarantee.
- (v) the application was not time-barred as art. 174 of the First Schedule to the Indian Limitation Act 1908, refers to applications under O. 21, r. 2 (2)

(applications by the judgment debtor) and not to applications by the decree-holder under r. 2 (1).
Application granted.

Cases referred to in judgment

- (1) *Hansard v. Lethbridge* (1892), 8 T.L.R. 346.
- (2) *National Provincial Bank of England v. Brackenbury* (1906), 22 T.L.R. 797.

Judgment

Simmons J: This is an application pursuant to s. 47 and s. 145 and to O. 21, r. 2 of the Indian Code of Civil Procedure, by a decree-holder, for the recording of adjustment of a decree of this court and for its execution against three alleged sureties. The application was opposed by the sureties on the grounds that they had not completed the contract of guarantee and that the application was time-barred.

To the affidavit in support of the application was exhibited the document relied upon as being the contract rendering the sureties liable. This was a letter to the plaintiffs dated October 8, 1958, the introductory paragraph of which began "We, the undersigned". At the foot came the signature of the three alleged sureties and an empty space for a fourth signature, "Fatmakhanu, widow of the late G. K. Jetha".

It was contended on behalf of the respondents that the guarantee was subject to a condition which had not been fulfilled. Their learned advocate referred to *Hansard v. Lethbridge* (1) (1892), 8 T.L.R. 346, and *National Provincial Bank of England v. Brackenbury* (2) (1906), 22 T.L.R. 797. It seems to me that in Tanganyika the situation is provided for by s. 144 of the Indian Contract Act:

"Where a person gives a guarantee upon a contract that a creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join."

This appears to contemplate the possibility of the collateral contracts being separate. The learned commentators in Pollock & Mulla (6th Edn.) say:

"Whether such a contract is to be inferred from the transaction as a whole is conceived (apart from the construction of any written document) to be purely a question of fact."

Although English and other persuasive authorities are of great value to this court, and often rightly treated as virtually binding, two things must always be remembered; first, that the Indian Contract and Evidence Acts do not purport to be exact reproductions of English law however closely they may resemble it, and secondly that they are codes, and the *raison d'être* of a code is to provide so far as may be, a self-explanatory statement. It is my first duty to look at the statutes, to see whether they offer a solution. I have to ascertain whether there was a contract between the applicant and the respondents that the applicants should not act upon the guarantee until widow Jetha had joined in it. The process of ascertainment is affected by s. 91 and s. 92 of the Indian Evidence Act. Section 91 provides that where a contract has been reduced to the form of a document (or documents) no evidence shall (with certain exceptions) be given in proof of its terms except the documents themselves. Section 92 provides that when the terms of any such contract have been proved by production of the documents no evidence of any oral agreement or statement shall be admitted (as between the parties) for the purpose of adding to its terms. There are, however, provisos permitting (*inter alia*) proof of the existence of any separate oral

agreement as to any matter upon which the document is silent and which is not inconsistent with its terms, or constituting a condition

precedent, or subsequently modifying the terms of the original contract—but the last proviso does not operate where the original contract was by law required to be in writing. Section 10 of the Contract Act saves:

“any law in force in Tanganyika by which any contract is required to be made in writing . . .”

(“Tanganyika” was substituted for “British India” by the Indian Acts (Application) Ordinance (Cap. 2–Supp. 56), s. 4.). So I take it that s. 10 saves such English Acts as have been applied to Tanganyika and as require such writing. The Statute of Frauds (1677) (29 Car. 2, c. 3) was thus applied to Tanganyika by art. 17 (2) of the Tanganyika Order in Council, 1920, and s. 4 thereof provides that contracts of guarantee are not enforceable unless evidenced by the written memorandum required by the Act. No evidence, therefore, may be given of any oral modification of the present contract of guarantee after its completion, but only of any collateral oral agreement as to any matter upon which that contract is silent, or as to any condition precedent.

Let us now turn to the affidavits and to the document. What happened appears from the plaintiff’s representatives’ affidavit in reply, which was not challenged by further affidavits or by any application for leave to cross-examine. The draft was handed to these three guarantors in order that they should sign, procure the signature of the fourth guarantor and return the document to the creditor. The three returned the document to the creditor with their own signatures upon it but without the fourth signature, at the same time stating that their signatures alone were sufficient security. This handing over of the signed paper was the culminating act of acceptance, and the contract came into being when but not until it took place. Thus follows from s. 3 of the Contract Act, which provides that acceptance is deemed to be made by any act of the acceptor which has the effect of communicating the acceptance. It follows that the oral statement that their signatures alone were sufficient security was not a subsequent modification but was a collateral, oral term. Is there a term in the document to the effect that the guarantee was conditional upon all four signing or is that document silent on the subject? If there is such a term the oral agreement at the time of the handing over is inconsistent with the document and cannot be admitted in evidence, but if the document is silent upon the point the oral agreement can be admitted.

The document in *National Provincial v. Brackenbury* (2) was silent on its face, but Walton, J., said that

“on the evidence before him he was quite unable to find as a fact that there was any consent by the three signatories that the signature of the fourth surety ‘should be dispensed with, or that they should be liable whether he signed or not’.”

On the facts, therefore, that case is immediately distinguishable from the present one. In *Hansard v. Lethbridge* (1) the Court of Appeal held that there was no evidence of dispensing with the missing surety, and that in the absence of such evidence any surety executing a guarantee in the belief, derived from its form, that it would be executed by the other sureties named would be relieved of his obligation if the other did not sign. Executing, however, must include delivery as well as signing. There would, I suppose, be a presumption from the form of this document alone, in the absence of any evidence to the contrary, that there was such a condition. But *Hansard’s* (1) is a different case because in the matter before me there is evidence that the fourth guarantor was dispensed with. Except as constituting authority for the apparent presumption to which I have just referred, but which does not arise here, I do not think there is anything in these two cases which is not to be found in s. 144 of the Contract Act. The question remains one of fact. But it does seem that in the English courts

evidence of the collateral term was held to be admissible, and I think it is in Tanganyika.

I still have to decide whether the agreement of October 8, 1958, was “silent” upon this question. I have come to the conclusion that it was. It is possible that in the absence of the collateral oral agreement I should have held that there was an implied term as the respondents say there was, but that only means that the document being silent the term is read into it in the absence of reason to the contrary. I hold that evidence of the oral agreement is admissible under the Evidence Act, s. 92, proviso 2. There was no condition precedent so that does not arise. Even accepting the respondents’ affidavit as correct when they say that they “signed” the instrument on the basis that the fourth guarantor would sign, that was not the basis upon which they communicated their acceptance by delivering the signed document and so completing the contract. At the time of execution there was no contract that the creditor should not act upon the guarantee until the fourth surety had signed, as contemplated by s. 144 of the Contract Act. On the contrary, there was a collateral agreement that the fourth surety would be dispensed with. The respondents are not absolved from liability merely because the fourth surety did not sign. The applicants did not prejudice their position by later tendering a new document in place of the old. It was natural to wish that everything should be in writing.

The respondents next pray in aid art. 174 of the First Schedule to the Indian Limitation Act, which enacts a limitation period of ninety days

“for the issue of a notice to show cause why . . . any adjustment of the decree should not be recorded as certified.”

But the article refers to applications under O. 21, r. 2 (2) (applications by the judgment-debtor) not to applications by the decree-holder under r. 2 (1), such as is before me. Sub-rule (1) makes no reference to the “issue of a notice to show cause” as does sub-r. (2). Article 174 does not bar the present application.

In para. 7 of their affidavit of April 23, the respondents raise another objection but this was abandoned and I will not deal with it.

There will be an order that the adjustment of the decree to a simple decretal amount of Shs. 33,818/17 be recorded and that the decree as adjusted may be executed against these three sureties.

Application granted.

For the applicants:

HG Dodd

Dodd & Co, Dar-es-Salaam

For the respondents:

W Dharsee

Dharsee McRoberts, Dar-es-Salaam

Richard Gray v Samuel Kenneth Odendaal
[1959] 1 EA 567 (SCK)

Division:

HM Supreme Court of Kenya at Nairobi

Date of judgment: 26 May 1959

Case Number: 626/1956

Before: Rudd J

Sourced by: LawAfrica

[1] Costs – Taxation – Application for final decree in mortgage suit opposed – Proceedings in chambers – Whether costs should be taxed under item 1 (b) or 1 (f) of Schedule VI of the Remuneration of Advocates Order, 1955, (K.).

Editor’s Summary

The plaintiff applied in chambers for the preliminary decree in a mortgage suit to be made final; the application was granted. On taxation of the plaintiff’s bill of costs, counsel for the plaintiff contended that as the application was a step in execution and was opposed, the bill of costs should be taxed under item 1 (b) of Schedule VI of the Remuneration of Advocates Order 1955, as provided in the proviso to item 10, and should not have been treated merely as an application in chambers under item 1 (f). On reference to a judge in chambers.–

Held –

- (i) it made no difference whether the matter was treated as an execution proceeding or as another form of application.
- (ii) contested execution proceedings do not necessarily come under item 1 (b) and where proceedings are in chambers item 1 (f) is more appropriate than item 1 (b); therefore, the taxing officer correctly taxed the instructions fee in this matter under item 1 (f).

Decision of taxing officer upheld.

No Cases referred to in judgment in judgment

Judgment

Rudd J: I do not think it matters much whether the matter should be treated as an execution proceeding or as another form of application. The difference in the minimum instructions fee for each case is only 9/-. It is 21/- in execution and 30/- in applications under item 1 (f). In any case this was clearly a case in which a special fee for instructions should have been allowed and in fact a special fee was allowed. I do not think that contested execution proceedings necessarily come under item 1 (b) and I think that where the proceedings are in chambers item 1 (f) is more appropriate than item 1 (b). It is in my opinion quite proper to tax proceedings in chambers on a lower scale than proceedings in court. I have ascertained that it is the practice to tax such proceedings under item 1 (f) and not under item 10.

In my opinion the taxing officer correctly taxed the instructions fee in this matter under item 1 (f). I am not satisfied that the amount allowed was so low as to indicate that he must have acted on a wrong principle. The decision of the taxing officer is therefore upheld.

Decision of taxing officer upheld.

For the applicant:

Ralph C de Souza

For the respondent:

RH Munro and Charles Njonjo of the Official Receiver's Office

For the plaintiff:

Stephen & Roche, Nairobi

For the defendant:

The Official Receiver, Kenya

Re an Application by Barbara Simpson Howison
[1959] 1 EA 568 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	29 May 1959
Case Number:	40/1959
Before:	Rudd and MacDuff JJ
Sourced by:	LawAfrica

[1] Habeas Corpus – Application by mother – Daughter over eighteen becoming Muslim and marrying Muslim according to religious rites – No allegation of restraint – Whether ground exists for issue of writ.

[2] Conflict of laws – Girl domiciled in Scotland marries Muslim in Kenya according to religious rites after becoming Muslim – Lack of parental consent to marriage – Whether marriage valid – Mohammedan Marriage, Divorce and Succession Ordinance (Cap. 148) (K.) – East Africa Order in Council, 1911, art. 2 – Colonial Marriages Act. 1865, s. 1.

Editor's Summary

The applicant, a widow, moved the court for an order that a writ of habeas corpus should issue directed to the respondent, one Patwa, to have her daughter brought before the court. The daughter who was domiciled in Scotland and was at the date of the proceedings eighteen and a half years of age, had embraced the Islamic religion at Nairobi on March 31, 1959 and had on April 19, 1959 married the respondent, a Dawoodi Bohra Shia Muslim, at Mombasa, in accordance with the rites of that faith, and since then had been living with him in Nairobi as his wife. The applicant in her affidavit alleged that the marriage was invalid, that her daughter had consistently refused to return to the parental home, that the applicant was entitled to the care and custody of her daughter until the latter should attain the age of twenty-one, and that if the writ was not issued the daughter would come to moral or other harm. There

was no allegation by the applicant that the respondent was unlawfully restraining or detaining her daughter or that she had been enticed away from the applicant. The application was contested by both the respondent and the daughter, who said, *inter alia*, that the daughter desired to continue in living as she was instead of returning to the applicant. It was common ground that the marriage between the daughter and the respondent was a valid marriage under Mohammedan law, but it was in dispute whether the applicant was the guardian of the daughter in any event, whether the daughter had embraced the Islamic religion or was still a Christian, or whether her marriage to the respondent was a valid marriage.

Held –

- (i) there was no illegal restraint by the respondent.
- (ii) in view of the nature of the proceedings and of the remedy sought, the court had no power to order the daughter to leave the respondent or to return to the applicant or to make an order against the daughter which would have the effect of putting her in *terrorem* as regards the court and its order in these proceedings.
- (iii) since the daughter had undoubtedly attained the age of discretion in law, and having regard to the nature of the proceedings, the court could not see any legal justification for an order that could only be made effective by subjecting her to some form of physical restraint.

Application refused.

[Editorial Note: Although it was not necessary for the determination of the application, the court proceeded to consider the validity of the marriage and held that the Mohammedan Marriage, Divorce and Succession Ordinance

validates within Kenya for all purposes a Mohammedan marriage, but not elsewhere; that the marriage was valid according to the law of the matrimonial domicile and that as the daughter had the capacity to contract this marriage it must be regarded as a valid Mohammedan marriage.]

Cases referred to in judgment

- (1) *In re Agar-Ellis, Agar-Ellis v. Lascelles* (1883), 24 Ch. D. 317.
- (2) *Lough v. Ward*, [1945] 2 All E.R. 338.
- (3) *Maleksultan w/o Sherali Jeraj v. Sherali Jeraj* (1955), 22 E.A.C.A. 142.
- (4) *Warrender v. Warrender* (1835), 2 Cl. & Fin. 488; 6 E.R. 1239.
- (5) *De Reneville v. De Reneville*, [1948] 1 All E.R. 56; [1948] P. 100.
- (6) *Kenward v. Kenward*, [1950] 2 All E.R. 297; [1951] P. 124.
- (7) *Baindail v. Baindail*, [1946] 1 All E.R. 342.

Judgment

Rudd J: read the following judgment of the court: The applicant, Mrs. Howison, moves this court for an order that a writ of habeas corpus should issue directed to the respondent, Saif Patwa, or more properly Saifuddin Taherali Patwa, to have the body of her daughter, Diane Ramsay Howison, brought before this court. The facts out of which this application arises, do not appear to be in dispute. The applicant is a widow and Diane Ramsay Howison, who is the legitimate daughter of the applicant and her deceased husband, was born in Scotland, is now eighteen and a half years of age, and up to the time of her marriage on April 19, 1959, in any case, was domiciled in Scotland. Miss Howison's name after her marriage is given as Diane Saifuddin Taherali Patwa, so to avoid confusion we shall refer to her as "the daughter". We are unaware as to whether the daughter was living with the applicant before she left Scotland, how she came to arrive in Kenya or how long she has been in Kenya. However, on March 31, 1959, she embraced the Islamic religion at Nairobi and on April 19, 1959 at Mombasa she was married to the respondent, a Dawoodi Bohra Shia Muslim, in accordance with the rites of that faith. Since that ceremony she has been living with the respondent in Nairobi as his wife.

In her affidavit the applicant alleges that the daughter's marriage is invalid, that the daughter has consistently refused to return to the parental home, that the daughter has consistently refused to return to the parental home, that she is entitled to the care and custody of the daughter until the daughter attains the age of twenty-one years, and that if the writ does not issue the daughter will come to moral or other harm. It is to be noted that there is no allegation against the respondent that he is unlawfully restraining or detaining the daughter. These allegations and contentions are denied by the respondent and by the daughter herself who go further and say that the daughter is capable at her age, and in her condition of life, of exercising her own discretion, that she has done so after careful thought and consideration, and that she is desirous of continuing in her present way of life and of not returning to the applicant.

For the purposes of record, it is accepted by counsel that the law of Scotland, as it may have any bearing on these proceedings, is correctly set out in the affidavits sworn herein by the respective Writers to the Signet. It is also accepted that the marriage between the daughter and the respondent is a valid

marriage under Mohammedan law. It is, however, in dispute whether the applicant is the guardian of the daughter in any event, whether the daughter has embraced the Islamic religion or is still a Christian, and whether her marriage to the respondent is a valid marriage.

In showing cause the first contention for the respondent is that there is no illegal restraint such as to justify the issue of a writ of *habeas corpus*, and that the daughter is of an age of discretion and does not desire to return to the

custody or control of the applicant. The respondent relied on a statement of the law set out in Short and Mellor on the Practice in the Crown Office, (2nd Edn.), at p. 313 that:

“With reference to the custody of children the judges of the common law courts have exercised a larger jurisdiction in granting writs of *habeas corpus* than in other cases. They have exercised powers somewhat analogous to those which the Court of Chancery has always exercised in its character of *parens patriae*. For instance, the writ was issued irrespective of the wishes or desire of the child detained, and in making the rule absolute, the court has always exercised a certain discretion in order to protect the child, in addition to merely setting the infant free from restraint. In *R. v. Greenhill*, 4 Ad. & El. 643, Mr. Justice Coleridge said: ‘A *habeas corpus* proceeds on the fact of an illegal restraint. When the writ is obeyed and the party brought up is capable of using a discretion—the rule is simple—the individual who has been under restraint is declared to be at liberty, but when the person is too young to have a choice, we must refer to legal principles to see who is entitled to the custody, because the law presumes that where the legal custody is no restraint exists: and where the child is in the hands of a third party, the presumption is in favour of the father’; and all the judges agreed that age, and not mental capacity was to be taken to be the criterion of a capacity to choose. In *R. v. Clarke*, 7 E. & B. 186, and *R. v. Howes*, 3 El. & El. 332, it was laid down that the age at which children should be deemed to have a discretion was fourteen in the case of a boy, and sixteen in the case of a girl.”

Counsel for the applicant conceded that the age of discretion in the age of females was sixteen years and referred to a statement in Eversley on Domestic Relations, (6th Edn.), at p. 342 to the effect that:

“The father and mother have a general right of control over the person, education, and conduct of their children till they attain majority, and when they come before the court on *habeas corpus*, or an application in Chancery, if the children have not arrived at the years of discretion, the court will order them to be delivered into the custody and control of their parents or other guardian. The courts on *habeas corpus* act upon the presumption that where the legal custody is, no restraint exists; but they have a discretion to refuse to restore the infant to the custody of its parent, if the parent’s conduct is grossly immoral, or if to surrender it up would be to the detriment of the interests of the child; the welfare of the infant being the first and paramount consideration. But where the children are not in the custody of their father or guardian, and he seeks to resume his control by *habeas corpus*, in cases where they have arrived at the age of discretion, and are capable of exercising a choice, they will be permitted to elect whether or not to return to their father’s or guardian’s control, but their choice must be a wise one and for their own interests. This is so because the question before the court upon *habeas corpus* is whether the person detained is in illegal custody without that person’s consent; and where the court finds that the infant is no longer a mere child, but is capable of consenting, and is consenting to the place where it is detained, then the ground of an application for a writ of *habeas corpus* falls away.”

As far as the present circumstances are concerned both authorities rely on the case of *In re Agar-Ellis, Agar-Ellis v. Lascelles* (1) (1883), 24 Ch. D. 317 where Brett, M.R., set out the law in these words at p. 326:

“It is the universal law of *England* that if any one person alleges that another is under illegal control by anybody, that person, whoever it may

be, may apply for a *habeas corpus*, and thereupon the person under whose supposed control, or in whose custody, the person is alleged to be illegally and without his consent, is brought before the court. But the question before the court upon *habeas corpus* is whether the person is in illegal custody without that person's consent. Now up to a certain age children cannot consent or withhold consent. They can object or they can submit. But they cannot consent. Because the court cannot inquire into every particular case, the law has now fixed upon certain ages—as to boys the age of fourteen, and as to girls the age of sixteen—up to which, as a general rule, the court will not inquire upon a *habeas corpus*, as between the father and the child, as to the consent of the child to the place, wherever it may be. But above the age of fourteen in the case of a boy, and above the age of sixteen in the case of a girl, the court will inquire whether the child consents to be where it is; and if the court finds that the infant, no longer a child, but capable of consenting or not consenting, is consenting to the place where it is, then the very ground of an application for a *habeas corpus* falls away. I say, if it is the father who applies for the *habeas corpus* the *habeas corpus* is not granted.”

It would appear then that there is no dispute on these authorities what the law is. In applications for a writ of *habeas corpus* once an infant has reached the age of discretion the court will give weight to the fact that the infant consents to be where he or she in fact is.

Nor do we think that the case of *Laugh v. Ward* (2), [1945] 2 All E.R. 338, referred to by the applicant in any way departs from that principle. That was an action in tort for an injunction and damages for enticement in respect of a girl of 16 years and 7 months of age. These remedies were granted, but Cassels, J. at p. 348 of the report indicates the difference between that form of proceedings and proceedings by way of *habeas corpus* when he says at p. 348:

“It is also important to observe that these are not *habeas corpus* proceedings. If they were the court would consult the wishes of the child, and, as Dorothy is over 16 years of age and, therefore, has attained what the law calls the age of discretion, the court might not interfere. On the other hand, it might. The fact that a girl at home with her father has reached the age of 16 does not mean that any stranger can come between father and daughter and entice the daughter away, and then say to the parents, ‘You have no remedy against me, because the girl is sixteen and a half years old, and I have persuaded her to stop with me’.”

Applying the principles set out in the above authorities to the circumstances of the present case we find that there is no illegal restraint by the respondent. As far as we can ascertain, and it is not denied by the applicant, the daughter has come to Kenya, has married the respondent according to the rites of his community, and lives with him, of her own free will and consent. The daughter has, in her affidavit, given a history of opposition to her proposed marriage to the respondent, and a reason for the applicant's present opposition, neither of which have been denied. She is eighteen and a half years of age, appears to this court to be fully of that age, and capable of exercising her own unfettered discretion, again a matter not denied by the applicant. In fact she appears to have done so despite opposition from her family. There is no allegation that she has been enticed away from the applicant. There is another matter to be taken into consideration, that is that assuming for the moment the daughter's marriage to the respondent to be valid in Kenya, as he says the religious head of his community contends, then she and any children she may have, have acquired certain rights under Mohammedan law.

Looking at the matter from another point of view we cannot see that this writ, if granted, would be of any effect. The respondent is not restraining the

daughter. It may fairly be assumed that if we were to release her from any alleged custody and control of the respondent she would immediately return to him of her own free will and consent unless prevented from so doing by some form of constraint. But in view of the nature of these proceedings, and of the remedy that is sought, we have no power to order her to leave the respondent or to return to the applicant, nor have we power in these proceedings to make an order against her which would have the effect of putting her in *terrorem* as regards this court and its order in these proceedings.

This is not a case in which it can be said that the daughter is merely on, or just over, the border-line of the attainment of years of discretion and of the ability to make decisions for herself. She is over eighteen years of age and does not appear to be in any way immature for her age. She has not offended against the law. In these circumstances, and having regard to the fact that she has undoubtedly attained the age of discretion in law, and having regard to the nature of these proceedings, we cannot see any legal justification for an order that, as far as we can judge, could only be made effective by subjecting her to some form of physical restraint. In our view, therefore, no ground for the issue of a writ of habeas corpus exists and the present motion must be dismissed.

In view of our decision in respect of the respondent's first contention, it is unnecessary for us to consider the remaining two contentions. However, since the applicant has alleged, in support of her application, that the daughter's marriage to the respondent is invalid, we are of opinion that this question is of such importance to the parties to the marriage that we should express our views thereon.

The essentials of a valid marriage according to Dicey's Conflict of Laws, (6th Edn.) are set out at p. 758 (and we quote only the passage relevant to the circumstances of the present case) as follows:

"Rule 168. Subject to the exceptions hereinafter mentioned, a marriage is valid when:

- (1) each of the parties has, according to the law of his or her respective domicile, the capacity to marry the other; and
- (2) any one of the following conditions as to the form of celebration is complied with (that is to say):
 - (i) if the marriage is celebrated in accordance with the local form."

Schmitthoff on the English Conflict of Laws, (3rd Edn.) at p. 316 expresses the same views in these words:

"English law has developed two rules for the determination of the validity of a marriage celebrated in a country other than that of the *lex domicilii* of the parties.

"Such marriages are valid if:

- (a) the incidents pertaining to the form of the marriage satisfy the *lex celebrationis* and, further, if
- (b) the incidents pertaining to the essentials of the marriage satisfy the *lex domicilii*.

"These rules have been stated by Lord Campbell in *Brook v. Brook*, (1861) 9 H.L.Cas. 193, 207:

"While the forms of entering into the contract of marriage are to be regulated by the *lex loci contractus*, the law of the country in which it is celebrated, the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. Although the forms of celebrating the foreign marriage

may be different from those required by the law of the country of domicile, the marriage may be good everywhere. But if the contract of marriage is such, in essentials, as to be contrary to the law of the country of domicile, and it is declared void by that law, it is regarded as void in the country of domicile, though not contrary to the law of the country in which it was celebrated’.”

Other authorities on this subject are in agreement with these general propositions.

Now, it is also accepted by all authorities that the consent to a marriage, by a parent or a guardian, is part of the form of the marriage and is governed by the requirements of the *lex loci celebrationis*. It has been accepted by counsel that the present marriage was one recognised as valid by Mohammedan law, and accordingly by virtue of s. 2 of the Mohammedan Marriage, Divorce and Succession Ordinance (Cap. 148 of the Laws of Kenya) is deemed to be a valid marriage throughout the Colony. The question of lack of consent by the applicant to the marriage therefore has no bearing on the validity of the present marriage. Since Mr. Hearn, for the applicant made some reference to the problem that daughters could in this manner avoid the necessity of obtaining the consent of their parents to marriage we should perhaps refer him to the law on this subject, and again we refer to Dicey as authority at p. 765 where he states:

“In the second place, the validity of a marriage is in no degree affected by the fact that the object of the parties in marrying away from their own country is to evade the requirements of the law of their domicile as to consents, publicity, etc. or that no regular ceremony is required by the law of the country where the marriage takes place.”

In our view, there are three methods in which this problem may be regarded. The first is that the effect of the Mohammedan Marriage, Divorce and Succession Ordinance is to exclude the English (and Scottish) Conflict of Law Rules as to validity of marriage. We think this must be so in so far as the validity of this marriage in Kenya is concerned. While in England (and Scotland) a polygamous marriage is not recognised as a “marriage” in so far as jurisdiction in divorce, and certain incidents as to inheritance to land are concerned that is not the position or at least not the position to the same extent, in this Colony. Some reliance was placed by the applicant on the provisions of the Colonial Marriages Act, 1865 (28 and 29 Vict. c. 64) s. 1 of which provides:

“1. *Operation of Colonial laws establishing validity of marriages.*—Every law made or to be made by the legislature of any such possession as aforesaid for the purpose of establishing the validity of any marriage or marriages contracted in such possession shall have and be deemed to have had from the date of the making of such law the same force and effect for the purpose aforesaid within all parts of Her Majesty’s dominions as such law may have had or may hereafter have within the possession for which the same was made: Provided, that nothing in this law contained shall give any effect or validity to any marriage, unless at the time of such marriage both of the parties thereto were, according to the law of England, competent to contract the same.”

However, this Act must be read subject (in the case of the Mohammedan Marriage, Divorce and Succession Ordinance) to the provisions of art. 2 of the East Africa Order in Council, 1911 which reads:

“(2) Subject to the other provisions of this Order, such civil and criminal jurisdiction shall, so far as circumstances admit, be exercised in conformity with the Civil Procedure, Criminal Procedure and Penal Codes of India

and the other Indian Acts which are in force in East Africa at the date of the commencement of this Order and subject thereto and so far as the same shall not extend or apply shall be exercised in conformity with the substance of the common law doctrines of equity and the statutes of general application in force in England on the twelfth day of August, 1897, and with the powers vested in and according to the procedure and practice observed by and before courts of justice and justices of the peace in England according to their respective jurisdictions and authorities at that date, save in so far as the said Civil Procedure, Criminal Procedure and Penal Codes of India and the other Indian Acts in force as aforesaid and the said common law doctrines of equity and statutes of general application and the said powers procedure and practice may at any time before the commencement of this Order have been, or hereafter may be, modified, amended or replaced by other provision in lieu thereof by or under the authority of any Order of His Majesty in Council, or by any Ordinance or Ordinances passed in and for the Protectorate: Provided always that the said common law doctrines of equity and statutes of general application shall be in force in the Protectorate so far only as the circumstances of the Protectorate and its inhabitants and the limits of His Majesty's jurisdiction permit, and subject to such qualifications as local circumstances render necessary."

which provisions have been preserved in similar terms by subsequent Orders in Council. The effect then of the Mohammedan Marriage, Divorce and Succession Ordinance is that while within Kenya it validates a Mohammedan marriage for all purposes, it does not do so in other colonies, dominions or in England (or Scotland). That this must be so is clearly supported by the decision of the Court of Appeal for Eastern Africa in *Maleksultan w/o Sherali Jeraj v. Sherali Jeraj* (3), (1955) 22 E.A.C.A. 142.

The second line of approach is to consider, in the light of English authorities whether this marriage is invalid or void as being against English (and Scottish) law. If we accept that the essentials of the marriage would not be recognised by the law of Scotland, the accepted domicile of the daughter, does that, in Kenya, or in Scotland, invalidate the marriage? There is some divergence of opinion between the authorities on this subject, Dicey on the one hand submits that it does, Cheshire and Schmitthoff on the other hand submit that:

"The principle accepted by the English courts may be formulated as follows:

The validity of the consent of the parties to be married and the attribution of the matrimonial status are determined by the law of the place where the parties intend to establish their matrimonial domicile, provided that they either reside at that place on conclusion of the marriage or take up residence there immediately afterwards.

This principle is founded on the consideration that the community of the place where the parties intend to establish their matrimonial home and to live as man and wife is more concerned that the marriage of the parties should conform with the moral standards and general ideas prevailing there than the community which a spouse is about to leave."

and it is submitted that this view is expressed by Lord Brougham in *Warrender v. Warrender* (4) (1835), 2 Cl. & Fin. 488, 536, in the following classical passage:

"A connection formed for cohabitation, for mutual comfort, protection and endearment, appears to be a contract having a most peculiar reference to the contemplated residence of the wedded pair; the home where they are to fulfil their mutual promises, and perform those duties which were the objects of the union; in a word, their domicile."

Similarly Lord Greene, M.R., said in *De Reneville v. De Reneville* (5), [1948] P. 100, at p. 114:

“It is a case of essential validity. By what law is that to be decided? In my opinion by the law of France, either because that is the law of the husband’s domicile at the date of the marriage or (preferably, in my view) because at that date it was the law of the matrimonial domicile in reference to which the parties may have been supposed to enter into the bonds of marriage.”

Further, Denning, L.J., observed in *Kenward v. Kenward* (6), [1951] P. 124, at p. 144:

“... the substantial validity of it (the marriage) may depend on the personal law of one or other of the parties to it, that is, on the law where he or she is domiciled. The personal law of one of the parties may attach a fundamental condition to marriage which does not exist in the personal law of the other, and, if he marries on the basis that that fundamental condition will apply, then it would be most unjust to hold him to the marriage after the condition has been broken or has failed. It all depends on whether the parties marry on that basis or not.”

We think that the trend of later decisions supports this latter view. If then we apply that principle to the present marriage it would be valid according to the law of the matrimonial domicile.

Even if there is doubt in respect of the two previous approaches to this problem it appears to us that the final answer must be this. There does not appear to be any prohibition in English (and Scottish) law against a polygamous marriage. There is no absolute prohibition which might have the effect of avoiding the marriage e.g. marriage under the age of sixteen years, or the parties being within the prohibited degrees of consanguinity prescribed by law. It would appear, however, from all the authorities that there is nothing to prevent any person entering into a polygamous marriage. Such a union will not be regarded by English (and Scottish) courts as being a marriage for all purposes, for they recognise as such only the Christian or monogamous marriage. A polygamous or potentially polygamous marriage would not in England (or Scotland) be treated as a valid marriage in proceedings for nullity, for divorce, or restitution of conjugal rights under the matrimonial jurisdiction of the English (and Scottish) courts. Probably it would not be treated as a valid marriage for purposes of intestate succession to land in England (or Scotland). Nevertheless we think that a Mohammedan marriage in Kenya would certainly be recognised as a marriage for some purposes at least by the courts in England and Scotland, see *Baindail v. Baindail* (7), [1946] 1 All E.R. 342. Ignoring for the moment the question of consent, in *Kenward v. Kenward* (6), Denning L.J., expressed his views on this point as follows at p. 145:

“Now take a case where an Englishwoman domiciled here marries a man of a polygamous race in his homeland by the ceremonies of his country, *intending to live with him there, well knowing that she is entering into a marriage that is potentially polygamous*: the substantial validity of that marriage depends on the personal law of the husband and not on the personal law of the wife. The marriage is valid by the law of that country and is, I should have thought, valid here. There was no condition of the marriage that it should be monogamous. If he in his own country takes to himself another wife, the English wife cannot complain. She could not ask in these courts for the marriage to be avoided. So also, *if she while in England, marries a man of a polygamous race, intending to go to live with him in his homeland, knowing what marriage means in that country, there would be*

no condition that it should be monogamous, and the marriage would not be made on that basis; and she could not complain if he there took another wife.”

Cheshire on Private International Law, (5th Edn.) at p. 296 sets out, in our view correctly, the present position as follows:

“Fortunately, the question is no longer doubtful, for it has now been decided that a polygamous union contracted in accordance with the law of the husband’s domicile is recognized as a valid marriage by English law for many purposes. The first explicit break with the older view came with Lord Maugham’s statement in *The Sinha Peerage Claim*, (1939):

‘It cannot, I think, be doubted now (notwithstanding some earlier dicta by eminent judges), that a Hindu marriage between persons domiciled in India is recognized in our courts, that the issue are regarded as legitimate and that such issue can succeed to property, with the possible exception to which I will refer later.’

“Seven years later the matter was carried further by the Court of Appeal in *Baindail v. Baindail*, (*supra*), where the facts were these:

‘A man, while domiciled in India, married an Indian woman in India in 1928 according to Hindu rites. During the subsistence of this marriage, he later went through an English ceremony of marriage at the Holborn registry office with the petitioner, an Englishwoman.’

“It was held that the Hindu marriage, though potentially polygamous in character at that date, was to be recognized as valid by an English court, that it was a bar to a subsequent monogamous marriage in England, and that therefore the petitioner was entitled to a decree nisi for the annulment of her marriage. In the course of his judgment, Lord Greene, after adverting to the married status that the man possessed by virtue of the Hindu law of his domicile, said:

‘Will that status be recognized in this country? English law certainly does not refuse all recognition of that status. For many purposes, quite obviously, the status would have to be recognized. If a Hindu domiciled in India died intestate in England leaving personal property in this country, the succession to the personal property would be governed by the law of his domicile; and in applying the law of his domicile effect would have to be given to the rights of any children of the Hindu marriage and of his Hindu widow, and for that purpose the courts of this country would be bound to recognize the validity of a Hindu marriage so far as it bears on the title to personal property left by an intestate here; one can think of other cases’.”

Since, therefore, the wife had the capacity to contract this marriage the marriage must be regarded as a valid Mohammedan marriage. Albeit she may be deprived of the right of bringing it before the courts of her former domicile for adjudication.

In the result therefore, since we hold the daughter’s marriage to the respondent to be valid according to the laws of this Colony, again the basis of the present application for a writ of habeas corpus falls away.

Application refused.

For the applicant:

HP Hearn and DPR O’Beirne

O’Beirne & Hearn, Nairobi

For the respondent:

Bryan O’Donovan QC and Swaraj Singh

Ngoni-Matengo Co-Operative Marketing Union Ltd v Alimahomed Osman
[1959] 1 EA 577 (CAD)

Division: HM Court of Appeal at Dar-Es-Salaam
Date of judgment: 11 June 1959
Case Number: 2/1959
Before: Sir Kenneth O'Connor P, Gould and Windham JJA
Sourced by: LawAfrica

[1] Practice – Court of Appeal – Extension of time to lodge appeal – Whether “sufficient cause” shown – Whether an incompetent appeal is “dismissed” or “struck out” – Eastern African Court of Appeal Rules, 1954, r. 9, r. 19 (6), r. 56, r. 58 and r. 62 (4) (e) – Eastern African Court of Appeal Order-in-Council 1950, s. 14 (b).

Editor’s Summary

The applicant filed an appeal against a judgment of the High Court dated November 4, 1958, on the last day allowed for filing his appeal. On the day before, namely, January 5, 1959, the applicant applied for and obtained from the registrar of the High Court a copy of what both believed to be the relevant decree which was incorporated in the record of appeal. On February 17, the applicant discovered that the copy decree supplied was an earlier decree in the same action. At the hearing of the appeal the Court of Appeal “dismissed” the appeal as incompetent on the ground that the proper decree was not lodged with the record by the due date namely, January 6, 1959. The applicant then applied to a single judge for an extension of time within which to lodge a fresh appeal with a copy of the correct decree. The application was dismissed, the judge holding that though the applicant had shown “sufficient reason” for an extension of time, the appeal could not, on the authority of *Harnam Singh Bhogal v. Jadwa Karsan* (1953), 20 E.A.C.A. 17, be restored by an application for leave to appeal out of time, as it had been “dismissed” by the Court of Appeal as incompetent.

Held –

- (i) the applicant had shown “sufficient reason” for an extension of time for the purpose of r. 9 of the Eastern African Court of Appeal Rules, 1954.
- (ii) the passage in *Harnam Singh Bhogal v. Jadwa Karsan* (1953) 20 E.A.C.A. 17, to the effect that an appeal which has been dismissed for failure to comply with the prescribed conditions cannot be restored by an application for an extension of time to file the appeal in accordance with the rules, was obiter and not binding upon the court; therefore it was open to the court to permit the applicant to lodge an appeal if the applicant could show “sufficient reason” for an extension of time for that purpose under r. 9. *Harnam Singh Bhogal v. Jadwa Karsan* (1953) 20 E.A.C.A. 17 considered.

- (iii) when an appeal is not properly constituted the court ought strictly to strike it out rather than dismiss it.

Application granted.

Cases referred to in judgment

- (1) *Harnam Singh Bhogal v. Jadwa Karsan* (1953), 20 E.A.C.A. 17.
- (2) *Gatti v. Shoosmith*, [1939] 3 All E.R. 916.
- (3) *Shabir Din v. Ram Parkash Anand* (1955), 22 E.A.C.A. 48.
- (4) *Farrab Incorporated v. The Official Receiver and Provisional Liquidator*, [1959] E.A. 5 (C.A.).
- (5) *N.A.S. Airport Services Ltd. v. Attorney-General of Kenya*, [1959] E.A. 349 (C.A.).
- (6) *Commissioner of Transport v. The Attorney-General, Uganda, and Another*, [1959] E.A. 329 (C.A.).
- (7) *Motel Schweitzer v. Cunningham* (1955), 22 E.A.C.A. 252.

June 11. The following judgments were read:

Judgment

Windham JA: This is an application under r. 9 of the Eastern African Court of Appeal Rules, 1954, for an extension of time for lodging an appeal to this court from a judgment of the High Court of Tanganyika dated November 4, 1958. The application was dismissed by LAW, J., sitting as a single judge of this court, and it now comes before us, as a full bench, under r. 19 (6) of the said Rules and s. 14 (b) of the Eastern African Court of Appeal Order in Council, 1950, with a prayer that it be granted and that the decision of LAW, J., be reversed.

The applicant duly filed notice of appeal against the judgment of November 4. Under r. 58 of the Eastern African Court of Appeal Rules, 1954, the last day upon which it was open to him to lodge his appeal was January 6, 1959; and under that rule and r. 56 and r. 62 (4) (e) the lodging of the appeal is to be effected by (*inter alia*) filing the record of appeal which must include among other things a copy of the formal decree to which the judgment appealed from had been reduced. It is conceded, following a number of recent decisions of this court, that in Tanganyika an appeal is incompetent until such decree has been extracted. On January 5, the registrar of the High Court supplied the applicant with a copy of what both of them believed to be the relevant decree, and next day this was duly lodged together with the rest of the record of appeal. It was only on February 17, that the applicant (through his counsel) discovered that what had purported to be the decree to which the judgment of November 4, had been reduced was in fact an earlier decree in the same action, being the decree of an earlier judgment upon a preliminary point which had been set aside by this court on appeal with directions for remission and re-hearing on merits. The present appeal from the judgment upon the re-hearing, that of November 4, came before this court on February 19, and was dismissed as incompetent by reason of the proper decree not having been lodged with the record of appeal by due date, January 6. The applicant thereupon, as we have seen, applied to LAW, J., as a single judge of this court, for extension of time to enable him to lodge a fresh appeal, including a copy of the correct decree.

In dismissing that application the learned judge in a careful and reasoned judgment held, in brief, that the applicant had shown “sufficient reason” for asking for an extension of time, for the purpose of r. 9 of the Eastern African Court of Appeal Rules, 1954, and that the only obstacle to his granting the extension was that the appeal had been “dismissed” by this court on February 19, as being incompetent, and that accordingly, upon the authority of a decision of this court in *Harnam Singh Bhogal v. Jadwa Karsan* (1) (1953), 20 E.A.C.A. 17, it could not be restored by an application for leave to appeal out of time.

I will consider *Bhogal’s* case (1) presently. But for the moment I would say that, in my view, the learned judge was justified in deciding that in the circumstances a “sufficient reason” had been shown. In so deciding he held, following the principle laid down in *Gatti v. Shoosmith* (2), [1939] 3 All E.R. 916, that he had an unfettered discretion for sufficient reason to grant an extension of time, notwithstanding the mistake of applicant’s counsel in not checking the decree handed to him by the Registry on January 5, to see if it was the correct one. The general principle laid down in that case, that a mistake of counsel is not necessarily a bar to his obtaining an extension of time, has been followed by this court in a number of cases, among which may be mentioned *Shabir Din v. Ram Parkash Anand* (3) (1955), 22 E.A.C.A. 48. More recently, it is true, this court has laid down that, in view of the clear terms of the relevant rules requiring the decree or order to be extracted before an appeal is lodged, in particular r. 56, an advocate

who fails to take steps to comply with that

requirement cannot excuse himself by pleading that his failure was due to any “error of judgment” on his part, and such failure may not of itself be held to afford “sufficient reason” for the purpose of r. 9. It was so held in the recent cases of *Farrab Incorporated v. The Official Receiver and Provisional Liquidator* (4), [1959] E.A. 5 (C.A.), *N.A.S. Airport Services Ltd. v. Attorney-General of Kenya* (5), [1959] E.A. 349 (C.A.) and *Commissioner of Transport v. The Attorney-General, Uganda and Another* (6), [1959] E.A. 329 (C.A.). But in each of those cases the applicant’s omission to extract the decree or order within the time limited for lodging his appeal had been due either to a failure to appreciate the legal necessity of so doing, or to a lack of diligence in taking steps to see that it was done in time. In the present case the position was very different, since counsel for the applicant was fully aware of the requirement of the Rules and of the relevant decisions of this court, and had taken all steps to comply with them up to the eve of the lodging of his appeal; and it was the mistake of the Registry of the High Court in then supplying him with a copy of the wrong decree, which was the primary cause of his non-compliance. For this reason I agree with Law, J., that the applicant showed “sufficient reason” for an extension of time for the purpose of r. 9.

I turn now to the difficulty afforded by this court’s decision in *Harnam Singh Bhogal v. Jadwa Karsan* (1). In that case the appellant had failed to file with his memorandum of appeal a certified copy of the formal order, as required by the Rules, and the appeal, Civil Appeal No. 70 of 1951, was “dismissed” by this court as incompetent. He then applied to this court under r. 9 for extension of time to enable him to restore the appeal and to file his memorandum of appeal properly. One of the grounds of his application was that:

“on the previous occasion there was no appeal before the court which the court had jurisdiction to hear.”

In dealing with that contention and dismissing the application this court held:

“... the argument is ingenious but in our view mistaken. If we acceded to it, the effect would be to give a second chance to many appellants who have failed to comply with the rules. It is well-settled law that a right to appeal can only be founded on a statute and that any party who seeks to avail himself of that right must strictly comply with the conditions prescribed by the statute. We have not been referred to nor are we aware of any reported case in which the court has been asked to entertain such an application as that now before us after a previous appeal on the same subject matter has been dismissed on account of a failure to comply with the prescribed conditions, and we do not propose to create a precedent for it now.”

In refusing the present application under r. 9, which he would otherwise have granted, Law, J., held himself bound by the above decision of a full bench in *Bhogal’s* case (1). The relevant passage from his judgment reads as follows:

“In *Bhogal’s* case, the memorandum of appeal did not include a certified copy of the formal order, as no such order had in fact been drawn up. In the instant case, the memorandum of appeal did not include a certified copy of the decree, no decree having in fact been drawn up. In *Bhogal’s* case, the appeal was held to be incompetent and was dismissed with costs; in the instant case, the appeal was likewise dismissed as incompetent, with costs. *Bhogal’s* case, so far as it is an authority for the proposition that an appeal which has been dismissed on account of a failure to comply with prescribed conditions cannot be restored by an application for leave to appeal out of time, the extension of time being necessary for the purpose

of enabling the appellant to cure that failure, has not so far as I am aware been over-ruled or departed from in any subsequent East African case. I agree with Mr. Dodd that, so far as this point is concerned, *Bhogal's* case is authoritative and binding upon me. Had a similar appeal to the present intended appeal not already been dismissed on a previous occasion, I would have granted this application . . .”

In my view, the above-quoted passage from *Bhogal's* case (1), was obiter, since it was not necessary to the decision of the appeal; for the court had, in an earlier part of the judgment, held that the grounds advanced by the applicant as constituting “sufficient reason” for the purpose of r. 9, namely counsel’s mistaken interpretation of the Rules and the failure of the respondent to take an earlier objection and of the registrar to refuse to accept the defective documents, were insufficient grounds upon which to grant the application. This passage is not, therefore, binding upon us.

It is common ground, and has been held by this court on a number of occasions, that a failure to extract and to lodge with the memorandum of appeal to this court a copy of the relevant formal order or decree is not a mere procedural defect, but goes to jurisdiction and renders the appeal incompetent, unless the municipal law gives a right of appeal notwithstanding that such order or decree has not been drawn up, as it does in Kenya in the case of decrees though not of orders (*Motel Schweitzer v. Cunningham* (7) (1955), 22 E.A.C.A. 252), but as it does not do in Tanganyika (vide s. 7 (1) (a) of the Appeals to the Court of Appeal Ordinance, Cap. 23). The position is clearly stated in *Farrab Incorporated v. The Official Receiver and Liquidator* (4). In the present case, therefore, as in *Bhogal's* case (1), when the appeal came before this court, it was incompetent for lack of the necessary decree, as in *Bhogal's* case (1) for lack of the necessary order. This court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive, and not a properly constituted appeal at all. What this court ought strictly to have done in each case was to “strike out” the appeal as being incompetent, rather than to have “dismissed” it; for the latter phrase implies that a competent appeal has been disposed of, while the former phrase implies that there was no proper appeal capable of being disposed of. But it is the substance of the matter that must be looked at, rather than the words used; and since neither the appeal in *Bhogal's* case (1), nor the present appeal was in fact capable of being dismissed, that is to say of being treated as something properly before the court, each must be treated as if it had been struck out, which in effect it was. It seems to me that the reasoning, in the passage from the judgment on the application in *Bhogal's* case (1), which I have set out, is based upon the inadvertent assumption that what the court had previously dismissed was a competent appeal, so that a subsequent attempt to restore it would, or might, be met by a plea of res judicata. But since, both there and in the present case, the earlier appeal was incompetent, there was no res before the court capable of becoming judicata. The ruling in *Bhogal's* case (1), should not, therefore, now be followed.

It is, therefore, in my opinion, open to us to permit the appellant to lodge an appeal if he can show “sufficient reason” for an extension of time for that purpose under r. 9. I have already said that I think he has shown sufficient reason. I would, therefore, reverse the decision of the learned judge and grant to the applicant the extension of time for which he prays, namely ten days from the date hereof, to enable him to lodge his appeal in proper form.

With regard to the costs of this application, although the applicant was not, as we have seen, mainly to blame for his failure to extract the right decree, he was not wholly free from negligence, since between the Registry’s handing to him the wrong decree and his lodging it on the next day with his memorandum of appeal, he could have checked it and remedied the error. The respondent,

on the other hand, was in no way to blame for what happened. I would therefore order that the costs of this application should be the respondent's in any event.

Sir Kenneth O'Connor P: I agree and have nothing to add. There will be an order in the terms proposed by the learned Justice of Appeal.

Gould JA: I also agree.

Application granted.

For the applicant:

WD Fraser Murray

Fraser, Murray, Thornton & Co, Dar-es-Salaam

For the respondent:

HG Dodd

Dodd & Co, Dar-es-Salaam

Nyali Limited v The Municipal Board of Mombasa [1959] 1 EA 581 (SCK)

Division:	HM Supreme Court of Kenya at Mombasa
Date of Judgment:	16 June 1959
Case Number:	1/1959
Before:	Edmonds J
Sourced by:	LawAfrica

[1] Rates – Rateable hereditament – Land divided into residential plots forming part of subdivisional scheme – Plots unsold or leased – Objection to municipal valuer valuing each plot as separate entity – Principles on which such land to be valued – Local Government (Rating) Ordinance, 1928 (Cap. 137), s. 6 (K.) – Local Government (Valuation and Rating) Ordinance, 1956, (K.).

Editor's Summary

This was a Case Stated by the Mombasa Valuation Court pursuant to s. 21 of the Local Government (Valuation and Rating) Ordinance, 1956 in respect of objections taken by Nyali Ltd. to entries in the valuation roll made under the provisions of the Local Government (Rating) Ordinance (Cap. 137), since repealed. Nyali Limited owns 600 acres within the Mombasa municipal boundary of which approximately half is leased under a subdivisional scheme involving subdivision into residential plots. Of the other half, 148 acres have been subdivided into some 100 plots, the subject-matter of these proceedings, such subdivision forming part of the original subdivisional scheme. The remaining 152

acres do not fall within the scheme. In valuing the land the municipal valuer valued separately each of the plots forming part of the 148 acres, instead of as one whole, and at a price at which similar plots of the subdivisional scheme had been sold. The questions argued before the court were (1) whether in valuing the plots as separate entities and calculating their value on the basis of what similar plots had fetched, the valuer was wrong and (2) whether the correct basis of valuation was the price which the company could reasonably expect to obtain for the whole entity on a sale at the relevant date to the best purchaser, having regard to all the potentialities, including the benefit of the survey scheme and the right of sale in accordance therewith and the right to amend or abandon such scheme. The relevant date of valuation was November 1, 1955. Section 6 of the Local Government (Rating) Ordinance (Cap. 137) reads:

“The amount or sum at which the valuer shall value, for the purposes of the valuation roll, any rateable property shall be the capital sum which the same might be expected to realize if offered at the time of valuation for

sale on such reasonable terms and conditions as a bona fide seller would require, due regard being had not only to such particular rateable property but to other properties of similar class, character, value, position or other comparative factors.”

It was contended for the Municipal Board that each plot of the subdivision was a separate hereditament and therefore was to be valued as a separate entity, while Nyali Ltd. argued that the basis of valuation should be the price that would be realised on sale of all the land retained by it with its present potentialities and with the value of the survey scheme included.

Held –

- (i) the subdivided plots in the company’s scheme could be treated as separate hereditaments for rating purposes; but it did not follow that the municipal valuer in valuing the plots separately had assigned anything like an appropriate and equitable value.
- (ii) in assigning to each of the plots a value equivalent to prices at which similar plots under the subdivisional scheme had been sold, the municipal valuer overlooked the fundamental principles of valuation expressed in s. 6 of the Local Government (Rating) Ordinance.
- (iii) the municipal valuer when making his valuation must take into account (a) that if all the unsold plots were put on the market at the same time the price realised would be much less and (b) the cost to the objector of clearing and demarcating more particularly the boundaries of each plot, roads and any other expense to which the objector would be put in giving good title to purchasers and in putting them in possession.

Order accordingly.

Cases referred to in judgment

- (1) *Maori Trustee v. Ministry of Works*, [1958] 3 All E. R. 336.
- (2) *St. John’s College Trust Board v. Auckland Education Board*, [1945] N.Z.L.R. 507.
- (3) *Gilbert v. S. Hickinbottom & Sons Ltd.*, [1956] 2 All E.R. 101.
- (4) *North Eastern Railway Co. v. Guardians of York Unions*, [1906] 1 Q.B. 733.

Judgment

Edmonds J: This is a Case Stated by the Mombasa Valuation Court under the provisions of s. 21 of the Local Government (Valuation and Rating) Ordinance, No. 18 of 1956, in respect of objections taken by Nyali Limited to entries in the valuation roll made under the provisions of the Local Government (Rating) Ordinance of 1928, since repealed.

Nyali Limited is the owner in fee simple of 3,000 acres known under the Registration No. 67/R, Section 1, Mainland North. The land was previously used for agricultural purposes namely, sisal. Six hundred acres of the area fall within the Mombasa municipal boundary; of those 600, approximately 300 have been leased under a subdivisional scheme involving subdivision of the land into residential plots, and of the balance of 300 acres, 148 have been subdivided into some 100 plots, such subdivisions forming part of the original subdivisional scheme. The balance of 152 acres does not fall within the scheme. It is the unleased plots of the subdivisional scheme which are the subject of the entries in the

valuation roll and of the objections by the company. In valuing the land the municipal valuer valued each plot as a separate entity. The following is an extract from the Case Stated:

- “5. At the hearing the objector (represented by Mr. R. P. Cleasby) requested the Valuation Court to state for the decision of the Supreme Court the following questions as questions of law:

- (i) Whether the valuation of the municipal valuer was correct (in valuing each sub-plot as a separate entity) or
 - (ii) Whether the method suggested by the objector is correct that the basis of valuation should be the price that would be realised by the objector on a sale of all the land retained by it with its present potentials and with the value of the survey scheme included or
 - (iii) If neither allegation is correct how the land should in law be rated.
- “6. In connection with the aforesaid questions the objector requested the court to find the following facts:
- (a) The photographs (exhibits 2 (a), (b), (c) and (d) show, as at November, 1955, typical parts of the land rated; in the case of all exhibits the area in the foreground has not been subdivided whereas the area in the background has been subdivided.
 - (b) There are no physical identifiable boundaries as between one subdivision or plot and another or between that part of the plot 67/R which has been subdivided and that part which has not.
 - (c) The area held by Nyali Limited under 67/R comprising all the land rated is held by them pursuant to a title a copy of which is exhibit 3: the land retained under the deed by Nyali Limited is 3,000 acres: The area which has been assessed for rating purposes is 300 acres, the balance being outside the municipality. About 152 acres of the land inside the municipality has not been subdivided and this has been rated as one entity.
 - (d) The boundaries between the subdivisions of the plots are marked by Government survey beacons at the plot corners; these survey beacons or pegs are lumps of concrete; the pegs are flat, some are buried under the ground and some stand one or two inches above the ground.

It would require a person with some knowledge of survey, or, a person with knowledge of the subdivisional plan itself, to find the position of the pegs, and, then, having found a peg to relate it to the relevant plot boundary.
 - (e) If a plot is to be pointed out it would be necessary to have labour clear the boundaries of bush in order to find the survey pegs and then point out the actual boundaries of the plot with reference to hypothetical lines joining the pegs.
 - (f) The approved survey subdivisional scheme can with the requisite consents be changed and has been changed so long as the amenities of plots already alienated are preserved.
 - (g) Nyali Limited could, subject to the normal municipal by-laws, use the land retained by it for any purpose it thought fit, e.g., a sisal estate, a golf course, etc.
 - (h) There is no obligation upon Nyali Limited upon alienation of the balance of the land held by it to sell it in plots as presently surveyed.
 - (i) The survey plan has not been registered against the title.
 - (j) A search of the Land Registry would not show the so-called plots retained by Nyali Limited.
 - (k) The first time a plot is given a section number at the Land Office is when it is allocated.
 - (l) It will take some considerable time for Nyali Limited to sell all the plots retained by it.

- (m) The rating authority has rated each subdivision or plot as a separate rateable entity and on the basis of the estimated value which such plot would realise upon a sale.
 - (n) If all the land presently rated by Nyali Limited and assessed for rates was sold together as one entity with the right of a purchaser to use the present subdivisional scheme the amount realised upon such a sale would be less than the aggregate of the rateable values of the so-called plots as assessed. Such difference would be greater than the expense occasioned in effecting the subdivisional scheme and the value to a purchaser of the time saved in not having to implement his own subdivisional scheme.
- “7. The Valuation Court finds that the facts as submitted by the objector are correct subject to the following amendments:
- Paragraph (b). There are no physical identifiable boundaries other than beacons which may sometimes be difficult to find or locate without the assistance of a surveyor.
- Paragraph (h). It is a fact that there is no obligation upon Nyali Limited to sell the land in plots as presently surveyed but if the company wish to sell they would be able to sell only as subdivided plots unless they submitted a consolidation and subdivision scheme and have it approved by the municipality.
- “8. At the hearing the respondents (represented by Mr. J. K. N. Stansbury) requested the Valuation Court to state for the decision of the Supreme Court the following questions as questions of law:
- (1) Whether the valuer was incorrect in showing in the valuation roll separate entries for each or any of the sub-plots on Nyali Estate.
 - (2) In the event of it being held that he was not incorrect in showing any plot as a separate entry, then whether the local authority is entitled to ask for the entry objected to, to be considered by the Valuation Court separately and in relation to all other entries in the roll of the same ‘class or character and description.’
 - (3) In the event of his being held to have been incorrect, for directions to be given as to what is or is not a separate hereditament for the purposes of the valuation roll in the circumstances of this case and as to what other method of valuation would be appropriate.
- “9. In connection with the aforesaid questions the respondents requested the court to find the following facts:
- (1) The practice in preparing the valuation roll has been to consider as a separate hereditament for the purposes of the compilation of unimproved site values any plot of land which after being beaconed and surveyed has been given an individual number by the Survey Department.
 - (2) That at the time of valuation the individual sub-plots, the subject of the objections being part of plot 67/R, had been subdivided. There were other parts of plot 67/R which had been subdivided and leased (shown elsewhere in roll) and a remainder of plot 67/R within the municipality which had not been subdivided.
 - (3) The subdivided plots had been beaconed and surveyed.
 - (4) The deed plans in respect of the individual sub-plots had been issued by the Director of Surveys and were in the hands of Nyali Limited

at the time of valuation. Each deed plan shows on it the anticipated new plot number of the subdivided portion of land.

- (5) The sub-plots were at the time of valuation on offer for sale separately as building plots.
- (6) Nyali Limited could sell any individual plot immediately, which sale, by reason of the deed plan would, if for a freehold title, be accepted at the Land Office for registration as a separate title. If a lease for more than a year were granted it would together with the deed plan be accepted for registration against the title to the freehold.
- (7) At the time of valuation some of the individual plots to which objection has been made by Nyali Limited and which were shown in the roll as belonging to Nyali Limited had in fact been alienated and others were leased between the time of valuation and the date of the laying of the roll before the local authority.
- (8) There were at the time of valuation, generally speaking, no physical identifiable boundaries other than indicated by beacons between the land retained by Nyali Limited and the alienated subdivisinal plots or between plot 67/R and the adjoining plots. In effect therefore the sub-plots of Nyali Estate are no more difficult to identify on the ground than are the adjoining and neighbouring plots in separate ownership.

“10. The Valuation Court finds in regard to the facts referred to above that the facts as submitted by the respondents are correct.”

The relevant date of the valuation of the property was November 1, 1955. At that date the Local Government (Rating) Ordinance, Cap. 137, was in force, and although there has since been transitional legislation and that Ordinance has been repealed and re-enacted under the Ordinance of 1956, it is the original Ordinance which must be looked to in regard to the questions before the court. Section 6 (1) provides:

“The amount or sum at which the valuer shall value, for the purposes of the valuation roll, any rateable property shall be the capital sum which the same might be expected to realize if offered at the time of valuation for sale on such reasonable terms and conditions as a bona fide seller would require, due regard being had not only to such particular rateable property but to other properties of similar class, character, value, position or other comparative factors:”

The valuation officer thereupon proceeded to value the 148 acres, not as one entity, but valuing each plot separately and at a price at which similar plots of the subdivisinal scheme had been sold. It is not contested that the aggregate of the values assigned to each plot thus became very much greater than the price which the company could expect to get on sale or lease of the land as one piece. The sole questions argued before the court were whether, in valuing the plots as separate entities and calculating their valuation on the basis of what similar plots had fetched, the valuer was wrong, and whether the correct basis of valuation was the price which the company could reasonably have expected to obtain for the whole entity on a sale at the relevant date to the best purchaser, having regard to all the potentialities including the benefit of the survey scheme and the right of sale in accordance therewith and the right to amend or abandon such scheme.

It is contended for the Municipal Board that each plot of the subdivision is a separate hereditament and to be valued, therefore, as a separate entity. The contrary is contended for the company. It is conceded that there is a very significant difference between the valuation based on each plot as a separate

entity and a valuation based upon the whole area of the land as one entity with all its potentialities as mentioned above.

I have had the benefit of hearing able and comprehensive addresses by counsel for both parties, each of whom places much reliance upon the decision of the Privy Council in *Maori Trustee v. Ministry of Works* (1), [1958] 3 All E.R. 336 though each places differing interpretations upon certain passages appearing in the judgment. That case concerned the compulsory acquisition of land by the New Zealand Government and the question confronting the court was whether the land should be valued on the assumption that it was available for sale in subdivided lots or on the basis of a sale of the land as a whole. It was held *inter alia* by the Privy Council (I quote the head note) as follows:

“Compensation for the ninety-one acres should be assessed on the basis of the sale of the land as a whole, unless at the specified date (a) ministerial consent to the subdivisional plan had been obtained, and (b) the subdivided parts were sufficiently apparent on survey of the ground to enable their immediate sale.”

The fundamental difference between the facts of that case and of those in the case before me is that in the former there was no more than a paper plan of the proposed subdivision, the scheme had not received the approval of the appropriate Government authority, and it had not been completed to the stage at which the owner could sell and give conveyance of the subdivided lots to separate purchasers. The facts are very different in the case of the subdivisional scheme of Nyali Limited. This scheme had by the relevant date reached the stage where an immediate sale or lease of the plots could be given if a purchaser or lessee was available. The survey had been carried out, beacons had been put in and all necessary authority and approval obtained to the scheme. The plots were and are immediately available to a purchaser or lessee and the appropriate conveyance or lease could be registered against the title without any other formalities.

In the *Maori Trustee* case (1), it was contended for the trustee that the land should be valued on the assumption that it was available for sale in subdivided lots. The Court of Appeal of New Zealand expressed their opinion in the following directions:

- “(i) In accordance with s. 29 (1) (b) of the Finance Act (No. 3), 1944, and subject to the other provisions of that section the function of the Maori Land Court is to ascertain as the value of the land ‘the amount which the land if sold in the open market by a willing seller on the specified date might be expected to realise.’ The specified date is September 15, 1952.
- “(ii) The valuation must be of the land in the state in which it is on the specified date; any potentialities shall be taken into account in assessing its value.
- “(iii) The court must contemplate the sale of the land as a whole unless on the specified date there could have been separate sales of particular portions, and there was a market for such separate portions. Only if the land had been legally subdivided at that date so that particular lots might have been sold and title given can it be said that there could have been separate sales of particular portions.
- “(iv) If the land has to be valued as a whole, the court in assessing the potentialities may take into account the suitability of the land for subdivision, the prospective yield from a subdivision, the costs of effecting such a subdivision, and the likelihood that a purchaser acquiring the land with that object would allow some margin for unforeseen costs, contingencies and profit for himself.”

The Privy Council approved these directions with the exception of the third for which it considered there should be the following substitution:

- “(iii) The court must contemplate the sale of the land as a whole unless it appears that the necessary legal consents to a subdivisional plan had been given and a survey on the ground at the specified date would have disclosed that the land or some part of it was in fact so far subdivided that the subdivided parts could at that date have been immediately sold and title given to individual purchasers, in which case the parts so subdivided may be separately valued, for the purpose of arriving at the total amount of compensation.”

It is this direction which has given rise to considerable argument before me. It was contended for the board that the Privy Council meant by the amending direction that once a plan of subdivision is complete, all plots must be valued as though immediately saleable irrespective of whether or not there was an immediate market for all the plots. This contention was based upon the omission by the Privy Council in its direction of the words “and there was a market for such separate portions” which appear in the direction of the New Zealand Appeal Court. It is contended that the omission of these words was deliberate with the intent that all plots must be valued as immediately saleable whether or not there were available purchasers. But, in deciding to vary the third direction, the Privy Council was, I am clear, not concerned with that aspect of the matter at all. The reason why it thought it desirable to vary that direction was, as it has expressed the matter in its judgment, as follows:

“They consider, however, that the third head of the opinion expressed in the order of the Court of Appeal should be varied. This seems to proceed on the view taken by the majority of the court that *St. John's College Trust Board v. Auckland Education Board* was correctly decided on its special circumstances, and leaves it open to the compensation court to follow that decision if it thinks the facts warrant it. As the view of the board is that that case was wrongly decided and as in any event the board cannot agree with the way in which this direction is expressed, their lordships are of opinion that the direction should be as follows:”

There then followed the amending direction which I have already quoted. In the *St. John's College Trust Board v. Auckland Education Board* (2), [1945] N.Z.L.R. 507, the facts are set out by the Privy Council in the following passage:

“As was stated by Myers, C.J., who gave the judgment of the court, it was common ground that the land was suitable for subdivision into allotments for building purposes and that compensation should be awarded on that basis. There was no legal impediment to a subdivision. As appears from the case, both the claimant and the respondent submitted in evidence plans of hypothetical subdivisions of the land taken. It is clear that there was, in fact, no subdivision of the land and that the land had the potentiality of subdivision. This potentiality was estimated by witnesses as being fully realisable in a relatively short period of time. The contest between the parties was whether the value of the land should be assessed on the assumption that the owner would have made his own subdivision and would have sought to sell the resultant building sections direct to purchasers or on the assumption of a sale by the owner to a purchaser who, having purchased, subdivided the land into building allotments and marketed them. For present purposes, the material part of the court's judgment is in the passage which runs ([1945] N.Z.L.R. at p. 513):

“If then the claimant is able to show that there was a market for the subdivisions as on December 15, 1942 the (relevant date), and that the

subdivisions could then have been sold, it is open to the Compensation Court to award compensation upon the assumption that, on that date, the claimant sold the land to several purchasers in lots accordingly.”

In their lordships’ view, this was an erroneous direction in law for the reason that there were, in fact, no subdivisions and that, to give the claimant compensation on the basis that there were, would be to give him compensation for unrealised possibilities as if they were realised possibilities.”

It is therefore quite clear that the Privy Council’s variation of the third direction was solely directed to correcting any impression that the decision in the *St. John’s College Trust Board* case (2), was good law. It is equally clear that the purport of this direction is that there can be a valuation of land based on subdivisional plots provided that the appropriate consents to the subdivisional plan have been obtained and the subdivided parts are sufficiently apparent on survey of the ground to enable their immediate sale.

But it is contended for the objectors that when the Privy Council expressed its direction that

“a court must contemplate the sale of the whole unless the land was so far subdivided that the subdivided parts could at that date have been immediately sold and title given to individual purchasers”,

it meant by the word “immediately” not only that it was possible to give immediate title but also that there were purchasers immediately available. I think there is some misunderstanding as to the meaning of the word “market” in the context in which it was used by the New Zealand Court of Appeal. I think it is the contention of both counsel that there cannot be said to be a market for goods or property unless there is a purchaser ready and immediately available. If that is their contention, then I think it is unsound. It is my view that when the question is considered whether there is a market for goods or shares or land, and, in the case of land, whether in connection with compensation for compulsory acquisition or for the purpose of valuing property for rating, the question is not considered from the aspect of whether at the relevant date there is a prospect of immediate sale and purchase. Rather is the question considered from the aspect of whether such property is saleable within a reasonably foreseeable future, that is to say, whether it is a saleable proposition. If a large subdivisional scheme is carried out in respect of land on the northern frontier of Kenya in a situation where there could not possibly be any attraction for purchaser, it could readily be decided that there is or would be no market for the plots; but if, as in the facts of this Case Stated, such a scheme was evolved in proximity to a growing township, it might well be held that there is a general market for the plots without there necessarily being a demand for the immediate alienation of all. The fact that Nyali Limited have sold the majority of the plots under their subdivisional scheme and continue, though slowly, to find purchasers for the balance, establishes that the scheme is a marketable proposition. And I have no doubt that the New Zealand Court of Appeal meant to convey nothing more significant than that in its use of the words “and there was a market for such portions.” Nor do I think that the Privy Council by omitting those words and by employing the words “immediately sold” meant to convey that there must be available an immediate purchaser. The Privy Council was concerned with the stage a subdivisional scheme had reached, and not with the question of whether there was a market for the subdivisions. I do not believe that it was in the least concerned with the question of the existence of immediate purchasers, nor, on the other hand, do I believe that it intended to alter the well settled law that, in considering the compensation to be awarded on compulsory acquisition of land where the owner seeks to relate the value of his land to a subdivisional scheme he has evolved in connection

therewith, one of the factors to be looked to is whether there is or would be a market for the subdivisional lots. It is quite clear to my mind that the Privy Council did not in its judgment consider as in issue the question of the necessity of there being a market for plots under a subdivisional scheme; it was concerned solely with the New Zealand Court of Appeal's misdirection on the question of the existence of a market in relation to a subdivisional scheme which was in embryo only.

The principle or basis upon which land must be valued either for purposes of compensation on compulsory acquisition or for purposes of rating is the same, namely, that the value of the land is to be taken to be the amount which a willing and bona fide seller might be expected to realise. In deciding whether the land which is the subject of this Case Stated should be valued as one entity, or whether each subdivisional lot should be valued as a separate hereditament, it is necessary, I think, to relate the particular facts and circumstances to the tests or conditions approved or prescribed by the Privy Council. I will repeat once again what the board laid down, namely, that the land should be valued as a whole unless (1) ministerial and all other necessary consents to the subdivisional scheme have been obtained, and (2) the scheme has in fact been so far implemented that immediate title could be given to a purchaser. There is a third condition which, in my view, is implied, as I have said, in the Privy Council's judgment, namely, that there is a market for the subdivisional plots. All three tests or conditions are met in the scheme of Nyali Limited. As to (1), all consents have been obtained; as to (2), the plots have been surveyed and beaconed and the deed plans issued by the Director of Surveys, and a sale or lease of any plot could immediately be registered and the appropriate title issued to a purchaser or lessee; and as to (3), while it may take a considerable time to dispose of all the subdivisional lots, there is in fact a market for them, that is to say, they are saleable.

There is no definition of what is a separate hereditament for rating purposes and none has ever been attempted. There are general rules, some of which are set out in the judgment of the learned Lord Justices in *Gilbert v. S. Hickinbottom & Sons Limited* (3), [1956] 2 All E.R. 101, but, always bearing in mind these general rules, the question of what is or is not a separate hereditament is, usually, one of a fact. In *North Eastern Railway Co. v. Guardians of York Unions* (4), [1906] 1 Q.B. 733, Channel, J., said at p. 739:

"I agree that it is almost entirely a question of fact. If the whole of these different portions of property were one hereditament, they ought to be rated in one lump sum, and whether they are one hereditament or more seems to me to be a question of fact. One thing I think is clear, that property must be rated according to what it is, and not according to what it might be. You may have a thing which, as it is, is one hereditament, but which is quite capable of being made into two. The owner of a field may sell half of it, and it may become two hereditaments in different occupations; but while it is undivided it is one hereditament. The fact that the different portions of the property here are capable of being made separate hereditaments is quite immaterial. The facts stated by the arbitrator show that at present they are one, though possibly with some slight alteration they might be made into separate hereditaments."

The facts in this Case Stated show that the land is at present regarded by the owner as subdivided for the purpose of sale by lots, that many lots have been sold and are still being sold, and that they can be sold and good title given whenever there is a purchaser. The land must be rated according to what it is, and applying these facts to the general rules enunciated in *Gilbert v. S. Hickinbottom & Sons Limited* (3), and to the decision of the Privy Council

in the *Maori Trustee* case (1), it is clear that the subdivisional lots in the objector's scheme may be treated as separate hereditaments for rating purposes.

However, this is far from saying that I consider that the municipal valuer in valuing the plots separately has assigned anything like an appropriate and equitable value. In valuing these plots he has assigned a value equivalent to prices at which similar plots under the subdivisional scheme had been sold, and it is my view that in doing so, he has overlooked the fundamental principles of valuation which are expressed in s. 6 (1) of the Ordinance. I will repeat that section:

"The amount or sum at which the valuer shall value, for the purposes of the valuation roll, any rateable property shall be the capital sum which the same might be expected to realise if offered at the time of valuation for sale on such reasonable terms and conditions as a bona fide seller would require, due regard being had not only to such particular rateable property but to other properties of similar class, character, value, position or other comparative factors:"

In valuing each plot the valuer has considered each plot alone without at the same time taking into consideration the fact that all the plots would have been on the market at one and the same time. I think it incontestable that, if at the relevant date, all unalienated plots of the subdivisional scheme had been put on the market together for the purpose of realisation, nothing like the prices would have been obtained at which the valuer has valued each plot. Such plots offered for sale at one and the same time could not possibly have been expected to realise prices equivalent to those at which other plots had been sold. In effect, the municipality has sought to put itself in a position more advantageous than ever an owner of compulsorily acquired land could expect. It is my experience that, generally speaking, the owner of land compulsorily acquired is treated, so far as is reasonable, on a generous scale. If the land in this case had been acquired compulsorily by the Government, Nyali Limited could not have expected to be compensated at a rate per plot for all plots based on comparable sales of their other plots. They could have expected the full rate for those plots, if any, which could reasonably be held to be immediately saleable or leaseable at the relevant date, less realisation expenses, and as to the balance, only at a diminished rate in relation to the period within which it could be assumed those plots would be sold. The municipality cannot surely be allowed to be in a position better than the owner of land compulsorily acquired.

I think it would be appropriate at this stage to quote the following passage from the judgment of the Privy Council in the *Maori Trustee* case (1) at p. 339:

"It is fundamental that the land must be valued in its state at the time of the taking. Under the Act of 1944, that value is to be assessed at the amount which a willing seller might be expected to realise if the land were sold in the open market at the date of the taking. This is not necessarily the price which it would fetch because the costs of realisation will have to be taken into account. Section 29 corresponds to s. 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919, in the United Kingdom which did away with the extravagant claims and extravagant awards that were frequently made under the Lands Clauses Acts and similar legislation on the view that the owner was an unwilling seller. What, in effect, is being computed is the capital value of an asset and while in the case of land it may not always be as easy to calculate this as it would be in the case of ascertaining the market price of easily realisable stocks or shares or commodities in the field of commerce, the problem does not generally present any great difficulty in the hands of competent land valuers. There are, however,

as has frequently been observed, cases where land has a potentiality which may be realisable in the foreseeable future and, if so, will give the land an added value over and above its value for the uses made of it at the time of the taking. As *Vyricherla Narayana Gajapatiraju (Raja) v. Revenue Divisional Officer, Vizagapatam* (1) (1939) 2 All E.R. 317) shows, the task of valuing land with such a potentiality may not always be an easy one. And in such it is difficult to envisage a sale to more than one hypothetical purchaser who is prepared to buy the land with a view to developing and realising the benefit of this potentiality. There seems no reason, however, why this need be in all cases an inevitable assumption. If the area of land taken, for instance, is so large as to be capable of building development in the hands of separate purchasers operating in different sections of the total area more than one hypothetical purchaser could be imagined; but for purposes of valuation the result would seem to be immaterial. The value of the whole in the open market for building development would seem to be equivalent to the sum of the values of the various parts if sold separately for the same purpose. The costs to the seller might be slightly greater in the one case than in the other, and this might lead to the assumption of a slightly higher market price in cumulo in the case of a sale to a number of purchasers; but, as the costs of realisation would be a factor to be taken into account in calculating the amount realised by the owner, the results at the end of the day should be very much the same."

It is no part of my duties to assess a valuation of these subdivisional lots, but I think it proper that I should indicate at least some of the factors which the municipal valuer must consider in making his valuation. First and foremost is the factor of all the unsold plots as a being put on the market at the relevant date and the necessary devaluation of those plots as a consequence. Then must be considered the cost to the objector of clearing and demarcating more particularly the boundaries of each plot, roading and any other expense to which the objector would be put in giving good title to purchasers and in putting them in possession. In other words the valuer must assess the capital sum which the plots might be expected to realise, that is to say, to realise after deduction of all expenses, losses, devaluations, etc. consequent upon a sale at the relevant date; in other words, the costs of realisation. At the risk of being tedious, I will repeat the last sentence from the passage of the judgment of the Privy Council in the *Maori Trustee* case (1):

"The value of the whole in the open market for building development would seem to be equivalent to the sum of the values of the various parts if sold separately for the same purpose. The costs to the seller might be slightly greater in the one case than in the other, and this might lead to the assumption of a slightly higher market price in cumulo in the case of a sale to a number of purchasers; but, as the costs of realisation would be a factor to be taken into account in calculating the amount realised by the owner, the results at the end of the day should be very much the same."

In conclusion may I add this remark. In its substitution for the third direction of the New Zealand Court of Appeal, the Privy Council has used these words, which I think are of some importance and may be of some assistance to the Municipal Board:

"in which case the parts so subdivided may be separately valued for the purpose of arriving at the total amount of compensation."

So far as I can judge, although I have no experience whatever of valuing land, the task of valuing this land by its separate lots may prove a difficult one.

Such a method is not obligatory. As the land in these particular circumstances can have only one value, though there may be more than one method of valuation, and as, no matter what method is employed, “the results at the end of the day should be very much the same”, it may be that in the result the board may find it more convenient to value the land as one entity and may find that the basis of valuation should be the price which the objector could

“reasonably have expected to obtain for the whole entity on a sale at the relevant date to the best purchaser having regard to all the potentialities including the benefit of the survey scheme, and the right of lease or sale in accordance therewith, and the right to amend or abandon such scheme.”

Order accordingly.

For the objector (Nyali Ltd.):

Richard P Cleasby

Atkinson & Cleasby, Mombasa

For the Mombasa Municipal Board:

JKN Stansbury and DS Obhrai

For the respondent:

The Municipal Board of Mombasa

Carvalho v Gulamani [1959] 1 EA 593 (HCT)

Division:	HM High Court for Tanganyika at Dar-Es-Salaam
Date of judgment:	8 July 1959
Case Number:	5/1959
Before:	Simmons J
Sourced by:	LawAfrica

[1] Landlord and tenant – Trespass – Occupier a trespasser when premises first occupied – Demand by owner for immediate payment of rent – Occupier counter-offering to pay rent later – Whether tenancy created by demand for rent.

Editor’s Summary

The appellant applied to the Rent Restriction Board for possession of and mesne profits from premises occupied by the respondent. The Board found that the respondent was a trespasser at the beginning of his occupation of the premises but that a tenancy was created which related back to the beginning of his occupation when rent was demanded by the appellant, and that since the appellant did not aver a tenancy

terminated by due notice the application was incompetent and dismissed the application. On appeal

Held – a mere demand for rent is not sufficient to create the relationship of landlord and tenant; there must be assent to the demand to create a tenancy and since the respondent did not assent but made a counter-offer which was not accepted he remained a trespasser.

Dictum of Mookerjee, J., in *Deo Nandan Pershad v. Meghu Mathon* (1907), 34 Cal. 57 at p. 62, applied.

Appeal allowed. Order for possession.

Case referred to in judgment

(1) *Deo Nandan Pershad v. Meghu Mathon* (1907), 34 Cal. 57.

Judgment

Simmons J: This is an appeal from a determination by the Rent Restriction Board made on February 11, 1959.

The applicant (now appellant) had applied for possession of and mesne profits from premises in Kichwele Street, Dar-es-Salaam, occupied by the respondent from September 5, 1958, and the application was dismissed. The Board found that the respondent was a trespasser at the beginning of his occupation but that he became a tenant when a demand for rent was made, and the appellant not having averred a tenancy terminated by due notice the application was dismissed.

The first ground of appeal is as follows:

“That the Board’s finding on the evidence that a demand for rent was made by the applicant was against the weight of the evidence and its conclusion that a tenancy was created which related back to the respondent’s original occupation was erroneous in law.”

Section 11 (1) of the Rent Restriction Ordinance (Cap. 301)—provides only for an appeal from the Board on questions of law or of mixed fact and law. That a demand for rent was made is a question of fact which the appellant has not sought to challenge in the appeal. The decisive question is whether a tenancy was created by that demand.

The Board found that the respondent occupied the premises in circumstances which made him a trespasser, but that while he was in unlawful occupation the appellant demanded rent from him, thus creating a tenancy which related back to the beginning of the occupation. They do not go into detail about the demand for rent, but for the purpose of this appeal one can make the assumption most favourable to the respondent and take as true his own story

on this point. This was that the appellant's agent, a Mr. Kesaria, asked him for an immediate payment of Shs. 230/- in the middle of September. The respondent refused. He said he would pay the money on October 1, but he never at any time paid anything.

I feel bound to hold that the Board's interpretation of the law was erroneous. It may be that if the respondent had acceded to the demand for rent that would have amounted to evidence upon which the Board could have found that a contract of tenancy had been concluded between the parties, the landlord thereby waiving the trespass. I cannot put it better than it was put in a dictum of Mookerjee, J., in *Deo Nandan Pershad v. Meghu Mathon* (1) (1907), 34 Cal. 57, at p. 62:

"A mere demand for rent is not sufficient to create the relationship of landlord and tenant, which is a matter of contract assented to by both parties. If A finds B in occupation of his land, and, being quite willing to treat him as tenant, makes a demand for rent, the demand for rent is at most an offer of a tenancy, and a tenancy is not necessarily constituted, unless B accepts the offer and attorns to A. This is amply supported by the cases of *Evans v. Elliot*, and *Towerson v. Jackson* which show that the offer is not binding, unless it is accepted, and the mere fact that such an offer has been made, and the person to whom the offer has been made has continued in possession, cannot be evidence of assent."

I propose to apply the dictum to the facts of this case. Even if the respondent's evidence is true, the offer made on behalf of the appellant meant no more than if he had said:

"Although you are now a trespasser I will accept you as my tenant if you pay me Shs. 230/- rent forthwith."

The respondent did not accept the offer or make a payment forthwith but merely made a counter-offer, to pay in October. The counter-offer was not accepted and no contract was concluded. The respondent therefore remains a trespasser and should have been treated as such by the Board. The appeal is allowed, with costs, and there will be an order for possession as prayed for in s. 10 of the appellant's application to the Board, No. 717 of 1958, presented on November 7, of that year.

Appeal allowed. Order for possession.

For the appellant:

AC Beynon

AC Beynon, Dar-es-Salaam

The respondent in person.

Muhinga Mukono v Rushwa Native Farmers Co-Operative Society Ltd [1959] 1 EA 595 (HCT)

Division:	HM High Court for Tanganyika at Dar-Es-Salaam
Date of judgment:	11 July 1958
Case Number:	8/1959
Before:	Davies CJ
Sourced by:	LawAfrica

[1] *Practice – Application for revision – Leave to appear and defend given after expiration of statutory period – Whether High Court has right to revise interlocutory order of subordinate court – Indian Code of Civil Procedure, 1908, s. 115 and O. 37, r. 2.*

Editor’s Summary

The applicant had sued the respondent corporation under the summary procedure provided by O. 37 of the Code of Civil Procedure for a sum due on a bill of exchange and the plaint was served on January 13, 1959. On January 16, 1959, the resident magistrate, Bukoba, made the following order:

“On the information received from the police that the plaintiff is going to be charged, I order this case be adjourned sine die.”

The case came before the magistrate again on February 13, 1959, at the request of an officer of the respondent, when the magistrate ordered, *inter alia*, that an affidavit setting out particulars and reasons for defending the suit should be produced on February 16, 1959, and eventually on March 14 he gave the respondent leave to defend the suit. Thereupon the applicants applied to the High Court for revision of the order on the grounds that the subordinate court had no power after the time had expired to extend the time for filing defence, and accordingly the applicant was entitled to a decree under the provisions of O.37 r.2 of the Code of Civil Procedure the respondent not having applied for leave to appear and defend within the statutory ten days.

Held –

- (i) the High Court has the right to revise an interlocutory order of a subordinate court; the right, however, is discretionary.
- (ii) the order of January 16, 1959, made by the magistrate should not have been made on the information then before him, but the irregularities had not occasioned such grave injustice to the applicant as to justify the court interfering.

Application refused.

Cases referred to in judgment

- (1) *Vithaldas Jetha v. Valibai* (1935), 1 T.L.R. (R.) 400.
- (2) *Hooda Ltd. v. Rajwami*, Tanganyika High Court Civil Revision Case No. 4 of 1957 (unreported).
- (3) *Hooda v. Walli*, Tanganyika High Court Civil Revision Case No. 1 of 1929 (unreported)
- (4) *Lal Chand v. Behari Lal* (1924), A.I.R. Lah. 425.
- (5) *Gurdevi v. Bakhish* (1943), A.I.R. Lah. 65.

Judgment

Davies CJ: This is an application for revision of orders made in a suit in the district court at Bukoba. The plaint was by way of a summary suit under the provisions of O. 37 of the Code of Civil Procedure and was a claim for a sum of money due on a bill of exchange. It was served on the defendant on January 13, 1959. The matter first came before the resident magistrate, Bukoba, on January 16, 1959, who made

the following order:

“On the information received from the police that the plaintiff is going to be charged, I order this case be adjourned sine die.”

On February 13, 1959, the matter came again before the resident magistrate when an officer of the defendant corporation appeared and asked for leave to defend out of time and the resident magistrate made the following order:

“Affidavit setting out particulars and reasons for defending to be produced on Monday, February 16, 1959. Money to be paid into court pending the decision of this application. The application be adjourned for Buch to take instruction is granted. Mention and argument (if ready) on February 18, 1959.”

The affidavit was filed on February 16.

On February 18, the matter again came before the resident magistrate and was adjourned until March 4, 1959, and further adjourned on February 23, to March 11.

The application was heard on March 11 and 12, and on March 14 the defendants were given leave to defend the suit.

The grounds on which the application for revision are:

- (i) That the resident magistrate erred in making the order of January 16, 1959, and the order of February 13, 1959.
- (ii) That the resident magistrate had no power to extend the time for making an application for leave to appear and defend the suit.
- (iii) That inasmuch as leave to appear and defend the suit was not applied for within the statutory period of ten days, the plaintiff was entitled to have a decree in his favour forthwith under the provisions of O. 37 r. 2 of the Code of Civil Procedure.

This application for revision is made under the provisions of s. 115 of the Code of Civil Procedure which provides that the High Court may in certain circumstances make revisional orders

“in any case which has been decided by any court subordinate to such High Court.”

In Tanganyika there are decisions of this court that it cannot revise an interlocutory order of a subordinate court under the provisions of s. 115 of the Code of Civil Procedure.

In *Vithaldas Jetha v. Valibai* (1) (1935), 1 T.L.R. (R.) 400, Bates, J., held that an interlocutory order was not “a case which has been decided” within the meaning of those words in s. 115 of the Code. In *Hooda Ltd. v. Rajwami* (2), Tanganyika High Court Civil Revision Case No. 4 of 1957 (unreported) Mahon, J., followed the decision in *Jetha v. Valibai* (1). And again in *Hooda v. Walli* (3), Tanganyika High Court Civil Revision Case No. 1 of 1929 (unreported). So far as I am aware those decision have not been challenged in the Court of Appeal for Eastern Africa and I have not been referred to any decision of that Court of Appeal.

Mr. Lockhart-Smith, counsel for the applicant, in a most able and lucid argument has invited me to dissent from those previous decisions of this court.

The burden of Mr. Lockhart-Smith’s submission was that the decision in *Jetha v. Valibai* was based entirely on the ruling given by the Lahore High Court in the case of *Lal Chand v. Behari Lal* (4) (1924), A.I.R. Lah. 425. It is quite patent from the judgment of Bates, J., that he was conclusively impressed by the reasons given by the Lahore High Court and adopted them. Since the decision in *Jetha v. Valibai* (1) however the Lahore High Court, probably, as counsel suggested, because they were impressed by the fact that many of the other High Courts in India were dissenting from its decision in *Lal Chand v. Behari Lal* (4), convened in 1943 a full bench of seven judges to reconsider that decision and in *Gurdevi v. Bakhish*

(5) (1943), A.I.R. Lah. 65 unanimously overruled the earlier decision.

I have given anxious consideration to the reasoning in the judgments in both the *Lal Chand v. Behari Lal* case (4) and that of *Gurdevi v. Bakhish* (5) and

I have come to the conclusion that of the two I respectfully prefer the reasoning in the latter case and I propose to follow it. There is nothing in the judgment of Bates, J., in *Jetha v. Valibai* (1) which leads me to believe that if he had the advantage, which I have had, of considering the reasoning in the case of *Gurdevi v. Bakhish* (5) he would have arrived at the conclusion he did.

So far as the decisions of *Hooda Ltd. v. Rajwami* (2) and *Hooda v. Walli* (3) are concerned the question in issue does not appear to have been fully argued nor was the decision in *Gurdevi v. Bakhish* (5) brought to the notice of the court.

I am fortified in my acceptance of the decision in *Gurdevi v. Bakhish* (5) by the fact as stated in Chitaley and Rao's Commentaries (5th Edn.) on s. 115 of the Civil Procedure Code that all the most influential High Courts of India have held the same view as that expressed in that case.

It follows that I have come to the conclusion that the High Court has the right to revise an interlocutory order of a subordinate court. The right, however, is a discretionary one and I have to consider whether it would be proper to interfere with the decision of the resident magistrate to give leave to the defendants to appear and defend the suit.

In the exercise of its discretion it is well established that the High Court will not necessarily interfere in every case where the subordinate court has made an irregular order unless its failure to do so would result in substantial injustice.

There is in my view no doubt that the order made by the resident magistrate on January 16, should not have been made on the information then before him. This is not disputed by counsel for the respondents, but counsel has urged that it was this irregular order that was the cause for the failure of the defendants/respondents to apply for leave to appear and defend the suit within the statutory period prescribed in art. 159 of the Schedule to the Indian Limitation Act.

It is clear from the decision of the resident magistrate to give leave to defend that he realised that the order he made on January 16, had led the defendants to believe that it was not necessary for them to take any steps to protect their interests and it was this factor which induced him to make the further order of February 13, and the final order giving leave to defend.

The period during which leave to defend could have been applied for expired on January 23, and there was in my view no power in the resident magistrate to extend that period.

I do not, however, think the irregularities have occasioned such grave injustice to the plaintiff/applicant as to justify this court in interfering in the matter. Furthermore I think that if this court were to interfere and give the plaintiff/applicant the remedy he seeks it would result in substantial injustice to the defendants/respondents.

For these reasons I am not disposed to exercise the power of revision.

Application refused.

For the applicant:

WJ Lockhart-Smith

WJ Lockhart-Smith, Dar-es-Salaam

For the respondent:

Nkabanemeheto s/o Masakura v R
[1959] 1 EA 598 (CAK)

Division: Court of Appeal at Kampala
Date of judgment: 3 July 1959
Case Number: 97/1959
Before: Sir Kenneth O'Connor P, Gould and Windham JJA
Sourced by: LawAfrica
Appeal from: H.M. High Court of Uganda–Bennett, J

[1] Criminal law – Murder – Conviction of being accessory after the fact – Principal in crime known – Principal's conviction of murder quashed – Whether accessory's conviction sustainable – Penal Code, s. 199 (U.) – Criminal Procedure Code, s. 181A (U.) – English Accessories & Abettors Act, 1861, s. 3 – Eastern African Court of Appeal Rules 1954, r. 41.

Editor's Summary

Two men were charged with murder. One was convicted of the murder and the other, the appellant, of being an accessory after the fact. The man convicted of the murder appealed and his conviction was quashed, whereupon the court granted the appellant leave to appeal out of time, since the decision to quash the conviction of the alleged principal might affect the validity of the appellant's conviction.

Held –

- (i) notwithstanding the absence from Uganda legislation of any provision corresponding to s. 3 of the English Accessories & Abettors Act, 1861, an accessory after the fact to murder may be convicted as such even though no person has been convicted of the murder.
- (ii) however, the conviction of the alleged principal having been quashed, there was a repugnancy on the face of the record in that the appellant stood convicted of assisting or receiving the alleged principal, knowing him to have committed murder, when that person had been held not guilty.

Per curiam: “In the present case, in view of the very wide powers conferred upon this court by r. 41 of the Eastern African Court of Appeal Rules, 1954, it might have been possible to cure the defect by quashing the conviction and substituting a conviction of being an accessory after the fact to murder by a person unknown”.

Appeal allowed.

Cases referred to in judgment

- (1) *R. v. Saidi Nsubuga and Another* (1941), 8 E.A.C.A. 81.
- (2) *R. v. Yonasani Egalu and Others* (1942), 9 E.A.C.A. 65.
- (3) *R. v. Rowley*, 32 Cr. App. R. 147.

Judgment

The following judgment was read by direction of the court: This appeal has been brought by the appellant from a conviction of being an accessory after the fact to the murder of Salimu bin Abdala pursuant to leave to appeal out of time granted by this court at its sessions in December, 1958. The appellant was originally charged with murder together with one Kasiringi s/o Kafuzi who was convicted upon that charge while the appellant was acquitted of murder, convicted of being an accessory after the fact contrary to s. 199 of the Penal Code and sentenced to seven years' imprisonment. Kasiringi appealed to this court against his conviction; the appeal was allowed and the conviction quashed for the reasons set out in the judgment of the court pronounced on December 17, 1958. No appeal had been lodged by the present appellant at that time but, in case the decision to quash the conviction of Kasiringi might affect the validity of the appellant's conviction of being an accessory he was given leave to appeal out of time.

The following passage of the judgment of this court above-mentioned states the position briefly so far as the appellant is concerned:

“The principal evidence on which the learned trial judge relied was that given by the accused Nkabanemeheto [i.e. the present appellant] in which he admitted being present when the murder was committed. He alleged that the murder was committed by the appellant, whom he had accompanied to the house of the deceased, but asserted that he himself did not know that the appellant was going to attack the deceased and that he took no part in the attack. He did, however, admit taking and hiding the spear which had been used for the killing. This spear he later produced, but there was no evidence as to its ownership.

“The deceased’s wife had been an eye-witness of the attack upon her husband. She purported to identify the two accused as the attackers, but, in view of the fact that the attack took place after dark and that she did not name either of the two accused until after their arrest, the learned judge (in our view, rightly) rejected her evidence of identification as unreliable. There did not appear to be any reason, however, for rejecting her account of the attack itself, and the learned judge did not in terms do so. This account was to the effect that the two persons who had come to the deceased’s house were both active participants in the attack on the deceased. Although he did not expressly reject this evidence, the learned judge seems to have ignored it and to have based his finding as regards Nkabanemeheto entirely upon Nkabanemeheto’s own statement and evidence, which, as the learned judge found, amounted to a confession to being an accessory after the fact to the murder.”

It is not necessary to set out in full the reasons underlying the quashing by this court of the conviction of Kasiringi for murder, and it will suffice to say only that they were not based upon any doubt that the murder of the deceased by some person had been proved, but were related to the unsatisfactory nature of the evidence relied upon by the learned trial judge as corroboration of the evidence of the appellant identifying Kasiringi as the assailant.

In this appeal counsel for the Crown has submitted that the conviction of the appellant as an accessory is good notwithstanding the quashing of Kasiringi’s conviction. It is clear that, in Uganda, the court has power to convict as an accessory after the fact one who was charged as a principal offender. This was expressly enacted in 1955 when a new section (No. 181A) was added to the Criminal Procedure Code by the Criminal Procedure (Amendment) Ordinance, 1955. Section 181A is as follows:

“181A. When a person is charged with an offence he may be convicted of being an accessory after the fact to the commission of such offence although he was not so charged.”

It has also been decided that, notwithstanding the absence from the Uganda legislation of any provision corresponding to s. 3 of the English Accessories and Abettors Act, 1861, an accessory after the fact to murder may be convicted as such even though no person has been convicted of the murder. That was laid down in two decisions of this court—*R. v. Saidi Nsubuga and Another* (1) (1941), 8 E.A.C.A. 81 and *R. v. Yonasani Egalu and Others* (2) (1942), 9 E.A.C.A. 65.

In the earlier of those two cases the appellants had been charged as accessories after the fact to murder and had been tried jointly with the person accused of that crime; it was alleged that the appellants had assisted in disposing of the body of the victim. The person accused of murder was acquitted but the appellants were convicted. The wording of the particulars of the charge against the appellants was

“... on or about the night of 10th/11th April, 1941, at Nakawa ... were accessories after the fact to the murder of one Sabani Kakwezi.”

This wording was criticised by the court for lack of particularity (though it was held that no embarrassment to the accused had resulted) and it is to be observed that it did not state specifically whom they were alleged to have received and assisted. It follows from the acquittal of the person or accused of the murder that the conviction of the appellants was of receiving or assisting an unidentified person well knowing that he had murdered Sabani Kakwezi. The court considered that the evidence was sufficient to sustain the conviction and the appeal was dismissed.

With respect, we have no doubt whatever that these two cases were correctly decided and, so far as the facts are concerned, the case of *R. v. Saidi Nsubuga and Another* (1), was very similar to the present one. The act alleged against the present appellant is that he concealed, not the body of the victim, but the spear with which the crime was committed. There is, however, a material distinction between the two cases. The present appellant was convicted of being an accessory after the fact to a murder by Kasiringi; on the learned judge's finding the appellant must be deemed to have received or assisted Kasiringi well knowing him to have murdered Salimu bin Abdala. The conviction of Kasiringi having been quashed, the result is that there is repugnancy on the face of the record in that the appellant stands convicted of assisting or receiving a person, knowing him to have committed murder, when that person has been held to be not guilty. In *R. v. Rowley* (3), 32 Cr. App. R. 147, it was decided that it was wrong to accept a plea of guilty from a prisoner charged as accessory after the fact to felony before the issue of guilt of the alleged felon has been decided. In that case after such a plea had been taken and the prisoner sentenced the alleged principal felons were acquitted. Humphreys, J., giving the judgment of the Court of Criminal Appeal said, at p. 149:

"In the result there is an error on record which cannot be cured by amendment. Writs or error have been abolished since 1908 by the Criminal Appeal Act, but this court has the power which the Court of King's Bench used to exercise in dealing with error on the record. Where there is no means of amending the record so as to make it consonant with the proved facts of the case and where the record is inconsistent with itself, as it is here, the only course which this court can take is to quash the conviction."

Later at pp. 149–150 he said:

"It being a matter which had to be decided by the jury whether Stanley and Gall were or were not guilty of felony, it was quite wrong to allow the appellant to plead guilty to having done something in the shape of assisting and comforting those two persons well knowing that they had committed a felony. That was a matter which had to be tried, and if it had been tried and Stanley and Gall had been acquitted, the prosecution would have been bound to offer no evidence on this indictment against the appellant, on the ground that it would be absurd to say that he had assisted and comforted persons whom he knew had committed a felony when they had not in fact committed a felony."

Rowley's case (3), was, of course, one in which there was no question of the felony having been committed by a person unknown and therefore the conviction of the accessory was incurably bad. In the present case, in view of the very wide powers conferred upon this court by r. 41 of the Eastern African Court of Appeal Rules, 1954, it might have been possible to cure the defect by quashing the conviction and substituting a conviction of being an accessory after the fact to murder by a person unknown. If we have such a power, it is one we do not care to exercise in the present case. The appellant was convicted upon his own admission that he had concealed a spear, the whereabouts of which, after his arrest he revealed to the police. The sentence of seven years'

imprisonment imposed upon him for this offence appears to us to be quite disproportionate and he has already been in prison for over a year.

In the circumstances we consider that the correct course for us to take is to quash the conviction, which as it stands, is bad. The appeal is therefore allowed and the conviction and sentence are quashed.

Appeal Allowed.

The appellant in person.

For the respondent:

HSS Few (Crown Counsel, Uganda)

The Attorney-General, Uganda

Muraya Wainaina v R
[1959] 1 EA 601 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	2 September 1959
Case Number:	455/1959
Before:	Rudd Ag CJ and Harley J
Sourced by:	LawAfrica

[1] Criminal law – Theft by servant – Pay of police constables handed to police officer for payment to constables – Money stolen by domestic servant of police officer – Whether theft by servant or simple theft – Penal Code, s. 263, s. 267, s. 270 and s. 276 (K.).

Editor's Summary

A police officer left in his jacket an envelope containing Shs. 474/- which he had received as the pay of some police constables for payment to them. The jacket was given to the appellant for washing and the appellant stole the money from the jacket. He was convicted of theft by a servant and sentenced to two years imprisonment and to be subject to police supervision for two years on his release. On appeal against conviction and sentence.

Held –

- (i) at the time of the theft the money remained the property of the person or authority who paid it to the chief inspector, namely, the Government.
- (ii) the offence proved was simple theft under s. 263 of the Penal Code and was not theft by a servant under s. 276 *ibid*.

Conviction amended. Appeal against sentence dismissed.

No Cases referred to in judgment in judgment

Judgment

Rudd Ag CJ: read the following judgment of the court: The appellant appeals from a conviction under s. 276 of the Penal Code of theft by a servant. The appellant was employed as a houseboy by a chief inspector of police who left in a pocket of his jacket an envelope containing Shs. 474/- which he had received in Nairobi as the amount of the pay of some police constables for payment to the constables concerned. The chief inspector left the jacket in his quarters to be washed and inadvertently left the envelope in the jacket pocket from which it was stolen. Although the evidence upon which the appellant was found to be the thief was circumstantial we consider that it did sufficient establish that the appellant was the person who committed the theft. The appellant had a bad previous record and we consider that the sentence of two years' imprisonment and order that he be subject to police supervision for two years upon his release was not manifestly excessive.

We consider, however, that the offence which was established was an offence of simple theft as defined in s. 263 of the Penal Code and was not an offence under s. 276 which reads as follows:

“If the offender is a clerk or servant, and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer, he is liable to imprisonment for seven years.”

When this section is read with s. 265 of the Penal Code it is clear in our opinion that the money which was stolen was not the property of the chief inspector of police who was the appellant’s employer. Section 265 of the Penal Code reads as follows:

“When a person receives, either alone or jointly with another person, any money or valuable security or a power of attorney for the sale, mortgage, pledge, or other disposition of any property, whether capable of being stolen or not, with a direction in either case that such money or any part thereof, or any other money’ received in exchange for it, or any part thereof, or the proceeds or any part of the proceeds of such security, or of such mortgage, pledge or other disposition, shall be applied to any purpose or paid to any person specified in the direction, such money and proceeds are deemed to be the property of the person from whom the money, security or power of attorney was received until the direction has been complied with.”

In the course of the hearing of the appeal it was suggested that under s. 267 of the Penal Code the money was the property of the police constables who were persons to whom it was intended to be paid. Section 267 of the Penal Code refers to money received on behalf of another. If the chief inspector had received the money on behalf of the constables that section would apply. The position is not completely clear on the evidence as recorded but in our opinion it is more likely that this was a case in which the chief inspector received the money with a direction that it be paid to the constables concerned and that he did not receive the money on behalf of those constables. In our opinion the money remained the property of the person or authority who paid it to the chief inspector, that is to say, it was at the time of the theft the property of the Government.

The conviction is altered to a conviction of simple theft under s. 263 and punishable under s. 270 of the Penal Code. The appeal against sentence is dismissed.

Conviction amended. Appeal against sentence dismissed.

The appellant did not appear and was not represented.

For the respondent:

ARW Hancox (Crown Counsel, Kenya)

The Attorney-General, Kenya

Lake Motors Limited v Overseas Motor Transport (T) Limited [1959] 1 EA 603 (HCT)

Division:	HM High Court for Tanganyika at Dar-Es-Salaam
Date of judgment:	21 July 1959
Case Number:	5/1958
Before:	Law J

[1] *Pleading – Action for price of goods sold and delivered – No averment that price agreed or price reasonable – Whether plaint discloses any cause of action – Sale of Goods Ordinance s. 10 (T.) – Indian Code of Civil Procedure, 1908, First Schedule, O. 6, r. 3, O. 7, r. 1, r. 11 (a).*

Editor's Summary

A plaint filed to recover the price of goods sold and delivered contained no averment that the price of the goods had been agreed or that the price was reasonable. The defendant company took a preliminary point that the plaint disclosed no cause of action since the facts constituting the plaintiff's case had not been set out therein and that no fact which ought to be pleaded can be inferred.

Held – the failure to allege that the sum claimed represented an agreed or reasonable price was a defect in pleading but it is not every such defect which results in the plaint not disclosing a cause of action; in this case the irregularity did not go to the root of the action and was curable by amendment.

Order accordingly.

Cases referred to in judgment

- (1) *Read v. Brown* (1889), 22 Q.B.D. 128.
- (2) *Sullivan v. Alimohamed Osman*, [1959] E.A. 239 (C.A.).

Judgment

Law J: This is a preliminary point, taken by the defendant company, that the plaint in this suit discloses no cause of action and should be rejected under para. (a) of r. 11 of O. 7 of the First Schedule to the Code of Civil Procedure.

The plaint reads as follows:

“The plaintiff company claims from the defendant company the sum of Shs. 245,610/19 being the balance of account due and owing by the defendant company to the plaintiff company in respect of goods sold and delivered (including plant, machinery, equipment, tools, furniture, fixtures and motor spares, sundries, etc.), and services rendered to the defendant company at the defendant company's request at Mwanza during 1956–1958 particulars whereof have already been supplied and are well-known to the defendant company per statement of account attached hereto and marked as exhibit ‘A’, which the company prays be read as part of this plaint.

“The plaintiff company had demanded the payment of the amount due but the defendant company refuses and/or neglects to pay the same.”

The statement of account which is annexed to the plaint and forms part of it indicates that the parties were engaged in a series of transactions evidenced by invoices covering the period from November 8, 1956 to March 15, 1958, resulting in debits and credits with a balance in favour of the plaintiff company which is the subject of the claim in the present suit.

Mr. Master for the defendant company has submitted that as the plaint does not state that the goods allegedly sold and the services allegedly rendered were

respectively sold and rendered for an agreed price or for a reasonable price, no cause of action is disclosed. His argument is as follows:

1. By O. 7, r. 1, which is mandatory, every plaint must set out the facts constituting the cause of action and where it arose;
2. By O. 6, r. 3, which is also mandatory, the forms of pleading set out in Appendix “A” shall be used for all pleadings;
3. Forms 3 and 4, and 7 and 8, in Appendix “A”, make it clear that every plaint for goods sold and delivered or for services rendered must specifically plead that the goods were sold, or the services rendered, at a fixed price or at a reasonable price, as the case may be.
4. The plaint in this suit is deficient in this respect, and accordingly discloses no cause of action.

Mr. Master relies on the dictum of Lord Esher, M.R., in *Read v. Brown* (1) (1889), 22 Q.B.D. 128 at p. 131 which reads:

“What is the real meaning of the phrase ‘a cause of action arising in the City’? It has been defined in *Cooke v. Gill* to be this: every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court.”

Mr. Master submits that it would be necessary for the plaintiff company, in order to support its right to judgment, to prove the price which it alleges the defendant company is liable to pay for the goods allegedly supplied and the services allegedly rendered, and whether such price was an agreed or a reasonable one. It is therefore necessary for these facts to be pleaded, and the absence of such pleading, in Mr. Master’s submission, has the effect of leaving the plaint barren of a cause of action.

Mr. Master also relies on an extract from Mogha’s “Law of Pleading in British India”, (5th Edn.), at p. 415, where the learned editor says, in note “rr” at the foot of the page:

“The contract of sale must be alleged, as also the agreement to pay the price. If the price was not settled, a reasonable price can be claimed under r. 9, Sale of Goods Act, 1930, and in such a case the plaintiff must allege in the plaint what he claims to be the reasonable price.”

As regards whether it could not be inferred from the plaint that at least a reasonable price was to be paid, Mr. Master submits that no fact can be inferred which ought to be pleaded, and he relies in this respect on the decision of the Court of Appeal for Eastern Africa in *Sullivan v. Alimohamed Osman* (2), [1959] E.A. 239 (C.A.), and in particular on the following extract from the court’s judgment:

“So in the present case, the plaint should have stated briefly the facts or circumstances constituting duress. The allegation that the defendant’s act was ‘wrongful’ was insufficient, it was a pleading of law and merely begged the question. In the second place, to conclude, as the learned trial judge did, that a taking by duress must be implied in the plaint because ‘if the lorry was driven away willingly the plaintiff would not be deprived of its use’ is, with respect, illogical reasoning. The plaint must allege all facts necessary to establish the cause of action. This fundamental rule of pleading would be nullified if it were to be held that a necessary fact not pleaded must be implied because otherwise another necessary fact that was pleaded could not be true. For these reasons I would hold that the court below erred in finding that the plaint disclosed a cause of action . . .”

Mr. Fraser-Murray, for the plaintiff company, whilst conceding that the plaint does not strictly comply with the requirements of the Code of Civil Procedure, submits that it does nevertheless disclose a cause of action, in that it alleges a breach of contract on the part of the defendant company in failing to pay an

amount due in respect of goods supplied and services rendered at its request. Mr. Murray points out that the plaint in its present form is in accord with the specimen statement of claim for the price of goods sold and delivered contained in Appendix “C” to the Rules of the Supreme Court in England, and that O. 19, r. 4 and r. 5, of those rules are identical in substance with O. 6, r. 2 and r. 3, of the Code of Civil Procedure. In England it is not, apparently, necessary to plead that the price of goods supplied or of services rendered was either agreed or reasonable. Mr. Murray submits that when it is alleged that goods have been sold and delivered, then a presumption arises under s. 10 of the Sale of Goods Ordinance that a price has been agreed, or that a reasonable price will be paid. Whilst agreeing that the plaint does not exactly conform with the specimens prescribed in Appendix “A” to the Code of Civil Procedure, Mr. Murray submits that these specimens are no more than guides to which slavish adherence is not essential. As regards the extract from Mogha relied on by Mr. Master, Mr. Murray points out that the learned author does not contend that failure to allege that the sum claimed represents an agreed or reasonable sum is a defect fatal to the plaint as resulting in non-disclosure of a cause of action; and if that is the learned author’s contention, then it is remarkable that he has not quoted a single authority in support of that proposition.

After careful consideration of the above arguments and authorities, I have come to the following conclusion. The plaint is on the face of it defective for want of an allegation that the sum sued for represents the agreed or reasonable price of the goods allegedly delivered and the services allegedly rendered. In this respect the plaint does not comply with the requirements of r. 2 and r. 3 of O. 6 of the Code of Civil Procedure. Is it however so defective as to disclose no cause of action, so as to necessitate rejection under O. 7, r. 11 (a)? This depends on whether or not it can properly be inferred, from the plaint, that an agreed or reasonable price was claimed. At first sight the authority relied on by Mr. Master, *Sullivan v. Alimohamed Osman* (2), would seem to prevent any such inference being drawn, the necessary fact not having been pleaded. But the reason why, in *Sullivan’s* case, the court would not allow an inference to be drawn of a necessary fact which had not been pleaded, was merely because to do so would mean that another fact which had been pleaded could not otherwise be true. I do not think that the Court of Appeal was purporting to lay down a principle of general application excluding in all cases inferences of the existence of facts which ought to have been pleaded. In the same judgment, at p. 2 of the roneo-ed copy available to me, there is a passage which appears to me to state the general rule as follows:

“This omission (i.e. to plead a fact which ought to have been pleaded) would of course be fatal to the claim if the correct approach to the plaint were a literal one. But it is not. That which is necessarily implied from its context must be read into the plaint.”

Is it necessarily to be implied from the plaint in the present case that the goods supplied and service rendered were respectively supplied and rendered at an agreed or reasonable price? The claim relates to a balance of account, and the account forms part of the plaint. The account shows that over the period of about 1½ years the plaintiff and defendant company entered into a number of transactions, invoices being submitted by both parties. It is not a case of a single isolated transaction, such as envisaged by the specimen forms of plaint in Appendix “A” of the First Schedule to the Code of Civil Procedure. It seems to me to be not unreasonable to infer that this series of transactions between two companies carrying on business in Tanganyika was conducted in accordance with the normal usages of trade, and that the goods mutually supplied and the services mutually rendered were supplied at prices which, if not agreed, were at any rate reasonable. Strict adherence to the requirements of the Code of Civil

Procedure would be extremely difficult in a case such as this, where the claim is for the balance of an account, computed by setting off credits against debits after a long series of transactions. To what extent could the balance be said to be in respect of agreed prices, and to what extent in respect of reasonable prices?

Appendix “A” does not contain a specimen form to cover a claim for a sum which represents the balance of an account struck after a series of transactions. The plaint in this case cannot, in my opinion, be said not to disclose a cause of action. In my view, the failure to allege that the sum claimed represents an agreed or reasonable price is a defect of pleading, in that it is an omission of a material fact; but it is not every such defect which results in the plaint not disclosing a cause of action within the meaning of O. 7, r. 11 (a). In a suit alleging a breach of contract, the cause of action consists of the making of the contract and of its breach; these matters are adequately pleaded in the present plaint. The plaint is defective in the respect pointed out above, but that defect, in my opinion, although it relates to the cause of action, does not go to the root of it, and is an irregularity curable by amendment. With some hesitation, I hold that the preliminary objection fails, and that the plaint in this case does disclose a cause of action.

Order accordingly.

For the plaintiff:

WD Fraser Murray

Fraser-Murray, Thornton & Co, Dar-es-Salaam

For the defendant:

KA Master QC

KA Master QC, Dar-es-Salaam

Ali Hassan Mohamed v R
[1959] 1 EA 606 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	2 September 1959
Case Number:	78/1959
Before:	Rudd Ag CJ and Harely J
Sourced by:	LawAfrica

[1] *Criminal law – Practice – Trial – Accused alleged to be unlawfully within Colony – Burden of proof placed on accused by law – Accused required to make his defence that presence lawful – Prosecution case presented afterwards – Whether procedure adopted correct – Immigration Ordinance 1956, s. 15 (1) and s. 18 (K.) – Criminal Procedure Code (Cap. 27), s. 206 and s. 210 (K.).*

[2] *Criminal law – Evidence – Onus of proof placed by law on defence – Standard of proof required to*

discharge onus – Indian Evidence Act, 1872, s. 105.

Editor's Summary

The appellant was charged with being unlawfully within Kenya Colony contrary to s. 15 (1) (i) of the Immigration Ordinance 1956. At the trial the magistrate relying on s. 18 (2) of the Immigration Ordinance first called upon the appellant to prove that his presence in the Colony was lawful, whereupon the appellant and two witnesses gave evidence for the defence. After the close of the defence case the magistrate allowed the prosecution to call evidence to show that in or about 1956 the appellant had been convicted of being in the Colony without a valid permit or pass. In his judgment convicting the appellant the magistrate treated the case as if the onus placed upon the appellant by s. 18 (2) required that if he could not prove conclusively that his presence in the Colony was lawful he must necessarily be convicted. Section 18 (2) reads as follows:

“The burden of proof that any person is not or was not at any time before or after the commencement of this Ordinance a prohibited immigrant or that the entry, presence or residence in the Colony of any person is or was at any such time lawful shall lie on that person”.

Held –

- (i) the procedure adopted was clearly at variance with the provisions of s. 206 and s. 210 of the Criminal Procedure Code.
- (ii) even when the onus of proving innocence is upon the defence, if the prosecution wishes to call evidence against the accused, it must do so at the proper time as provided for by s. 206 of the Criminal Procedure Code and it cannot rely on s. 210 and confine itself to adducing evidence in rebuttal after the close of the defence case unless that evidence in rebuttal is evidence which the prosecutor could not by the exercise of reasonable diligence have foreseen.
- (iii) it is well settled upon general legal principles that where in a criminal case the onus is placed upon the defence, it is not necessary that the defence should do more than establish that on the case as a whole it is more likely that the defence is, as regards the particular point, true than that it is not true.
- (iv) although the evidence of the defence witnesses was not of a very strong nature it was nevertheless discounted without sufficient regard and consideration.
- (v) the trial was quite unsatisfactory and upon the evidence the appellant ought to have been acquitted.

Appeal allowed.

No Cases referred to in judgment in judgment

Judgment

Rudd Ag CJ: read the following judgment of the court: The appellant appealed from a conviction of being unlawfully present within the Colony contrary to s. 15 (1) (i) of the Immigration Ordinance, 1956, and from sentence of six months’ imprisonment in respect of the said conviction. On August 17, 1959, we allowed the appeal and set aside the conviction and sentence stating that reasons would be given at a later date.

According to the evidence the appellant was a man of about twenty-one years of age. He claimed to be the son of an Arab father and a Somali mother and to have been born in Kenya and to have remained there all his life.

The particulars of the charge were as follows:

“Ali s/o Hassan Mohamed on April 13, 1959, at Mombasa in the Coast Province, was found to be unlawfully present within the Colony in contravention of the provisions of the Immigration Ordinance, 1956, in that he was not in possession of a resident’s certificate or an entry permit or a pass, or a certificate of exemption authorising him to remain in the Colony, nor was he excluded from the necessity of being in possession of such authority to remain, nor was he otherwise entitled to reside in the Colony.”

Section 18 (2) of the Immigration Ordinance, 1956, provides:

“The burden of proof that any person is not or was not at any time before or after the commencement of this

Ordinance a prohibited immigrant or that the entry, presence or residence in the Colony of any person is or was at any such time lawful shall lie on that person.”

The course of proceedings at the trial was that the magistrate, relying upon this sub-section, instead of first hearing evidence adduced by the prosecution immediately called upon the appellant to prove that his presence in the Colony was lawful, whereupon the appellant and two witnesses gave evidence for the defence, then after the close of the defence case the magistrate allowed the prosecution to call evidence to show that in or about 1956 the appellant had

been convicted of “being in Colony without valid permit or pass” and that he had been fined Shs. 500/- for this alleged offence. The procedure adopted was clearly at variance with the provisions of s. 206 and s. 210 of the Criminal Procedure Code which provide as follows:

“206. If the accused person does not admit the truth of the charge, the court shall proceed to hear the complainant and his witnesses and other evidence (if any).

“The accused person or his advocate may put questions to each witness produced against him. If the accused does not employ an advocate the court shall, at the close of the examination of each witness for the prosecution, ask the accused whether he wishes to put any questions to that witness and shall record his answer.”

“210. If the accused person adduces evidence in his defence introducing new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut the said matter.”

We appreciate the fact that the prosecution in this case was of an exceptional nature in view of the provisions of s. 18 (2) of the Immigration Ordinance, 1956, which put the onus of proving his innocence upon the defence. It would appear to be the case that if a person accused of such an offence produces no evidence at all which tends to show that he was lawfully present in the Colony then he must be convicted even if the prosecution has called no evidence, but we are clearly of the opinion that even in the case of a charge of this offence if the prosecution wishes to produce evidence against the accused it must do so at the proper time as provided for by s. 206 of the Criminal Procedure Code and the prosecution cannot rely on s. 210 of the Criminal Procedure Code and confine itself to adducing evidence in rebuttal after the close of the defence case unless that evidence in rebuttal is evidence which the prosecutor could not by the exercise of reasonable diligence have foreseen.

Learned Crown Counsel who appeared for the Crown stated that he agreed with the propositions which we have just stated and he did not support the conviction. For this reason we considered that the procedure adopted in the lower court was wrong and we allowed the appeal.

But there are other reasons also which would have necessitated that the appeal should be allowed. The trial magistrate dealt with the case in his judgment as if the onus placed upon the appellant by s. 18 (2) of the Immigration Ordinance required that if he could not prove conclusively that his presence in the Colony was lawful he must necessarily be convicted. In our opinion this was a very serious misdirection of law. It is well settled upon general legal principles that where in a criminal case an onus is placed upon the defence, it is not necessary that the defence should do more than establish that on the case as a whole it is likely that the defence is, as regards the particular point, true than that it is not true, that is to say, the onus upon the defence in such a case is much less than the onus upon the Crown in an ordinary case of establishing the facts necessary to conviction beyond all reasonable and probable doubt. In Kenya, however, the onus upon the defence is even less in many cases for s. 105 of the Indian Evidence Act as amended in Kenya provides that in any cases to which that section applies the onus upon the defence will be discharged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of the offence. The section reads as follows:

“105. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to the operation of the law creating the

offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

“Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution whether in cross-examination or otherwise, that such circumstances or facts exist; and

“Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.

“(2) Nothing in this section shall:

- (a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions, or intentions which are legally necessary to constitute the offence with which the person accused is charged; or
- (b) impose on the prosecution the burden of proving that the circumstances or facts described in sub-s. (1) of this section do not exist; or
- (c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity.”

There was no evidence at all that the appellant had ever left the Colony and Protectorate of Kenya. The magistrate does not seem to have considered the evidence of the appellant that he had been born in Kenya and that he had lived there all his life. The magistrate misdirected himself in saying that the appellant’s father’s condition, status and residence in Kenya was immaterial and although he accepted the fact that the appellant’s mother’s residence in Kenya could be material he gave no consideration to the appellant’s statement in evidence that his mother had died when the appellant was five years old, but if his mother had been lawfully resident in the Colony or Protectorate for an aggregate period of five years out of any period of eight years the appellant would have been entitled to a certificate of permanent residence valid for the whole of his life. In our opinion the evidence of the appellant, which was completely un rebutted as regard this matter, strongly suggested that he was so entitled.

The evidence for the defence showed that the appellant’s father and mother had both died while the appellant was still a child. If this were true it naturally precluded the possibility of either of them being called to testify on behalf of the appellant. Two elders of the appellant’s father’s tribe or community gave evidence that they knew the appellant’s father, they had seen the appellant as a young child and that he was recognised as his father’s son and as a member of that tribe or community. Although this evidence was not seriously rebutted it was discounted on the ground that as these two witnesses had not seen the appellant since he was a child they might be mistaken as to his identity. In view of the absence of any evidence in rebuttal and of the fact that the appellant was an orphan who, according to his evidence, had left the place of his birth and gone to Mombasa when he was a youth, we think that although the evidence of the defence witnesses was not of a very strong nature it was nevertheless discounted without sufficient regard and consideration.

The main difficulty in the way of the defence was the fact that he appears to have been convicted in or about 1956 of some immigration offence, but apart from the fact that this evidence if it was to be relied upon by the prosecution should have been adduced at the proper time the evidence itself was most unsatisfactory. It was as follows: the appellant stated that he had appeared before the Liwali, that the charge was not explained to him and that he had

been told to pay a fine and did so. The evidence against him was that of the Liwali who stated that he had properly explained the charge to the appellant and that the appellant had been properly convicted, but the record of the proceedings was not produced and one cannot help doubting the evidence that the charge had been properly explained to the appellant at the time of his conviction in view of the fact that in evidence the Liwali stated that the offence was the offence of “being in Colony without valid permit or pass.” This is not a proper statement of any offence known to the law. If the appellant’s defence, in the instant case, were correct he would not require any permit or pass to justify his presence in the Colony.

In our opinion the trial was quite unsatisfactory. We think that upon the evidence the appellant ought to have been acquitted.

Appeal allowed.

For the appellant:

J O’Brien Kelly

O’Brien Kelly & Hassan, Mombasa

For the respondent:

DD Charters

The Attorney-General, Kenya

Chimanlal Rugnath Thakkar v R [1959] 1 EA 610 (SCK)

Division: HM Supreme Court of Kenya at Nairobi

Date of judgment: 2 September 1959

Case Number: 538/1959

Before: Rudd Ag CJ and Harley J

Sourced by: LawAfrica

[1] Criminal law – Corruption – Search warrant endorsed for execution by one police inspector but executed by another – Car radio seized different to that authorised by search – Bribe offered to release the radio seized – Whether offence committed – Prevention of Corruption Ordinance, 1956, s. 3 (2) (K.).

Editor’s Summary

A search warrant had been issued by a magistrate authorising the search of premises belonging to the appellant and his brother for a car radio No. KV 61 N982584 in connection with the investigation of a complaint of obtaining money by false pretences. The warrant was endorsed for execution by one, Inspector Roberts, and as he was new to the district Inspector Allan was asked to accompany him.

Inspector Allan, however, went alone and searched the appellant's house and found a Blaupunkt car radio on which was stuck a piece of cardboard which carried the number 138136. Inspector Allan took possession of the radio as he was not completely satisfied that its number was correct. The appellant then made overtures to the inspector to induce him not to take away the radio and finally offered and paid him Shs. 10,000/-. He was later convicted of corruption. On appeal it was argued that the search was illegal, that if the inspector had a right of search under the search warrant he had no right to take possession of the car radio No. 138136, that in acting as he did the inspector acted unlawfully, tortiously and that, in the circumstances, no offence was committed. It was also argued that the words "in which the said public body is concerned" appearing in s. 3 (2) of the Prevention of Corruption Ordinance, 1956, must be construed as "in which the said public body is lawfully concerned".

Held –

- (i) though the car radio found by the inspector was in fact No. 138136, nevertheless, it was not unreasonable of him, in the circumstances, to retain it

for the purpose of satisfying himself that it was not in fact the radio which was required under the search warrant;

- (ii) once the corrupt offers were made by the appellant to the inspector when taking possession of the radio, a new offence of corruption was perpetrated and this offence was, of course, quite different from the originally suspected offence of obtaining money by false pretences.

Appeal dismissed.

No Cases referred to in judgment in judgment

Judgment

Rudd Ag CJ: read the following judgment of the court: The appellant appealed from conviction on two counts of corruption contrary to s. 3, sub-s. (2) of the Prevention of Corruption Ordinance, 1956. The particulars of the charges were as follows:

“Count 1. Chimanlal Rugnath Thakkar on the 8th day of May, 1959, at Nakuru in the Rift Valley Province, corruptly gave Shs. 5,000/- to George William Allan, an inspector in the Kenya Police Force stationed at Nakuru, to induce the said George William Allan to return to him a Blaupunkt car radio No. 138136 which the said George William Allan had taken possession of in the course of investigating an alleged offence of obtaining money by false pretences.

“Count 2. Chimanlal Rugnath Thakkar on the 9th day of May, 1959, at Nakuru in the Rift Valley Province corruptly gave Shs. 5,000/- to George William Allan an inspector in the Kenya Police Force stationed at Nakuru, as a reward for the said George William Allan having returned to him on the 8th day of May, 1959, a Blaupunkt car radio No. 138136 which the said George William Allan had taken possession of in the course of investigating an alleged offence of obtaining money by false pretences.”

The facts stated in these particulars were amply proved and are not now disputed, but it was argued that in the other circumstances of the case no offence against the sub-section had been proved. The argument submitted was admittedly purely legal and technical for it was admitted that the appellant's conduct was very wrong and there was no justification for this conduct which was the subject of the two counts.

The facts of the case which are significant for the purposes of the appeal are as follows: a search warrant was issued by the resident magistrate, Nakuru, authorising the search of premises belonging to the appellant and his brother for a Blaupunkt car radio No. KV 612N982584 in connection with the investigation of a complaint of obtaining money by false pretences. The warrant was endorsed for execution by Inspector Roberts and as Inspector Roberts was new to the district Inspector Allan was asked to accompany him. But in the events that happened Inspector Allan unaccompanied by Inspector Roberts found the appellant in a certain shop, showed him the search warrant and then went with him to the appellant's house where the inspector conducted a search. In the course of this search a Blaupunkt car radio labelled 138136 which, of course, was not the number of the radio that was stated in the search warrant, was found. The number was on a piece of paper or cardboard which was stuck on the outside of the chassis of the radio. Inspector Allan noticed that the number on the car radio that was found was not the number stated in the search warrant, but he was not completely satisfied that it was the correct number of the radio that was found. He, therefore, took possession of this radio intending that if a radio of the specified number was not found upon continuation of the search, to take the radio which was found to the police station for further check to see if the number that was stuck on the chassis was its correct

number. The appellant then made overtures to Inspector Allan

to induce the inspector not to take away the radio which he had found. He offered to see that the unpaid instalments on the inspector's new car were paid off or to provide the inspector with a new motor car if the radio was not taken away by the inspector. Quite clearly the appellant in fact wished the inspector to make no investigation as to that particular radio. When these overtures were made the inspector at first, very properly, told the appellant not to be foolish and that he (the inspector) was a police officer, but the appellant disregarded this excellent and proper advice and offered to pay 10,000/- to the inspector for the consideration stated in the particulars of the count. This money was eventually paid in two instalments.

The search warrant had never been endorsed for execution by Inspector Allan and Inspector Roberts was not present during the search in which the car radio No. 138136 was found.

It was argued that the search was illegal, that the inspector had no right of search under the search warrant and that even if he had a right of search he had no right to take possession of the car radio No. 138136, that in acting as he did the inspector acted unlawfully, tortiously and that in the circumstances the offer and payment of bribes in order to attempt to induce the inspector to return the car radio to the appellant did not constitute an offence under s. 3 (2) of the Prevention of Corruption Ordinance. This sub-section reads as follows:

“Any person who shall by himself, or by or in conjunction with any other person, corruptly give, promise or offer any gift, loan, fee, reward, consideration or advantage whatever, to any person, whether for the benefit of that person or of another person, as an inducement to, or reward for, or otherwise on account of, any member, officer or servant of any public body doing or forbearing to do, or having done or forborne to do, anything in respect of any matter or transaction whatsoever, actual or proposed or likely to take place, in which the said public body is concerned, shall be guilty of a felony.”

It was argued that the words “in which the said public body is concerned” must be construed as “in which the said public body is lawfully concerned” and that the police were not lawfully concerned in the car radio No. 138136 which was found in the appellant's house.

We are prepared to assume for the purposes of this appeal, but not necessarily further or otherwise, that the inspector exceeded his authority when he searched the appellant's house in purported pursuance of a warrant which was not endorsed to him for execution. It is now admitted that the correct number of the car radio that was found was in fact 138136 and consequently it follows that Inspector Allan would not have been justified under the warrant in taking possession of this car radio, nevertheless we do not think that it was unreasonable of him in the circumstances to retain this radio for the purposes of satisfying himself that it was not in fact the radio which was the subject of the search authorised by the warrant. It may very well be that in deciding to retain this radio the inspector did so at his peril and that if the appellant had not made corrupt overtures to him the inspector would have had no legal right at that time to remove or retain this radio. But once the corrupt offers were made by the appellant to the inspector a new offence of corruption was perpetrated and this offence was, of course, quite different from the originally suspected offence of obtaining money by false pretences. If the appellant had objected to the removal of the car radio on the ground that its retention was not justified by the search warrant he might well have been on firm legal ground, but instead of doing that the appellant made corrupt offers.

We think that the police at Nakuru clearly were lawfully concerned in the investigation of an alleged offence of obtaining money by false pretences. In that connection they were lawfully concerned in attempting to find a radio

which was specified in the search warrant and they were lawfully concerned to establish, as far as they could, that the radio which was discovered either was or was not the radio that was specified in the search warrant. For that purpose it was proposed to detain the radio that was found. They were lawfully concerned in the radio. It may be that some of the actions taken by Inspector Allan in pursuance of that lawful concern exceeded his strict legal powers in which case he could be held liable in a civil action in respect of any unlawful action, but in our opinion that fact could not alter the other fact that Mr. Allan as a police officer was lawfully concerned in examining and making enquiries regarding the radio that was found. Once the corrupt offers were made to him we think that he was on that account too lawfully concerned in the radio. Whatever defects there may have been in the search procedure the appellant's conduct when the radio was discovered was such as would necessarily cause any competent police officer to suspect that this radio was in some way concerned in some offence. Investigation of suspected crime is pre-eminently a concern of the police as a public body. We have no doubt but that in the circumstances it was Mr. Allan's duty as a police officer to make investigation as to this radio. We find that the point taken in argument on behalf of the appellant does not lie on the facts of the case.

The sentence of two years' imprisonment on each count to run concurrently was not excessive and has not been appealed from. We consider the appeal to have no merit and accordingly it is dismissed.

Appeal dismissed.

For the appellant:

*B O'Donovan QC and Oliver Shaw
Shah & Gautama, Nairobi*

For the respondent:

*JP Webber (Crown Counsel, Kenya)
The Attorney-General, Kenya*

R v Joshua M'Imangi Muthare and another
[1959] 1 EA 613 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	12 August 1959
Case Number:	239/1959
Before:	Rudd Ag CJ and Templeton J
Sourced by:	LawAfrica

[1] Criminal law – Forfeiture of vehicle – Vehicle alleged to have been used in commission of offence – No specific finding by trial magistrate that car used – Whether order of forfeiture can be sustained – Penal Code, s. 306 (K.).

Editor's Summary

The accused were convicted by a magistrate, and the Peugeot car used by them was confiscated under s. 306 of the Penal Code as being the vehicle used or employed in the commission or to facilitate the commission of the offence of which they were convicted. This car had been hired out to one, Nguku, who applied to the Supreme Court in its revisional jurisdiction to set aside the magistrate's order of confiscation and in his affidavit stated that at the material time he was absent from Nairobi and was not aware that his vehicle was being used by his brother-in-law who was one of the accused. There was some evidence in the court below that the convict was not the owner of the vehicle.

Held –

- (i) as the court had made no specific finding that the Peugeot car was used in the commission, or to facilitate the commission of the offence of which the accused was convicted, the order of confiscation was of no effect and had to be set aside.

- (ii) the proviso to sub-s. (2) of s. 306 casts upon a court which finds, or purports to find, that a vehicle was used in the commission of an offence the duty which must be exercised judicially of satisfying itself that the case is not one to which the proviso applies, even if this involves an adjournment to enable enquiries to be made.
- (iii) in a case of this nature the trial court should give to all parties interested an opportunity to be heard before arriving at a finding resulting in the forfeiture of a vehicle.

Order of confiscation set aside.

No Cases referred to in judgment in judgment

Judgment

Rudd Ag CJ: read the following judgment of the court: The applicant, Raphael Nzoka Nguku, applied to this court in its revisional jurisdiction to set aside an order made by the first class magistrate, Nairobi, in Criminal Case No. 557 of 1959, declaring Peugeot car number KCE.561 to be confiscated under s. 306 of the Penal Code.

We set aside the order of confiscation and directed the vehicle to be released to the applicant. We now give our reasons.

The relevant portion of s. 306 of the Penal Code reads as follows:

“306. (1) Where any person is convicted of an offence, or of an attempt to commit an offence or of counselling or procuring the commission of an offence, under the provisions of this Chapter, Chapters XXVI or XXVIII or of s. 317 of this Code and the court by which such person is convicted finds that any aircraft, vessel or vehicle was used or employed by such person in the commission or to facilitate the commission of the offence of which he is convicted, such aircraft, vessel or vehicle shall be forfeited to His Majesty.

“(2) Where any aircraft, vessel or vehicle is detained by any police officer under the provisions of s. 25 of the Criminal Procedure Code and no person is, within seven days, charged with any offence specified in sub-s. (1) of this section, a magistrate shall, upon the written application of a police officer of or above the rank of inspector, inquire into the circumstances in which such aircraft, vessel or vehicle was detained and shall determine whether or not it was used for or employed in the commission or attempted commission of any such offence; and, if the magistrate finds that it was so used or employed, such aircraft, vessel or vehicle shall be forfeited to His Majesty.

“Provided that no forfeiture of any such aircraft, vessel or vehicle shall take place if, on the trial of any person mentioned in sub-s. (1) of this section or in any inquiry held under the provisions of sub-s. (2) of this section, the court finds that neither the owner nor any of his agents or servants consented to the use or employment of such aircraft, vessel or vehicle or was aware that it was so being used or employed.

“(3) The owner of any such aircraft, vessel or vehicle shall have all the rights of an accused person under the provisions of Part VIII of the Criminal Procedure Code and, so far as the same are applicable, the provisions of that Part shall apply to an inquiry held under the provisions of sub-s. (2) of this section.”

Under sub-s. (1) of this section forfeiture of an aircraft, vessel or vehicle takes place by operation of law following upon a finding by the court that such aircraft, vessel or vehicle was used in the commission, or

to facilitate the commission, of an offence. In Criminal Case No. 557 of 1959 the court made no specific finding that Peugeot car number KCE.561 was used in the commission,

or to facilitate the commission, of the offence of which the accused person was convicted. For that reason alone the order of confiscation was of no effect and had to be set aside.

There is, however, another matter to which we must refer. In our view, the proviso to sub-s. (2) of s. 306 casts upon a court which finds, or purports to find, that a vehicle was used in the commission of an offence the duty, which must be exercised judicially, of satisfying itself that the case is not one to which the proviso applies, even if this involves an adjournment to enable inquiries to be made. The affidavits in support of this application disclose that the applicant, whose brother-in-law was the person convicted in Criminal Case No. 557 of 1959, is the hirer of the vehicle in question under a hire-purchase agreement entered into between him and the owners, Rehman Brothers, and that at the material time the applicant was absent from Nairobi and was not aware that his vehicle was being used by his brother-in-law. There was some evidence in the court below that the convict was not the owner of the vehicle but even if there had been no such evidence we think that in a case of this nature the trial court should give to all parties interested an opportunity to be heard before arriving at a finding resulting in the forfeiture of a vehicle.

Order of confiscation set aside.

For the Crown:

ARW Hancox (Crown Counsel, Kenya)

The Attorney-General, Kenya

For the applicant:

Mervyn JE Morgan

Mervyn JE Morgan, Nairobi

Yusuf Ahmed Alias Ursad H T Ahmed Farah v R
[1959] 1 EA 615 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	21 July 1959
Case Number:	106/1959
Before:	Forbes V-P, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Somaliland–Greene, C.J

[1] *Criminal law – Practice – Adjournment – Application for adjournment to engage counsel – Accused warned that no further adjournment would be given – Further adjournment sought – No certainty that advocate would be engaged if adjournment allowed – Adjournment refused – Whether refusal unreasonable – Indian Penal Code, s. 467, s. 477A and s. 409 – Poor Persons Defence Ordinance (Cap. 26), s. 3 (Som.).*

Editor's Summary

The appellant was on May 5, 1959, committed for trial at Hargeisa for offences under s. 467, s. 477A and s. 409 of the Indian Penal Code. At the hearing on May 26, after he had pleaded to the charges and assessors had been selected the appellant applied for and obtained an adjournment to engage an advocate. The appellant was told that the case would be adjourned to June 3, and that no further adjournments would be given. On June 3, the appellant sought a further adjournment as he had received a letter from an advocate in Aden saying he could not visit Hargeisa before June 18. The trial judge refused the application since owing to other cases, any adjournment would have to be for a long period, it was uncertain that the appellant would be able to obtain or pay for the services of an advocate in the end, and for other reasons. The trial

then proceeded, the appellant cross-examined the prosecution witnesses at length, gave evidence on oath in his defence and was eventually convicted. On appeal the circumstances of the refusal of a further adjournment by the trial judge were considered.

Held – the trial judge had a discretion whether or not to grant the adjournment and the appellate court did not consider that he had exercised his discretion upon any wrong principle.

Per curiam: “The fact that a Crown witness was leaving was a factor which the court was entitled to consider and while it might have been practicable to take his evidence forthwith and then adjourn for a long period, that is not a very satisfactory way of conducting a criminal trial with assessors”.

Appeal dismissed.

Cases referred to in judgment

(1) *Galos Hired v. R.*, [1944] 2 All E.R. 50; [1944] A.C. 149.

(2) *R. v. Kingston*, 32 Cr. App. R. 183.

Judgment

The following judgment was read by direction of the court: The High Court of Somaliland at Hargeisa convicted the appellant of offences under s. 467, s. 477A and s. 409 of the Indian Penal Code. Upon his appeal to this court we were of opinion that there was ample evidence to support the conviction and the appeal was dismissed. We think it necessary, however, to deal in writing with one matter.

The record showed that the appellant appeared in the court below on May 26, 1959, pursuant to notice of hearing. He pleaded to the charges and assessors were selected but he then applied for an adjournment to engage an advocate. The case was adjourned to June 3, 1959, and the appellant was told that no further adjournments would be given. On June 3, 1959, the appellant applied for a further adjournment as he had received a letter from an advocate Mr. Iyer saying he could not visit Hargeisa before June 18. The adjournment was refused and the reasons of the learned Chief Justice are given in the record as follows:

“I always try to facilitate accused persons in getting legal aid, but in this case the application must be refused. One of the prosecution witnesses is proceeding to the United Kingdom on June 12. Accused was committed for trial on May 5. On that day he knew he would need the services of an advocate. Notice of hearing was served on him on May 14 for May 26. On May 26 he applied for an adjournment which was granted to today and it was made clear to accused that there would be no further adjournment after today. At the conclusion of this trial a long manslaughter case is down for hearing. On 16/6/59 I proceed on local leave. On my return a long murder case is set down for hearing. On 13/7/59 the new Governor arrives and this building will be taken over by the Legislative Council for 3 weeks. On 27/7/59 there is a High Court Sessions at Burao. It is impossible to grant accused’s application which is refused.”

The trial proceeded and the appellant cross-examined the prosecution witnesses at some length and gave evidence on oath in his defence.

As this court is aware, no advocates are available in Hargeisa and the practice is to obtain one from Aden or elsewhere. Although there is a direct air service between the two places an adjournment of eight days might well prove insufficient to enable this to be done in time. As the learned Chief Justice pointed out, however, the appellant had been committed for trial on May 5, and as he was on bail he should have

had no difficulty in obtaining someone to represent him if he had taken active steps to that end.

Mr. O'Donoghue who appeared as counsel for the Crown at the trial and before this court, informed us that the record did not contain all that had transpired and we accepted a statement from him from the bar in amplification. It appears that the appellant had first consulted a Mr. Mariano, a petition writer (who in fact signed the memorandum of appeal to this court) and handed him his copy of the record. Four or five days after May 15, when the appellant had first received his copy of the record, the appellant came to Mr. O'Donoghue for advice; he was advised that the court would not permit Mr. Mariano to appear for him at the hearing and that he should obtain a lawyer. Mr. O'Donoghue also gave the appellant his own copy of the record for this purpose as Mr. Mariano, who had the appellant's copy, had temporarily left Hargeisa. At a later date, which Mr. O'Donoghue thought to be towards the end of May, an Aden counsel was present in Hargeisa and Mr. O'Donoghue arranged a meeting between him and the appellant with a view to his appearing. He left them discussing fees and dates but apparently no agreement could be arrived at. At the hearing on June 3, 1959, as is noted in the record, the appellant produced the above-mentioned letter from Mr. Iyer. Mr. O'Donoghue also informed us that this letter contained reference to an earlier interchange of letters and (a factor which may well have influenced the learned Chief Justice) a statement that there was still no question of payment of fees and reference to other conditions made by Mr. Iyer for his appearance. The offences of which the appellant was charged did not fall within the scope of the Poor Persons Defence Ordinance (Cap. 26) so as to entitle him to be considered for legal aid.

We have considered the case of *Galos Hired v. R.* (1), [1944] 2 All E.R. 50; [1944] A.C. 149, in which the Privy Council held that an appeal from convictions of murder, also in the Somaliland Protectorate, must be restored when an advocate who had been assigned for the preparation and conduct of the appeal, was unable, through no default on his part, to reach the court in time. In the judgment of their lordships at p. 155 is the following passage:

"The necessity for an assignment of counsel for the purpose of 'conducting an appeal' seems to their lordships to involve the necessity of seeing that it will be possible for the counsel to be present at the hearing. An appreciation was called for of the difficulties which, in such a case as their lordships have before them, might well make it impossible for counsel to cross 150 miles of sea by an adequate ship in time to be present on the date originally fixed for the hearing of the appeal. The assignment of counsel in the present case was made of no effect. These considerations seem not to have been present to the mind of the judge sitting as the Appeal Court, and, in the view of their lordships, the provisions of s. 3 of the Poor Persons Defence Ordinance, so far as regards the appeal, have, as a matter of substance, been disregarded. They will add that there does not appear to have been any special reason why the hearing of the appeal should not have stood over for a few days to enable Mr. Manilal to attend, and their lordships are informed that he, in fact, arrived in British Somaliland on July 2, 1942, so that a comparatively short adjournment would have enabled him to attend and to argue the case on appeal."

Those were very different circumstances, in that an advocate had been assigned and had been prevented by shipping difficulties from attending. A short adjournment would have been sufficient but the Appeal Court made no inquiry with regard to the absence of the advocate.

We have considered also the case of *R. v. Kingston* (2), 32 Cr. App. R.183 in which counsel for a woman who was on trial for receiving stolen goods, was not present in court owing to a misunderstanding. The accused did not cross-examine any of the witness for the prosecution or put forward any defence. It is clear that the Court of Criminal Appeal would not have interfered

merely because of the absence of counsel. The judgment at pp. 187–188 reads:

“We have had a report in this case from the learned recorder of Manchester, and it is quite clear from that report that the primary cause of this unfortunate situation was the failure of the counsel who had been briefed to do his duty to his client and the court in attending when the case was in the list for trial. If he was unable for any good reason to attend, his duty, as everybody knows, was to see that some other member of the Bar held his brief and was in a position to represent the accused person. It was owing to the fact that that member of the Bar agreed with counsel for the prosecution that neither would go to the court till 2 p.m. that all this trouble arose. In those circumstances, we think it right to say that in our opinion the assistant-recorder was perfectly justified in continuing with the trial of a person although she was unrepresented. The jury had to be considered. It would have been quite wrong for the assistant-recorder at 10.30 a.m. to waste the jury’s time and tell them there was nothing for them to do and that they must come back at 2 p.m. for the convenience of counsel. No application had been made to the court to fix the case for 2 p.m. or postpone it in any way.

“If the matter rested on the facts which I have stated so far, this court would not have interfered, . . .”.

The court was, however, greatly influenced by the fact that counsel for the Crown had suggested to the learned assistant-recorder that there were members of the Bar present who would hold the brief for the absent counsel and that this suggestion had been declined by the assistant-recorder. At pp. 188–189 of the judgment:

“Now, it seems to us that that was tantamount to depriving the appellant of the right which she had of being defended by counsel. She had put herself, or her family had put her, in the position of a person who was entitled to the services of counsel. Money had been paid for that purpose by them, and she was entitled by the law of this country to the services of counsel. The result of the whole matter is that, having briefed counsel, she has in fact been tried as an unrepresented person, there being other members of the Bar present, any of whom would have defended her if he had been asked, but of course could not come forward and offer to do so. The result is that the jury have never had any opportunity of knowing what was the defence to this case or hearing any cross-examination of the witnesses for the prosecution.”

The circumstances of that case also appeared to us to be far removed from those of the present, in which the Crown and the court had done all that could reasonably be expected of them to assist the accused, who must have known that advocates were unavailable in Hargeisa and who should have taken active steps in the matter as soon as he was committed for trial. A very long adjournment would have been necessitated and it appears that there was no certainty that the appellant would be able to obtain or pay for the services of an advocate in the end. The fact that a Crown witness was leaving was a factor which the court was entitled to consider and while it might have been practicable to take his evidence forthwith and then adjourn for a long period, that is not a very satisfactory way of conducting a criminal trial with assessors.

The learned Chief Justice had and exercised a discretion whether to grant the adjournment. We did not consider that he had done so upon any wrong principle and therefore dismissed the appeal.

Appeal dismissed.

The appellant did not appear and was not represented.

For the respondent:

P O’Donoghue (Crown Counsel, Somaliland)

The Attorney-General, Somaliland

Vishvanath Chhaganlal Trivedi v Khorshed Kaiku Wadia
[1959] 1 EA 619 (CAK)

Division: Court of Appeal at Kampala
Date of judgment: 11 July 1959
Case Number: 19/1959
Before: Sir Kenneth O'Connor P, Gould and Windham JJA
Sourced by: LawAfrica
Appeal from: H.M. High Court of Uganda–McKisack, C.J

[1] Money-lender – Memorandum of loan that promissory notes “discounted” – Whether promissory notes given by way of security for loan – Whether memorandum defective – Meaning of “discounting” – Money-lenders Ordinance 1951, s. 7, s. 22 (U.).

Editor’s Summary

On November 16, 1955, the respondent, a licensed money-lender, paid to Motor Sales Ltd. a sum of Shs. 30,000/-, and on November 21, 1955, paid to one Damji a sum of Shs. 25,000/- upon terms contained in two memoranda of those dates. At the time of the transaction, Motor Sales Ltd. handed to the respondent three promissory notes drawn by the appellant in favour of and endorsed by that company for a total of Shs. 30,000/- and payable on March 30, 1956. Similarly Damji handed to the respondent three promissory notes drawn by Motor Sales Ltd. in favour of the appellant and endorsed by him and Damji payable ninety days after November 21, 1955, for Shs. 10,000/-, Shs. 10,000/- and Shs. 5,000/- respectively. Each memorandum referred to “Particulars of promissory notes discounted” and gave details of these promissory notes. The first two notes handed over by Damji were paid by the appellant. The respondent as holder later sued the appellant as drawer of the three promissory notes handed over by Motor Sales Ltd. and as endorser of the third note handed over by Damji. The appellant’s main defence at the trial was that the promissory notes had been delivered to the respondent as security for loans to Motor Sales Ltd. and Damji respectively within s. 7 of the Money-lenders Ordinance, 1951, and that they were unenforceable by reason of defects in the memoranda. The trial judge held that the notes were not given as security but were discounted by the respondent and that the Money-lenders Ordinance was irrelevant. On appeal

Held –

- (i) the memoranda seemed inconsistent with discounting and showed clearly that the transactions were loans of money repayable by the borrowers as such.
- (ii) the memoranda evidenced lending transactions, and in spite of the use of the word “discounted” the correct inference to be drawn from the documents was that the promissory notes were intended to be securities for the loan.
- (iii) for the purposes of the Money-lenders Ordinance, 1951, discounting of bills must be deemed to

fall within the category of money-lending transactions by virtue of s. 22, and as the discounting in the present case was at a rate in excess of nine per cent per annum the transactions would not be excluded from the scope of the Ordinance by s. 22.

- (iv) if the transactions were regarded as lending by discounting the respondent had in addition to the liability of the actual borrower the liability of the makers and prior endorsers of the notes, which is a security within s. 7 of the Ordinance; it was this security which the respondent desired to enforce and which was unenforceable by s. 7 by reason of the defects in the memoranda.

Appeal allowed.

Cases referred to in judgment

- (1) *London Financial Association v. Kelk* (1884), 26 Ch. D. 107.
- (2) *Stirling v. John*, [1923] 1 K.B. 557.

July 11. The following judgment was read by direction of the court:

Judgment

On December 17, 1958, judgment in this action was given in the High Court of Uganda in favour of the original respondent (plaintiff) against the appellant (defendant) for the sum of Shs. 37,568/85 with interest and costs. On June 15, 1959, an appeal from the judgment was heard and allowed by this court and for this decision we now give our reasons. The original respondent kaiku Ratanji Wadia died since the institution of the appeal and his widow has been substituted as respondent by order dated June 5, 1959, but for convenience we will continue to refer to the original respondent as “the respondent”.

The respondent was a licensed money-lender. On November 16, 1955, he paid to Motor Sales Ltd. the sum of Shs. 30,000/- and on November 21, 1955, he paid to one Kassam J. Damji the sum of Shs. 25,000/- upon terms contained in two memoranda respectively bearing those dates. Counsel for the appellant conceded before this court that these transactions were loans of money. At the time of the transaction of November 16, 1955, Motor Sales Ltd. handed to the respondent three promissory notes drawn by the appellant in favour of that company and endorsed by it, for a total sum of Shs. 30,000/- payable on March 30, 1956. Similarly at the time of the transaction of November 21, 1955, Kassam J. Damji handed to the respondent three promissory notes drawn by Motor Sales Ltd. payable ninety days after November 21, 1955, in favour of the appellant and endorsed by him and Kassam J. Damji, for the sums of Shs. 10,000/-, Shs. 10,000/- and Shs. 5,000/- respectively. The first two of these notes were paid by the appellant pursuant to an arrangement he had entered into with the respondent and the respondent as holder brought the present action against the appellant as drawer of the three promissory notes handed over by Motor Sales Ltd. and as endorser of the third note handed over by Kassam J. Damji. I have used in referring to these transactions the neutral phrase “handed over” in relation to the promissory notes as the main defence put forward by the appellant was that the promissory notes had been delivered to the respondent as security for loans to Motor Sales Ltd. and Kassam J. Damji respectively and that they were unenforceable by reason of non-compliance with certain provisions of the Money-lenders Ordinance, 1951; the respondent’s submission, which was upheld by the learned Chief Justice, was that the notes were not given as security but were discounted by the respondent and that the provisions of the Money-lenders Ordinance, 1951, were irrelevant.

Section 7 of the Money-lenders Ordinance, 1951, is in the following terms:

- “7.(1) No contract for the repayment by a borrower of money lent to him or to any agent on his behalf by a money-lender or for the payment by him of interest on money so lent, and no security given by the borrower or by any such agent as aforesaid in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract; and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not signed by the borrower before the money was lent or before the security was given, as the case may be.
- (2) The note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and either the interest charged on the loan expressed in terms of a rate per centum per annum, or the rate per centum per annum represented by the interest charged as calculated in accordance with the provisions of the Schedule to this Ordinance.”

A memorandum (the heading of which indicates that it was intended to be in compliance with s. 7) was prepared in respect of each of the transactions in question and signed by the borrower. That which relates to the loan to Motor Sales Ltd. is as follows:

“K. R. Wadia	P.O. Box 511,
Money-lender	Kampala.
(Money-lenders Ordinance No. 31 of 1951, Section 7)	
Memorandum of Loan Given to:	Motor Sales Ltd.
1. Name of borrowers	Motor Sales Ltd.
2. Name of lender	K. R. Wadia.
3. Date on which amount to be lent	November 16, 1955.
4. Amount of loan	Shs. 30,000/-.
5. Rate of interest	12 per cent.
6. Interest how and when payable	To be deducted from the amount of loan.
7. Period of loan	Repayable March 30, 1956.
8. Particulars of promissory notes discounted	Three promissory notes drawn by V.C. Trivedi dated 14.11.55 in favour of Motor Sales Ltd. for Shs. 10,000/- each payable 30.3.56.
9. Arrangement for further interest after the expiry of the term granted	In case of default of payment on due date, interest at the rate of 12 per cent. is payable on the amount lent or any part thereof remaining unpaid.
10. Any other terms	Nil.

“We, Motor Sales Ltd., the above-named borrowers do hereby declare that the foregoing entries inserted above are correct and that we have signed this contract before receiving the loan above-mentioned and before giving the above promissory notes and agree to the above terms, statements and conditions.

“Kampala, dated this 16th day of November, 1955.

for and on behalf of:

Motor Sales Ltd.

1/- Stamp

(Sgd.) Kassam J. Damji

Uganda Revenue

Director.

“We acknowledge to have received a copy of the above memorandum on the 16th day of November, 1955.

For and on behalf of:

Motor Sales Ltd.

(Sgd.) Kassam J. Damji.

Director.

Receipt

“We hereby acknowledge to have received the aforesaid amount of loan viz. Shs. 30,000/- (Shillings Thirty Thousand) only.

16th November, 1955.

For and on behalf of:

Motor Sales Ltd.

(Sgd.) Kassam J. Damji.

Director.

10c. Stamp

Uganda Revenue.”

The memorandum in respect of the loan to Kassam J. Damji was in the same terms (*mutatis mutandis*); the amount was Shs. 25,000/-, the rate of interest 18 per cent. and the due date February 22, 1956. It was not contested in the court below or before this court that these memoranda failed fully to comply with the requirements of s. 7 and it would appear from the agreed facts that, for one thing, the amount of the loans was inaccurately stated. No evidence was called and, while certain facts were agreed, they did not assist in the determination of the question which the court was called upon to decide, which was whether the promissory notes were a “security given by the borrower” within the meaning of s. 7. If they were, they were unenforceable by reason of the defects in the memoranda.

The learned Chief Justice in the absence of other relevant evidence based his decision on the contents of the two memoranda and said in his judgment:

“Mr. Vyas, for the defendant, contends that these documents speak for themselves and are manifestly evidence of a loan of money to the borrowers, Motor Sales Ltd. and Kassam Damji, respectively, the references in them to promissory notes being included because those notes were given as security. I am unable to agree. Each of these documents contains the words ‘particulars of promissory notes discounted’, and there is no reference to their being a security for the loan. The discounting of promissory notes is one form of lending money, and the provisions of the Money-lenders Ordinance apply to such transactions, at any rate where the rate of interest exceeds 9 per centum per annum. This is apparent from s. 22 of the Ordinance, the relevant provisions of which are as follows:

‘22. (1) The provisions of this Ordinance shall not apply—

.....

(b) to any transaction where a bill of exchange is discounted at a rate of interest not exceeding nine per centum per annum;

.....

(3) Any person who only lends money by means of the type of transactions set out in sub-s. (1) of this section and by means of no other type of transaction shall be deemed not to be a money-lender for the purpose of this Ordinance.’

“The fact, therefore, that the plaintiff has obtained the signature of the borrower to a memorandum of loan approximating to the type required by s. 9 of the Ordinance does not detract from the strength of the plaintiff’s case. I am satisfied on the evidence available that the true nature of the transactions in question was that of discounting the promissory notes, and that they were not merely given as security for a loan.”

It is expedient to approach this problem by ascertaining what is meant by the discounting of a promissory note. We were referred to *London Financial Association v. Kelk* (1) (1884), 26 Ch. D. 107 where at pp. 134–135 of the judgment it is said:

“The difference between ‘advancing’, ‘lending money’, and ‘discounting’, is distinct and palpable. ‘Discounting’ is purchasing, not lending. The discounter, whether of a bill, or bond, or any other security, becomes the owner. If the thing bought turns out when realised to be of less value than the price paid for it, the loss falls upon the purchaser or discounter. If a profit or gain is made upon the transaction, it belongs wholly and exclusively to the discounter or purchaser.”

This passage describes a discounting transaction in the strict sense but with regard to the reference to the loss falling upon the purchaser we would observe (though not by way of qualification) that those whose business it is to discount bills normally take steps to guard against such loss by requiring the person to

whom the money is paid either to endorse the bill or to enter into a subsidiary contract of guarantee.

The text books give similar descriptions of discounting transactions. Sheldon's Practice and Law of Banking (6th Edn.) at pp. 317–318 reads:

“To discount a bill is to buy it, to become the transferee of it, by having it indorsed or transferred by delivery by the holder, giving him a price settled either by agreement or by the current rate in the money market, and based on the time the bill has yet to run . . . A discounteer is a holder for full value. He is not a pledgee, he can deal and part with the bill as he likes, his title to the bill and to sue on it is absolute and covers the whole face value, he is in no sense a trustee for the previous holder as to any part of the bill or its proceeds. The person who gets the bill discounted is a transferor; if by indorsement then with all the liabilities of an indorser, if a transferor by delivery then with the liabilities attaching to that character. In either case he parts with all right, title and interest in the bill and its proceeds.”

“Discounting a bill must be distinguished from the pledging of a bill. When a banker takes a bill as security, he, as pledgee, has only an interest in the bill equal to the amount he has advanced on the security of the bill. The bill itself remains the property of the pledgor.”

The transaction from the banker's point of view is also described in Vol. 2 of Halsbury's Laws of England (3rd Edn.) at pp. 226–227:

“A banker discounts a bill, as opposed to taking it for collection or as security for advances, when he takes it definitely and at once as transferee for value. It does not matter that the amount of the bill, less discount, is carried to current account. In the case of a customer that is the usual course. Whether the bill is taken from a customer for collection or as security, or discounted for him, is a question of fact . . . Where the transaction is really one of discounting, the banker is of course at liberty to deal with the bill as he pleases, rediscounting or transferring it.

“Where the banker has the customer's endorsement on the bill, he has the remedies of an endorsee against him; where he has not got the customer's endorsement on the bill, he only has against him the remedies of a transferee by delivery. Mere dishonour of a bill not endorsed by the customer gives no right to debit the customer's account or to proceed against him on the bill.

“Instead of endorsing each bill for discount separately, the customer may give to the banker a general guarantee of all bills discounted for him, which has, vis-à-vis the banker, the same operation as specific endorsement in each case.

“The fact that bills have been discounted by the banker for a customer, which bills are still running, gives the banker no right to retain moneys due to the customer as a provision against such bills, except in the event of the customer's bankruptcy. Where the bill is dishonoured, the banker, if he has the customer's endorsement on it, can, after giving due notice of dishonour, debit the account.”

The transaction of discounting a bill then, in the strict sense, involves a complete transfer of the bill to the discounteer or purchaser and the person who receives the money may or may not be personally liable on the bill. The memoranda which have to be construed in the present case appear to us to be inconsistent with a discounting transaction of this nature, for, by referring to “borrower” and “lender” “amount of loan”, “period of loan”, by making provision for the payment of interest in default of payment on the due date

and by the inclusion of an agreement by the borrowers “to the above terms, statements and conditions”, the memoranda show clearly that the transactions were loans of money repayable by the borrowers as such. The money received when a bill is discounted in the strict sense is not a loan—it is the purchase price of the bill. If the money is lent and is repayable by the borrower under the lending contract itself it would appear that bills endorsed to the lender must be intended to be no more than securities, for the lender is not confined (as he would be in a strict discounting transaction) to his remedies on the bills but may rely upon the contract to repay. There is nothing in the memoranda which indicates that the contractual obligation to repay arises only contingently upon the prior dishonour of the promissory notes or was in the nature of the “general guarantee” referred to in the passage from Halsbury’s Laws of England above quoted. We consider therefore the memoranda, as a whole, evidence lending transactions, and that in spite of the use of the word “discounted” in the item numbered 8 the correct inference to be drawn from the documents is that the promissory notes were intended to be securities for the loan.

What has been said so far is, in our opinion, unaffected by the fact that the discounting of bills must for the purposes of the Money-lenders Ordinance, 1951, be deemed to fall within the category of money-lending transactions. This is clearly implied by s. 22, the relevant portions of which are set out in the passage from the judgment of the learned Chief Justice quoted above. No doubt, having regard to the object of the Ordinance, and to the fact that a person who obtains the discounting of a note while remaining liable upon it is, in a sense, borrowing its full present value, the legislature considered that such transactions should receive the protection of the Ordinance. That does not, however, in our view, detract from the considerations which impelled us to the conclusion that the memoranda in the present case imported that the promissory notes were securities. Had it been otherwise the memoranda could and should have been in a form consistent with discounting. Moreover, even if the transactions now under discussion were regarded as discounting, the respondent would not thereby be assisted. The discounting was in each case at a rate in excess of nine per centum per annum and the transactions would not be excluded from the scope of the Ordinance by s. 22. There is little guidance to be had as to what constitutes a security for the purpose of the money-lending legislation but there is a passage in the judgment of Younger L.J., in *Stirling v. John* (2), [1923] 1 K.B. 557 which appears to us to be of the essence of the matter. In that case the plaintiffs, who were registered money-lenders, advanced to the defendant £1,600 on a promissory note and took also post dated cheques to cover the stipulated instalments in repayment. The cheques were, however, payable to nominees of the plaintiffs. The question was whether the cheques were “securities for money” or merely a means of repayment. The above-mentioned passage of the judgment is at p. 562 of the report:

“I think both the cheques and the promissory note were securities for money. The cheques, like the promissory note, were negotiable instruments, and they gave the money-lender something by means of which he could recover his money, something in addition to that which was conferred upon him by the principal document, the promissory note itself.”

In the present case, if the matter is regarded as one of lending by discounting, the money-lender had in addition to the liability of the actual borrower the liability of the makers and prior endorsers of the notes, which is clearly, in our opinion, “something by which he could recover his money” and a security within the meaning of s. 7 of the Ordinance. It is that security which the respondent desired to enforce in his action against the appellant and which

was in our view rendered unenforceable by s. 7 of the Ordinance by reason of the defects in the memoranda required by that section.

For these reasons we allowed the appeal with costs in this court and the court below and set aside the judgment appealed from; it is not therefore necessary for us to express any opinion upon a further ground relied upon by the appellant and based upon a failure by the respondent to comply with the requirements of s. 11 (1) of the Ordinance.

Appeal allowed.

For the appellant:

PJ Wilkinson and MP Vyas

MP Vyas, Kampala

For the respondent:

YV Phadke

Parekhji & Co, Kampala

Tomasi Mufumu v R
[1959] 1 EA 625 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	1 July 1959
Case Number:	101/1959
Before:	Sir Kenneth O'Connor P, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda–Lewis, J

[1] Criminal law – Practice – Plea – Plea of guilty to charge of murder – Whether plea equivocal – Steps trial judge should take before recording a plea of guilty to murder.

Editor's Summary

The appellant had speared to death one Ludoviko who had earlier on the same day killed the appellant's son. When arraigned for murder, the appellant said "I speared him to death as he killed my son the same day". His advocate informed the court that he had advised the appellant to plead guilty as in his opinion he had no possible defence to the charge. The trial judge then heard counsel for the prosecution and thereafter convicted the appellant of murder and sentenced him to death. The appellant appealed on the ground that he did not know that the sentence for murder was death.

Held – it was clear that the appellant’s plea was not an unequivocal plea of guilty of murder and might well have been a plea of killing upon provocation and this vitiated the conviction.

Per curiam: “. . . it is very desirable that a trial judge, on being offered a plea which he construes as a plea of guilty in a murder case, should not only satisfy himself that the plea is an unequivocal plea, but should satisfy himself also and record that the accused understands the elements which constitute the offence of murder . . . and understands that the penalty is death.”

Appeal allowed. New trial ordered.

Case referred to in judgment

(1) *R. v. Yonasani Egalu and Others* (1942), 9 E.A.C.A. 65.

July 1. The following judgment was read by direction of the court:

Judgment

The appellant was convicted by the High Court of Uganda at Fort Portal on May 26, 1959, of the murder on June 22, 1959, of one Ludoviko Alimarwoha and was sentenced to death. Against this conviction and sentence he appealed to this court. On June 19, 1959, we quashed the conviction and sentence and

ordered that the appellant be arraigned anew and tried upon the indictment dated April 6, 1959. Our reasons were as follows:

When the appellant was arraigned, he said “I speared him to death as he killed my son the same day”. His advocate is then recorded as saying:

“I have advised the accused to plead guilty as in my opinion he has no possible defence to the charge.”

Counsel for the Crown is then recorded as having said:

“The accused’s son Kabuleta, aged thirty, was speared to death by the deceased, Ludoviko, who had been practically insane for some months. About half an hour later accused killed the man Ludoviko.

“I see no legal defence but there are extenuating circumstances for consideration by H.E. in Executive Council.”

The learned judge then recorded:

“On hearing both counsel and reading the depositions, I am satisfied that this is a proper case in which to accept a plea of guilty to murder.”

He then convicted the appellant of murder and sentenced him to death.

The appellant appealed on the ground that he did not know that the sentence for murder was death. We sent for and perused the depositions and asked for a report from the learned trial judge on the question whether, before the prisoner’s plea was accepted, the effect of pleading guilty to murder had been explained to the appellant or whether his counsel had said that it had been explained to the appellant by him. The learned judge reported that he had accepted the plea on hearing that the accused’s counsel had told the accused the penalty for murder, and that he (the learned judge), for reasons which he gave, did no explaining.

On the appeal, the learned Crown Counsel who then appeared, on instructions from the Attorney-General did not support the conviction. He argued that the plea was not unequivocal: it might be a plea of guilty to manslaughter, that is to killing upon grave and sudden provocation.

The depositions showed that Ludoviko, the deceased, had been mentally ill for about seven months. About 2 p.m. on the day in question he had left his house and gone, taking his spear, to the house of Kabuleta, the son of the appellant. He had returned about five minutes later saying that he had left his spear behind. Kabuleta was then found dead, bleeding from spear wounds. The appellant was called and saw the body of his son. Ludoviko was apprehended and one Mukembandwa went to summon the Muluka chief. When Mukembandwa got back, he found Ludoviko being tied up and the appellant outside in the yard holding a spear. He said that the appellant tried to stab Ludoviko and that he and another man tried to stop him. When the other man moved away, the appellant stabbed Ludoviko as he lay tied up, apparently in retaliation for the killing of his (the appellant’s) son.

If these facts were correct, there could be no doubt that the gravest provocation had been given to the appellant by Ludoviko in killing the appellant’s son. There was nothing, however, in the depositions which threw light on the crucial question—whether there had been time for the appellant’s anger to cool. It was not stated what time was, or would be, taken by Mukembandwa in going and reporting to the Muluka chief and returning. It does not appear where the Crown Counsel at the trial got his estimate of “about half an hour”. If that is correct, it may well be that there had not been sufficient time for passion to cool. This will be a question for consideration by the judge at the new trial.

We thought it clear that the accused's plea was not an unequivocal plea of guilty of murder and might well have been a plea of killing upon provocation,

and that this vitiated the conviction. As already mentioned, we ordered the appellant to be arraigned anew and tried upon the indictment.

It remains only to say that it is very desirable that a trial judge, on being offered a plea which he construes as a plea of guilty in a murder case, should not only satisfy himself that the plea is an unequivocal plea, but should satisfy himself also and record that the accused understands the elements which constitute the offence of murder (*R. v. Yonasani Egalu and Others* (1) (1942), 9 E.A.C.A. 65) and understands that the penalty is death. This should be done (and recorded) notwithstanding that the accused may be represented by an advocate, particularly where the advocate belongs to another race and may have encountered language difficulties in explaining the charge to, and taking instructions from, the accused.

Appeal allowed. New trial ordered.

The appellant in person.

For the respondent:

HSS Few (Crown Counsel, Uganda)

The Attorney-General, Uganda

Charles Butler v R
[1959] 1 EA 627 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	13 July 1959
Case Number:	69/1959
Before:	Forbes V-P, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Seychelles–Bonnetard, C.J

[1] *Criminal law – Legal aid – Counsel assigned to represent appellant – Application by counsel for leave to withdraw as no ground for prosecuting appeal – Withdrawal granted – Whether appellant deprived of legal aid or prejudiced – Legal Aid (Criminal Proceedings) Ordinance 1957 (Sey.) – Eastern African Court of Appeal Rules, 1954, r. 39 (1).*

Editor's Summary

The appellant appealed to the Supreme Court of Seychelles from a conviction by a magistrate's court. Under s. 3 (1) of the Legal Aid (Criminal Proceedings) Ordinance, 1957, he was assigned counsel to conduct the appeal, but at the hearing counsel informed the court that he could see no ground on which to

support the appeal and asked for and obtained leave to withdraw. The appellant then conducted his own appeal which was dismissed and appealed again on the ground that the Supreme Court was wrong in not granting him an adjournment to allow him to take the necessary steps to be legally represented. No application for an adjournment or for further legal aid had been made by the appellant before the Supreme Court.

Held –

- (i) the withdrawal of the advocate did not prejudice the appellant who was afforded the opportunity of arguing his own case, which he would not have been permitted to do if the course indicated in *R. v. Reynolds*, 32 Cr. App. R. 39 had been adopted.
- (ii) the appellant had been given legal aid and his case had been considered by the advocate assigned.

Per curiam: “An advocate who has been assigned to represent an appellant and who has studied the case, is not under any duty, if he can find no ground for supporting the appeal, to waste the time of the court by advancing what he knows to be futile arguments”.

Appeal dismissed.

Cases referred to in judgment

- (1) *Samson v. R.*, [1958] E.A. 681 (C.A.).
- (2) *Galos Hired and Another v. R.*, [1944] 2 All E.R. 50; [1944] A.C. 149.
- (3) *R. v. Kingston*, 32 Cr. App. R. 183.]
- (4) *R. v. Reynolds*, 32 Cr. App. R. 39.

Judgment

The following judgment was read by direction of the court: The appellant was convicted by a magistrate at Victoria District, Seychelles, of the unlawful possession of property, contrary to s. 310 of the Seychelles Penal Code and upon separate counts for signing and issuing a receipt not duly stamped contrary to s. 34 (1) of the Stamp Ordinance (Cap. 70). His appeal to the Supreme Court of the Seychelles was dismissed.

It is unnecessary to relate the facts of the case as we are satisfied that the appeal to this court is entirely without merit and must be dismissed. Nevertheless there is one aspect of the case which requires brief mention. When the appeal before the Supreme Court was called Mr. Loizeau appeared for the appellant and (though it does not appear from the record) we understand that he was assigned by the learned Chief Justice under s. 3 (1) of the Legal Aid (Criminal Proceedings) Ordinance, 1957, to conduct the appeal. The following notes then appear in the record:

“Mr. Loizeau: I have gone through the record in this case and I can see no ground on which to prosecute this appeal. I have informed my client through the Superintendent of Prisons.

“Appellant: I wish to continue the prosecution of my appeal.

“Court: Grants leave to Mr. Loizeau to withdraw from the case.”

The appellant then conducted his own appeal which was dismissed. The appellant did not appear before this court but a written case was submitted on his behalf under r. 39 (1) of the Eastern African Court of Appeal Rules, 1954, in which and in the memorandum of appeal the episode above referred to was made the sole ground of appeal. The memorandum reads:

“The court was wrong in not granting the appellant an adjournment to allow the appellant to take the necessary steps to be legally represented.”

No application for an adjournment or for further legal aid was made by the appellant but, particularly having regard to the fact that he is a man of a low standard of education, we would not on this account have refused relief had we been of the opinion that the appellant had been deprived of legal assistance to which he was entitled. In the case of *Samson v. R.* (1), [1958] E.A. 681 (C.A.) this court, having regard to the decision of the Privy Council in *Galos Hired and Another v. R.* (2), [1944] A.C. 149, and to *R. v. Kingston* (3), 32 Cr. App. R. 183, quashed the conviction of and ordered the retrial of an appellant in circumstances which are clearly distinguishable from those of the present case. In *Samson's* case (1), the advocate appointed to defend the accused obtained leave to withdraw when the case was called on August 25, 1958, on the ground that he had been appointed only on August 21, 1958, and had not had time to see the accused. The learned Chief Justice refused to adjourn the trial of the accused as it would have involved a rather lengthy adjournment. In the judgment of this court is the following passage:

“Without examining the validity of the grounds upon which Mr. Valabhji asked leave to withdraw, we consider that the effect of this ruling was unwarrantably to deprive the appellant of the legal aid which had already

been assigned to him. If it was the case that no date was available until November (and it is noted that some amount of time was eventually made available on September 6) the court could at least have granted an immediate short adjournment to enable Mr. Valabhji to obtain instructions, or if that was for some reason not possible have offered the appellant, who would perhaps have had to remain in custody, the option either of an adjournment to November or of proceeding without legal assistance.”

That was a case of the trial of an accused person for which his advocate should have been given an opportunity to obtain instructions and at which, even without full instructions, an advocate might have been able to be of assistance to the accused. In an appeal the position is different. An advocate who has been assigned to represent an appellant and who has studied the case, is not under any duty, if he can find no ground for supporting the appeal, to waste the time of the court by advancing what he knows to be futile arguments. He can be of no assistance to the appellant in that way and his proper course of conduct is that indicated in *R. v. Reynolds* (4), 32 Cr. App. R. 39. There the Lord Chief Justice said (at pp. 39–40):

“I desire, however, to repeat what I have said before, that there is no duty on counsel merely because he is asked to represent an appellant against a conviction of murder to attack a summing-up which is quite impeccable and which has put the case fairly and properly to the jury. There is no obligation on counsel in such a case to endeavour to find some minute points which could have no bearing on the case. The court has always read the transcript of the case, and when it is perfectly clear that there is no ground for appeal, there is no duty on counsel other than to tell the court that he represents the appellant, and that if the court has discovered anything in the case on which they wish to hear him, he is prepared to do his best to assist the court.”

In the present case, had the learned Chief Justice seen anything in the record upon which the advocate might have assisted the court he would no doubt have said so instead of giving him leave to withdraw. In the circumstances the withdrawal did not prejudice the appellant who was afforded the opportunity of arguing his own case, which he would not have been permitted to do if the course indicated in *R. v. Reynolds* (4) had been adopted. The appellant had been given legal aid and his case had been considered by the advocate assigned; if the circumstances were such as to render further legal assistance useless the responsibility for those circumstances must surely rest with the appellant. We are quite unable to see that the appellant was deprived of legal aid and the contrary view would imply that he was entitled to be represented by one advocate after another until one was found who was prepared to argue in support of the appeal. Any such suggestion would be plainly wrong.

The appeal is dismissed.

Appeal dismissed.

The appellant did not appear and was not represented.

For the respondent:

Stephen Davies (Crown Counsel, Kenya)

The Attorney-General, Seychelles

Division: Court of Appeal at Nairobi
Date of judgment: 25 July 1959
Case Number: 27/1959
Before: Sir Kenneth O'Connor P, Forbes V-P and Windham JA
Sourced by: LawAfrica
Appeal from: H.M. Supreme Court of Kenya–MacDuff, J

[1] Easement – Right of way – Alleged breach of covenant for quiet enjoyment – Crown grant – Common lessor – No evidence that Crown caused or permitted alleged breach – Whether lessee has any cause of action against Crown – Crown Lands Ordinance (Cap. 155) s. 76 (b) (K.).

[2] Easement – Light – Alleged breach of covenant for quiet enjoyment – Crown grant – Common lessor – No evidence that Crown caused or permitted alleged breach – Whether lessee has any cause of action against Crown – Crown Lands Ordinance (Cap. 155) s. 76 (b) (K.).

Editor's Summary

The Crown had granted to the predecessors in title of the appellants a piece of land for a term of twenty-two years from December 1, 1930, subject to a special condition that the grantees would be entitled to a new lease for a further term of forty-nine years, if during the currency of the grant a stone or brick building was erected on the land. According to the plan attached to the grant, the land was shown to abut on one side on a road reserve which subsequently became Jeevanjee Street and on another side on a strip marked "Lane". On the further side of the lane was shown another plot of land. In 1950 the grantees constructed a building according to a plan approved by a representative of the Commissioner of Lands and it was clear from the approval given that he was aware that access from the lane was intended to the yard at the backs of the shops in the building and vice versa and that the corridor window on the first floor overlooking the lane was to be lighted from the lane. On June 7, 1950, the Crown executed a new grant in pursuance of the special condition. The lane was never formed or made up, nor was the further side of it physically bounded or fenced, but it was used for access from and to the appellants' premises by way of the back door opening upon it. In September, 1957, the Crown granted a long lease to a company of an adjoining plot which included some of the land marked on the original grant as "Lane" and a portion of it abutted on the back of the appellants' plot. The company built on its plot right up to the appellants' plot so as to close one end of the lane which connected with Jeevanjee Street and to block two-thirds of the corridor window in the appellants' building. The appellants sued the Crown in August, 1958, as at that time the company had commenced building on the lane and had blocked its access to Jeevanjee Street, but its building had not then reached a sufficient height to interfere with the light to the corridor window. At the time of the hearing, however, interference with the light had occurred. The back door of the appellants' building had not been blocked, access could still be had to the lane, but it was no longer open to Jeevanjee Street. There was access by the other end of the lane which entailed a detour of about two hundred yards as against one of a few yards previously. The appellants claimed that under the 1930 grant they had an express or implied right of way from the lane and a right to light, that the Crown had wrongfully, or alternatively, in breach of the covenant for quiet enjoyment implied by the 1930 grant, granted the adjoining plot to the company, and that the company in exercise of the indefeasible rights

conferred upon them, had commenced the

erection of buildings on part of the lane preventing access, and were intending to interfere with light to their premises. The trial judge dismissed the action and held that the original grantees and the appellants acquired no rights either of access or to light by virtue of the 1930 grant and that as at the date of the issue of the plaint, no cause of action existed in respect of interference with light. On appeal it was contended for the appellants that the trial judge had been wrong in having regard only to the 1930 grant and not also to the 1950 grant and the circumstances then obtaining, for the purpose of deciding whether the quasi-easements of access and light were matters of necessary and unavoidable intendment, that when the 1950 grant was made, there were continuous and apparent quasi-easements enjoyed by the appellants in respect of their plot over the lane, and that the trial judge had failed to give effect to the principle of “apparent accommodations”. The respondent denied that the appellants had any rights.

Held –

- (i) the appellants had not shown that they had a cause of action against the Crown for a breach of the covenant for quiet enjoyment and as their case rested upon that covenant it failed in limine.
- (ii) if the door at the back of the appellants’ premises opening on the lane had been, or had been threatened to be blocked, the court considered (subject to the question whether any remedy was in this case available against the Crown) that that was a sufficient interference with the reasonable enjoyment of the property granted to justify intervention by the court.
- (iii) as to light, the corridor window had been constructed at the date of the 1950 grant and therefore a quasi-easement of the light to that window from the lane then arose.
- (iv) an action can be brought for injury to an easement before damage is actually sustained.
- (v) if an action is brought by a lessee against a common lessor for breach of a covenant for quiet enjoyment because of something done by another lessee, it must be shown either that the other lessee’s action was lawful or that the lessor caused or permitted it and that was not done in the present case.

Per **Sir Kenneth O’Connor P**: “I do not accept that a Crown grant can only give rise to an easement of necessity or that where, (as here) it is made for value it must be construed strictly against the grantee”.

Appeal dismissed.

Cases referred to in judgment

- (1) *Feather v. R.*, 122 E.R. 1191.
- (2) *Sanderson v. Berwick on Tweed Corporation* (1884), 13 Q.B.D. 547.
- (3) *Malzy v. Eichholz*, [1916] 2 K.B. 308.
- (4) *Colls v. Home and Colonial Stores Ltd.*, [1904] A.C. 179.
- (5) *Harris v. James* (1876), 45 L.J.Q.B. 545.
- (6) *Robson v. The Palace Chambers, Westminster Co. Ltd.* (1897), 14 T.L.R. 56.
- (7) *Molyn’s case* (1598), 6 Co. Rep. 5.
- (8) *Whistler’s Case* (1613), 10 Co. Rep. 63.

- (9) *Glave v. Harding* (1858), 27 L.J. Ex. 286.
- (10) *Birmingham, Dudley and District Banking Co. v. Ross* (1888), 38 Ch. D. 295.
- (11) *Pearson v. Spencer*, 122 E.R. 285.
- (12) *Wheeldon v. Burrows* (1879), 12 Ch. D. 31.
- (13) *Bayley v. Great Western Railway Co.* (1884), 26 Ch. D. 434.
- (14) *Coutts v. Garham* (1829), Mood. & M. 396; 173 E.R. 1201.

- (15) *Rudd v. Bowles*, [1912] 2 Ch. 60.
- (16) *Hansford v. Jago*, [1921] 1 Ch. 322.
- (17) *Cory v. Davies*, [1923] 2 Ch. 95.
- (18) *Donnelly v. Adams*, [1905] I.R. 154.

July 25. The following judgments were read:

Judgment

Sir Kenneth O'Connor P: The appellants are merchants carrying on business in Nairobi. The respondent was sued as representing the Crown, under the Provisions of s. 12 of the Crown Proceedings Ordinance of Kenya (Ordinance No. 47 of 1956).

By an instrument dated December 23, 1930, (which I will call the 1930 Grant) the Governor and Commander-in-Chief of the Colony of Kenya granted to the predecessors in title of the appellants a piece of land in Nairobi described by a land reference number and delineated on a plan attached to the instrument and thereon marked by the plot number 940. This plot was shown to abut on its south-east side on Whitehouse Road, on its south-west side on a reserve (which was subsequently made up and became Jeevanjee Street) and on its north-west side on a strip marked "Lane". I will call this the lane, though it was never marked out on the land. On the further side of the lane is indicated a plot bounded on three sides by a broken line. The 1930 Grant (which calls itself a Grant, though it is in law a lease) purports to grant plot 940 to the persons named therein for a term of twenty-two years from December 1, 1929, at an annual rent of Shs. 102/-. It will be observed that the term of the Grant would in the normal course expire on November 30, 1951. The 1930 Grant was made subject to a special condition which reads as follows:

- "1. If at any time during the currency of this Grant a building constructed of stone or brick and roofed with iron or tiles is . . . erected on the land hereby granted the Grantees shall be entitled to a new lease for a further term of forty-nine years from the date of the expiration of this Grant provided that this Grant shall not have been determined in the meantime."

In 1950 the then grantees constructed a building on plot 940 according to building plans which were exhibited. The plan attached to the appeal record (which is undated and unsigned, but purports to be the approved plan of the existing building) shows eight shops on the ground floor fronting on Whitehouse Road and Jeevanjee Street, covering the whole plot; and, on the first floor, offices on each side of a passage or corridor which runs almost the whole length of the building and ends in a window overlooking the lane. This plan shows three windows overlooking the lane; but I understand that only one of these (the corridor window) was in fact constructed. Behind the shops which front on Jeevanjee Street is delineated a walled yard containing a "dust bin stand" and this yard is shown to have a door opening on the lane. A third floor is shown on the plan consisting of living accommodation. A building plan comprising a different lay-out of the ground floor and much the same lay-out for the first floor was marked "Approved" and was signed by an assistant land officer in 1948. This plan also shows the yard door opening into the lane (which is thereon marked "Sanitary Lane") and the corridor window. It seems clear that the representative of the Commissioner of Lands was aware that access from the lane was intended to the yard at the backs of the shops and vice versa for the purpose, among other purposes, of removing the contents of dust-bins, and was aware that the corridor window was to be lighted from the

lane, and that he approved these arrangements. That knowledge and approval must be imputed to the Commissioner of Lands.

A building was duly erected and, accordingly, the grantees qualified for the new lease mentioned in the special condition in the 1930 Grant. The lane was never formed or made up, neither was the further side of it physically bounded or fenced, but it was used for access from and to the appellants' premises by way of the back door opening upon it. It was used *inter alia* for removal of rubbish and for bringing in merchandise for the shops.

On June 7, 1950, the Acting Commissioner of Lands executed a new Grant (which I will call "the 1950 Grant"). This was endorsed on the 1930 Grant and read as follows:

"KNOW ALL MEN BY THESE PRESENTS that in pursuance of the Special Condition of the within written Grant the GOVERNOR AND COMMANDER-IN-CHIEF of the Colony of Kenya hereby GRANTS unto GANGA SINGH SON OF MALU and LAL SINGH SON OF MALU both of Nairobi in the said Colony ALL that piece of land comprised in the said Grant TO HOLD for the term of Seventy-one years from the First day of December One thousand nine hundred and twenty nine subject to the payment of the rent reserved by and to the Ordinance and conditions contained or referred to in the said Grant excepting the Special Conditions aforesaid."

In 1955 the plot was sold and transferred to new grantees who added a third storey to the building. In August, 1957, the plot was acquired by the appellants for Shs. 650,000/-.

In September, 1957, the Crown granted a ninety-nine year lease to a company known as Dominion Properties Ltd. of a plot, known as plot 4990, which, apparently, had been carved out of the land shown on the 1930 Grant plan as lying on the other side (i.e. north west side) of the lane, bounded (as previously mentioned) by a broken line. This plot (4990) fronts on Jeevanjee Street and includes some of the land marked on the 1930 Grant plan as "Lane", to a depth of 30 ft. back from Jeevanjee Street. This portion of plot 4990 abuts on the back of plot 940. Dominion Properties Ltd. have built on plot 4990 right up to plot 940 so as to close that end of the lane which connected with Jeevanjee Street and to block two thirds of the corridor window in the appellants' building.

The appellants filed a plaint against the Attorney-General in August, 1958. At that date Dominion Properties Ltd. had commenced building on the lane and had blocked its access to Jeevanjee Street, but their building had not yet reached a sufficient height to interfere with the light to the corridor window in the appellants' building. That light had, however, been interfered with by the time that the suit was heard. The back door of the appellant's premises (being more than thirty feet back from Jeevanjee Street) has not been blocked. Access can still be had to the lane, but the lane is no longer open to Jeevanjee Street. There is access by the other end of the lane which, apparently, runs into a car park. This entails going about two hundred yards round, instead of a few yards to Jeevanjee Street, and is clearly less convenient. There was no evidence whether access by that end of the lane is to be kept open until the expiry of the 1950 Grant or whether that may be blocked also.

The appellants pleaded that:

- (a) by the 1930 Grant they had an express grant of a right of way from the lane and a right to light;
- (b) alternatively, the 1930 Grant, of necessity or by implication of law, operated to confer upon the grantees a right of way from the lane and a right to light;

- (c) the Governor had wrongfully, or in the alternative in breach of the covenant for quiet enjoyment implied by the 1930 Grant, granted plot 4990 to Dominion Properties Ltd.; and
- (d) Dominion Properties Ltd., in exercise of the indefeasible rights conferred upon them, had commenced the erection of buildings on part of the lane preventing, access, and were intending to interfere with light to the appellants' premises;

and the appellants claimed damages, costs and other relief.

It will be observed that the pleadings were gravely defective and the evidence was insufficient to support the plaintiffs' claim. An express grant of a right of way and of a right to light was claimed under the 1930 Grant, which clearly, however, contained no such express grant. The implied grant pleaded also referred to the 1930 Grant and not to the 1950 Grant, notwithstanding that in 1930 there was no building on plot 940 in respect of whose windows a quasi-easement of light could be implied. Also, for some reason by no means apparent, the appellants only sued the Crown, and Dominion Properties Ltd. was not joined as a party. The appellant also called no evidence to show what was the nature and extent of the grant from the Crown to Dominion Properties Ltd. The appellants did not attempt to prove that the lane was recognised by the Commissioner of Lands as a sanitary lane under the Municipalities Ordinance. And, most important of all, the appellants failed to prove that the Commissioner of Lands had approved or permitted building by Dominion Properties Ltd. up to the boundary of plot 940 so as to block one end of the lane. One would have thought that the appellants would have joined Dominion Properties Ltd. as a party and would have obtained discovery of their lease and building plans so as to show (if that was so) that the building complained of had been approved by the Commissioner of Lands.

By an amendment of the plaint, the 1950 Grant was pleaded. Accordingly, we allowed Mr. Slade, who appeared for the appellants on the appeal (though they had been otherwise represented below) to argue that the 1950 Grant was the relevant grant and that the implications arose from it and from the circumstances obtaining in 1950, and not from the 1930 Grant and the circumstances then obtaining. Without this permission, he would have had no case. We permitted this to be argued for the first time on appeal on the ground that the 1950 Grant had (although belatedly) been pleaded and its effect was a matter of law.

The learned trial judge held that Crown grants were to be construed strictly against the grantee, and that under a Crown grant nothing passes except that which is expressed or which is a matter of necessary and unavoidable intendment in order to give effect to the plain and undoubted intention of the grant: *Feather v. R.* (1), 122 E.R. 1191. He held that there was in the 1930 Grant no express grant of any right of way or access to the plot demised; and that, in as much as the grantees had access to their plot from Whitehouse Road and also from the road reserve (which became Jeevanjee Street), there was no "necessary intendment" that they should also acquire rights over the lane. He also thought that the word "Lane" had been entered on the grant plan merely for the purpose of ascertaining the situation of the plot and did not imply a right of user as a lane. Accordingly, he found that the original grantees and their successors in title the present plaintiffs acquired no rights either of access or to light by virtue of the 1930 Grant and that the claim must fail on that ground. It will be observed that the learned judge was addressing his mind to the position under the 1930 Grant. He also held that the plaintiffs had failed to prove that the Crown had granted any indefeasible rights to Dominion Properties Ltd. and commented on the fact that there was no evidence

as to the nature of the grant to that company. He correctly held that all that had been admitted by the defendant on the pleadings was that the Crown had “granted adjoining land to Dominion Properties Ltd.” With regard to the claim for light, the learned judge held that the alienation of the land to Dominion Properties Ltd. did not constitute interference, and that as, at the date of the issue of the plaint, the building had not progressed sufficiently far to block the appellants’ window, no cause of action existed in respect of interference with light. In the circumstances, he found it unnecessary to consider what damages the plaintiffs had suffered; but said that, if it had been necessary, he would have accepted the evidence of the witness Flatt. The learned judge gave judgment for the defendant with costs.

Mr. Slade for the appellants conceded that the rule of construction enunciated in *Feather v. R.* (1) applied and that nothing in a Crown grant passed otherwise than by express words or necessary intendment; but he contended that the learned judge had been wrong in having regard only to the 1930 Grant and not also to the 1950 Grant and the circumstances then obtaining, for the purpose of deciding whether the quasi-easements of access and light were matters of necessary and unavoidable intendment. He said that the learned judge should have taken into account:

- (a) that in 1950 a building had already been erected on plot 940;
- (b) that the 1950 Grant was made in consideration of such building having been erected;
- (c) that the building then had a door opening on to the lane, and the lane was then being used for access thereinto;
- (d) that the building had a window on the first floor overlooking the lane; and
- (e) that the lane was officially recognised as a sanitary lane.

Mr. Slade argued that when the 1950 Grant was made, there were continuous and apparent quasi-easements enjoyed by the appellants in respect of plot 940 over the lane, and that the judge had failed to give effect to the principle of “apparent accommodations”. As to remedies, Mr. Slade contended that the judge should have considered the possibility of making a declaration of the appellants’ rights and that he was wrong in holding that the appellants had no cause of action in respect of interference with their right to light merely because such interference, which was clearly threatened, had not yet taken place when the plaint was filed.

Mr. Rumbold, for the respondent, argued that the appellants had no rights. He submitted the following propositions:

- (1) The only rights which can arise by implication in Crown grants are rights of necessity, and it was admitted that no such right was claimed in the present case;
- (2) the relevant date for ascertaining whether there were or were not continuous and apparent quasi-easements was the date of the original severance of possession, that is the date of the 1930 Grant: the 1950 Grant amounted only to an extension of the term which was related back to 1930;
- (3) as at 1930, there were no continuous and apparent quasi-easements whether of way or light and, therefore, no possibility of acquiring rights by implication;
- (4) whether 1930 or 1950 be the critical date no question of a right of way could arise, because there was no “formed lane” at either date;

- (5) the circumstances did not reveal any necessary and unavoidable intendment that such quasi-easements should be created, and that is necessary in a Crown grant.

Mr. Rumbold also argued that even if the appellants had rights, they had no remedies, and he submitted that it was necessary, before they could recover, for the appellants to show that the Crown had done something which caused their rights to be infringed, and that the Crown had authorised or participated in the infringements. He submitted that there was no evidence of this and that a mere admission on the pleadings that the Crown had granted adjoining land to Dominion Properties Ltd. did not necessarily involve an admission that the lane was included; if it was, there was no evidence that there was not a reservation of rights over it for plot 940 and, in any event, if plot 4990 was servient to the plaintiffs' rights, it would remain so servient, without express words in the Grant to Dominion Properties Ltd. He contended that the appellants, in order to succeed against the Crown, must show that the grant of plot 4990 necessarily involved interference with their rights, and this they had not shown. He also submitted regarding the claim in respect of light, that damages were not recoverable for anticipated injury; that an injunction could not have been granted against the Crown and that an injunction could only have been granted against Dominion Properties Ltd., but they had not been sued.

Mr. Slade in reply said that the appellants' case rested on the covenant for quiet enjoyment which is implied in every Crown Grant by s. 76 (b) of the Crown Lands Ordinance. He said that there had been a lawful interruption of the appellants' quiet enjoyment of their premises by Dominion Properties Ltd., a person claiming under the Crown.

The difficulty in Mr. Slade's way was that it had not been shown in the court below that the interruption of the quiet enjoyment of the appellants' premises was a lawful interruption; or that, if it was unlawful, the Crown had caused or permitted it. There was nothing to show that the Crown had authorised Dominion Properties Ltd. to interfere with light or access to or from the appellants' premises. The case of *Sanderson v. Berwick on Tweed* (2) (1884), 13 Q.B.D. 547 shows that a lessor is not liable under a covenant for quiet enjoyment for unlawful user by its lessee of land leased to him which causes damage to the premises of another lessee from the lessor, unless the lessor has caused or permitted the damage. So also a lessor is not liable to his lessee under a covenant for quiet enjoyment for damages for a nuisance caused by another of his lessees merely because the lessor knows of it and does not himself take any steps to prevent what is being done. There must be active participation on his part to make him responsible for the nuisance: *Malzy v. Eichholz* (3), [1916] 2 K.B. 308. That was a case of nuisance; but I think that the principle applies to infringement of a quasi-easement of light or access. Obstruction of light is regarded as a particular form of nuisance: *Colls v. Home and Colonial Stores Ltd.* (4), [1904] A.C. 179 per Lord Lindley at p. 208; and so, in certain circumstances, may be the blocking of a lane giving access to one's premises. Though the foundations of the rights of action for nuisance and for disturbance of an easement are distinct, similar principles as to the nature of the remedies for them apply to both: (Gale on Easements 11th Edn. p. 514). In *Harris v. James* (5) (1876), 45 L.J.Q.B. 545, Blackburn, J., (as he then was) said:

"I do not think when a person demises property he is to be taken to authorise all that the occupier may do. If land were let on an agricultural lease, and there were a requirement that the tenant should cultivate the soil as well as possible, and the tenant brought a large quantity of inodorous manure on the land and placed it so as to be a nuisance, I do not think

that his landlord would be liable, for he could not be said in any sense to have authorised the creation of this nuisance; nor would he in the case put by Mr. Crompton, of letting ground on a building lease where the lessee created a nuisance by obstructing light and air by means of the buildings he erected; there the lessor would not be liable, because he had not authorised his tenant to build so as to obstruct the light and air of others.”

This dictum is obiter; but it is entitled to very great respect.

Mr. Slade relied on *Robson v. The Palace Chambers, Westminster Co. Ltd.* (6) (1897), 14 T.L.R. 56; but the facts of that case were rather special and I do not think that it assists him.

The appellants, in the court below, chose not to join Dominion Properties Ltd. as a party and not to obtain and produce the grant from the Crown to that company or any evidence of its contents, and failed to adduce any evidence whether the Commissioner of Lands had approved building plans for plot 4990 including the erection of a building on part of the lane. In the result, there is nothing but a statement in an advocate’s letter (which is not evidence of the fact stated) to show that the grant to Dominion Properties Ltd. did not reserve rights of access from and to, and light from, the lane for the building on plot 940. And there is no evidence that the Crown permitted Dominion Properties Ltd. to build on a portion of the lane. A mere admission in the defence that the Governor granted adjoining land to Dominion Properties Ltd. coupled with a denial that he did so wrongfully or in breach of any covenant for quiet enjoyment is not enough. I think that, as the Lands Office approved the appellants’ building plans, it is highly probable that it also approved the building plans of the Crown’s other lessee Dominion Properties Ltd. and that the building was constructed in accordance with those plans. But there is no evidence of this and it is not the function of this court to make assumptions in favour of appellants who do not take steps to prove their case in the court below. I regret having to decide the case on this argument which may be devoid of merit; but I think it is clear that the appellants have not shown that they have a cause of action against the Crown for a breach of the covenant for quiet enjoyment. As their case rests upon that covenant, it must fail in limine.

In case, however, I am wrong on this, I had better give my opinion on the other points raised by the appeal.

Mr. Rumbold, at one stage, went so far as to contend that the only rights of way which could arise by implication in a Crown grant are rights of necessity. I do not accept that. Even where the doctrine that Crown grants are to be construed strictly in favour of the Crown and against the grantee applies, the rule is that

“nothing passes except that which is expressed, or which is a matter of necessary and unavoidable intendment in order to give effect to the plain and undoubted intention of the grant”:

Feather v. R. (1). An easement or quasi-easement of necessity arise where without it the grantee could obtain no benefit from the grant e.g. where the subject matter of the grant is a close completely surrounded by other land of the grantor. But that is not the same thing as

“a necessary and unavoidable intendment in order to give effect to the plain and undoubted intention of the grant.”

Such an intendment might arise even where, without such a construction, the grantee would take some benefit from the grant. But, be that as it may, there is a well-established and long standing exception to the rule that Crown grants are to be construed strictly against the grantee. Grants from the Crown

proceeding on valuable consideration from the grantee are to be construed strictly in favour of the grantee for the honour of the Sovereign. Halsbury's Laws of England (3rd Edn.) Vol. 7, p. 316; *Molyn's case* (7)(1598), 6 Co. Rep. 5; *Whistler's case* (8) (1613), 10 Co. Rep. 63, 65 (a); Chitty's Prerogatives of the Crown, p. 394; and *Feather v. R.* (1) at p. 1202. I should certainly hold that a grant, executed in consideration of an annual rent and in pursuance of an arrangement that a building be erected on the land by the grantee which would add greatly to the value of the Crown's reversion, was a grant made for valuable consideration moving from the grantee. *Glave v. Harding* (9) (1858), 27 L.J. Ex. 286 was a case of a Crown grant; but it was not suggested in that case that quasi-easements could not arise by implication. In truth, however, quasi-easements though implied rights, arise not from interpretation of the grant but from the relation of grantor and grantee to which the grant give rise. Cotton, L.J., said in *Birmingham, Dudley and District Banking Co. v. Ross* (10) (1888), 38 Ch. D. 295 at p. 308:

"For instance where one man grants to another a house, then *prima facie* he cannot interfere with that which he has granted; namely, the house, and the enjoyment of the house. That obligation arises, I repeat, not from any interpretation of the conveyance, but from the duty which is imposed on the grantor in consequence of the relation which he has taken upon himself towards the grantee."

And per Bowen, L.J., at p. 314:

"It is not an obligation which arises from interpretation of the deed as read by the light of circumstances outside. It is a duty that arises from the outside circumstances having regard to the relation of grantor and grantee which the deed creates . . . It is only by looking outside the deed that the implication of a duty arises".

In my opinion, where there is a Crown grant proceeding on valuable consideration from the grantee, quasi-easements can arise by implication from outside circumstances, having regard to the relation of grantor and grantee which the grant creates. I do not accept that a Crown grant can only give rise to an easement of necessity, or that where, (as here) it is made for value it must be construed strictly against the grantee.

I will now set out the principles which, in my opinion, are applicable to the present case and then endeavour to apply them to the facts. The following passage taken from Gale on Easements (12th Edn.) at p. 102 and p. 103 correctly summarises the law:

"The implication of the grant of an easement may arise upon the severance of a tenement by its owner, into two or more parts . . .

"On the grant by the owner of a tenement of part of that tenement, a grant will be implied of (1) all those continuous and apparent easements which are necessary to the reasonable enjoyment of the part granted, and which have been, and are at the time of the grant, used by the owner of the entirety, for the benefit of that part; and (2) of all those easements without which enjoyment of the part granted could not be had at all.

"The latter class are usually termed easements of necessity. The former class are usually termed 'quasi-easements'."

Erle, C.J., said in *Pearson v. Spencer* (11), 122 E.R. 285 at p. 287 speaking of an implied grant of a way:

"It falls under that class of implied grants where there is no necessity for the right claimed, but where the tenement is so constructed as that parts of it involve a necessary dependence, in order to its enjoyment in the state it is in when devised, upon the adjoining tenement."

Thesiger, L.J., said in *Wheeldon v. Burrows* (12) (1879), 12 Ch. D. 31 at p. 49:

“We have had a considerable number of cases cited to us, and out of them I think that two propositions may be stated as what I may call the general rules governing cases of this kind. The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean quasi easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted. The second proposition is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant.”

In *Bayley v. Great Western Railway Co.* (13) (1884), 26 Ch. D. 434 at p. 452, and p. 453, Bowen, L.J., said:

“The rule about rights of way which arise from implication is simply this, that on a severance of two properties, anything like a right of way, or any other easement which is used, and which is reasonably necessary for the reasonable and comfortable use of the part granted, is intended to be granted too. The principle is that the grantor is assumed to have intended that his grant shall be effectual.”

As has been said above, the implication of the grant of an easement may arise upon a severance of the tenement by the owner into two or more parts. In the present case, did the relevant severance take place in 1930 or was there a severance in 1950? Must the circumstances obtaining in 1930 only be considered, as Mr. Rumbold contends, or should one look at the circumstances obtaining when the 1950 Grant was made, as submitted by Mr. Slade? I am of opinion that the 1950 Grant, made in pursuance of an agreement to grant a “new lease” contained in the 1930 Grant, amounted to the grant of a new lease. In *Coutts v. Gorham* (14) (1829), Mood. & M. 396; 173 E.R. 1201; the defendant took a new lease of the premises during the currency of an existing lease. The second lease was held to be the material one, Tindal, C.J., saying:

“It is true that the defendant had an existing term at the time, and his interest in that term shall not be affected by Hall’s lease; but he surrendered that term by operation of law when he accepted a new lease from Hall.”

I think that a surrender of the 1930 Grant by operation of law took place immediately before the 1950 Grant was made. Even if not, then it would have to be taken that the new lease became operative when the old lease expired i.e. on November 30, 1951. In either case, there was a notional resumption of unity of ownership by the Crown, either by surrender by operation of law or on the expiration of the first term granted, sufficient to enable the Crown to grant the further term, and there was, at that instant, a new severance. The reversion, of course, was always in the Crown. Therefore, I think that the 1950 Grant and the circumstances obtaining on June 7, 1950, (the date of the 1950 Grant) or if I am wrong in this, on November 30, 1951, should be regarded. I think June 7, 1950, is the relevant date. Since the erection of the building was a condition of obtaining the 1950 Grant, it is to be assumed that it had been erected before that Grant was made. If so, it was in existence at either of the dates just mentioned. The surrounding circumstances, so far as material, were the same at both dates. I am glad to be able thus to avoid the conclusion, in a case such as the present where a lease has been renewed in consideration

of valuable building having been erected on the land, that the landlord need (for the purposes of the implication of quasi-easements) pay no regard to the circumstances applicable to the land with the building on it, but need only measure his obligations to the lessee by what those obligations would have been twenty years before when the subject of the demise was vacant land.

The next question to be considered is whether, at the date of the 1950 Grant, there were in existence, in favour of plot 940 and the building thereon, continuous and apparent quasi-easements over the lane “which were necessary to the reasonable enjoyment of the property granted” (*Wheeldon v. Burrows* (12)); or, in other words, whether the tenement was so constructed as that parts of it involved a necessary dependence, in order to its enjoyment in the state it was in when demised by the 1950 Grant, upon the adjoining tenement, i.e. the lane which was retained by the Crown: *Pearson v. Spencer* (11).

It will be convenient first to consider the right of access. As Gale points out at p. 127, a way is not in the ordinary sense a continuous easement. But when the cases are examined, it seems possible to understand the word “continuous” to refer, in this connection, not to continuity of enjoyment, but to “permanence in the adaption of the tenement”. In *Bayley v. Great Western Railway Co.* (13) there was a “hard-beaten” road which had been used as the only access to stables, a “made and visible way” and there was also a plan on the conveyance on which the road was indicated. Is it necessary, before a right of way can be implied, that there should be “a formed way”? I think not.

In *Rudd v. Bowles* (15), [1912] 2 Ch. 60, the defendant Bowles had granted to G. (the plaintiff’s mortgagor) separate leases of four plots of land fronting on a road and four houses which had been erected thereon by G. under a building agreement. The plan on each lease, which was made part of the description, showed a row of plots fronting on the road, including the houses demised, and a strip of land coloured brown running past the back of all the plots to E. road. The position of this strip on the plan suggested that it was intended to give access to the back of the plots, but there were no words on the plan expressing such intention. At the dates inserted by agreement in the leases, the houses had been erected and surrounded by fences with gates giving access to and from the brown strip. The strip, which belonged to Bowles, had never been fenced or marked off from the rest of his land and the occupiers in using it for access had not confined themselves exactly to the brown strip. The plaintiff claimed a right of way over the brown strip. It was held that the circumstances at the dates of the leases must be looked at and that an implied way over the brown strip was granted by the leases to the lessees and those claiming under them. The plaintiff was given a declaration and an injunction to restrain Bowles, who had commenced to build a house whose flank included the strip in the rear of two of the houses. Bowles’s building would have come right up to their back fences blocking their access to and from the strip so as to render it necessary to carry coal and garden refuse through the house to the front doors. Neville, J., said at p. 65:

“When the leases were originally executed the houses demised by them were nearly completed, but the fence at the back had not been erected. It must even then have been fairly obvious to any one inspecting the houses with the plan upon the leases before him, having regard to the laying out of the ground and the construction of the houses, that the back gardens were intended to open the four foot strip of land indicated on the plan; while at the date which the leases bear the matter was made clearer, the back fences having been erected, and the position of the gates defined.”

Rudd v. Bowles (15), whose facts bear a considerable resemblance to the facts of the present case, is interesting in that it shows that it is not essential that

a road or way should be made up or formed or fenced or exclusively used; provided that it can be sufficiently identified by user, by reference to a plan on the lease, and by reference to the building which is in existence at the date of the lease. Mr. Rumbold suggested that *Rudd v. Bowles* (15) was a case of doubtful authority. But *Rudd v. Bowles* (15) was considered, apparently with approval, in *Hansford v. Jago* (16), [1921] 1 Ch. 322 at p. 341 and p. 342; and was mentioned without disapproval in *Cory v. Davies* (17), [1923] 2 Ch. 95. I cannot find that it has ever been disapproved or doubted. *Hansford v. Jago* (16) also shows that it is not essential, in order that a quasi-easement of a right of way should arise by implication, that the way should be formed and made up; provided that there are other indicia to show that the land was intended to be used as a way. *Donnelly v. Adams* (18), [1905] I.R. 154 cited in *Hansford v. Jago* (16) seems to be an authority to the same effect. The report of *Donnelly v. Adams* (18) is not available here. It seems that it is sufficient if the way is used on behalf of the dominant tenement and if its location can be sufficiently identified on the ground and by reference to a lease plan.

In the present case, if the door at the back of the appellants' premises opening on the lane had been, or had been threatened to be, blocked (as in *Rudd v. Bowles* (15)) I should have considered (subject to the question whether any remedy is in this case available against the Crown) that that was a sufficient interference with the reasonable enjoyment of the property granted to justify intervention by the court. However, access to and from the door to the lane has not been blocked or threatened to be blocked. If I had taken another view as to the remedies available against the Crown, it would have been necessary to remit the case to the learned judge (who heard the evidence) for him to make a finding whether the blocking of one end of the lane was sufficient to interfere with the reasonable enjoyment of the property granted in the state it was in when demised. That is hardly a matter which an appellate court, which did not hear the witnesses, could decide. But the point does not now arise.

As to light, the corridor window had been constructed at the date of the 1950 Grant. I think that a quasi-easement of light to that window from the lane then arose. That window, overlooking a lane marked "Sanitary lane", had been shown on a building plan approved by a land officer. Mr. Flatt, a valuer, whose evidence the learned judge accepted, valued the diminution of light in the corridor at Shs. 250/- a month. If the judge had not accepted the evidence of that witness, I should have doubted whether the diminution of light in the corridor was sufficiently substantial to give rise to a cause of action: *Colls v. Home and Colonial Stores* (4). As the judge did accept the evidence of that witness, I should have felt bound by his estimate of damages, had there been a remedy against the Crown in this case.

On the question whether an action can be brought for injury to an easement before damage is actually sustained, I think it can. I think that the law is correctly stated in *Gale* (12th Edn.) at p. 502:

"Although, generally, some injury must have been sustained before redress can be had, yet, if the necessary consequence of what has already been done will be an injury to an easement, it is not a condition precedent to the exercise of the remedy that actual damage shall have accrued."

Rudd v. Bowles (15) was a case where the damage was merely threatened, though there the remedies granted were a declaration and an injunction. I should have felt difficulty in saying that the judge in the present case ought to have granted a declaration, when that remedy was not asked for. But, in any event, the right party must be sued, and the essential evidence must be adduced, that is to say either the person to be sued must be the person who has caused or is about to cause the injury to the easement, or if the action is brought

by a lessee against a common lessor for breach of a covenant for quiet enjoyment because of something done by another lessee, it must be shown either that the other lessee's action was lawful or that the lessor caused or permitted it. That was not done in the present case.

I would dismiss the appeal with costs.

Forbes V-P: I agree and have nothing to add.

Windham JA: I also agree.

Appeal dismissed.

For the appellants:

Humphrey Slade & HD Trivedi

Trivedi & Travadi, Nairobi

For the respondent:

JS Rumbold

The Attorney-General, Kenya

Bhailalbhai Rambhai Patel and others v Natubhai Dahyabhai Patel [1959] 1 EA 642 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	14 July 1959
Case Number:	4/1959
Before:	Sir Kenneth O'Connor P, Forbes V-P and Gould JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya–Rudd, J

[1] *Fraudulent transfer of business – Business transferred without publication of notice in Official Gazette – No agreement as to taking over existing liabilities – Transferees held liable in separate action – Action by transferees against transferor for reimbursement – Fraudulent Transfer of Businesses Ordinance (Cap. 286) s. 3 (K.) – Partnership Ordinance (Cap. 284) s. 11 (K.) – Indian Contract Act, 1872, s. 69 and s. 70.*

Editor's Summary

The appellants, together with the respondent, had been held liable by the Court of Appeal under the Fraudulent Transfer of Businesses Ordinance for the debts of a business solely owned by the respondent which he had subsequently transferred to a partnership consisting of himself and the appellants, and from

which partnership he resigned almost immediately after the transfer. The appellants, who had paid some of these debts, sued the respondent in the Supreme Court for the money paid towards these debts and for a declaration that they were entitled to recover the amount of any further debts which they might be obliged to pay. The suit was dismissed. On appeal the appellants argued that the trial judge was wrong in holding that the appellants were not entitled to reimbursement or compensation under either s. 69 or s. 70 of the Indian Contract Act, 1872; or if neither section applied, the appellants were nevertheless entitled to be indemnified by the respondent at common law. The respondent argued that the appellants were not entitled to indemnity and further submitted that the parties were in *pari delicto* in the matter and that the court should not assist the appellants.

Held –

- (i) the Fraudulent Transfer of Businesses Ordinance does not make a transfer of even an insolvent business without notice in accordance with the Ordinance illegal; its only effect is to provide that the transferee as well as the transferor shall be responsible for the liabilities of the business which has been transferred.

- (ii) the Fraudulent Transfer of Business Ordinance makes a transferee liable in his own right for the debts of the business, and if the transferee is compelled to pay, he pays in discharge of his own statutory liability; therefore, the payments made by the appellants were payments made for themselves and not “for” the respondent within the meaning of s. 70 of the Indian Contract Act.
- (iii) so far as the transferor and transferee of a business affected by the Fraudulent Transfer of Businesses Ordinance are concerned there is nothing in the Ordinance to suggest that there is any right of contribution as between themselves in respect of the debts of the business; in the absence of agreement, a transferee who is compelled to pay a debt must either be entitled to reimbursement of the whole amount paid, or not be entitled to recover anything from the transferor.
- (iv) apart from statute the appellants were not, as between themselves and the respondent, bound to pay the respondent’s debts, nor was the suit one for contribution.
- (v) section 69 of the Indian Contract Act applied in the instant case and the appellants were persons “interested” in the payment of money within the meaning of the section; they were, therefore, entitled to recover from the respondent any moneys paid by virtue of their liability for his debts under the Fraudulent Transfer of Businesses Ordinance.
- (vi) so far as the statutory liability of the appellants was concerned, on the facts before the court there was no agreement between the parties, and no consent or intention on the part of the appellants to take over the liabilities of the respondent; the appellants were therefore entitled under the common law to recover from the respondent.

Appeal allowed.

Cases referred to in judgment

- (1) *Cottingham v. Earl of Shrewsbury*, 3 Hare 627; 67 E.R. 530.
- (2) *Munni Bibi v. Tirloki Nath* (1931), 58 I.A. 158.
- (3) *Binda Kuar v. Bhonda Das* (1885), 7 All. 660.
- (4) *Raghavan v. Alamelu Ammal* (1908), 31 Mad. 35.
- (5) *Tangya Fala v. Trimbak Daga* (1916), 40 Bom. 646.
- (6) *Jagapatiraju v. Sadrusannama* (1916), 39 Mad. 795.
- (7) *Brooks Wharf v. Goodman Bros.*, [1936] 3 All E.R. 696.
- (8) *Pownal v. Ferrand* (1827), 6 B. & C. 439; 108 E.R. 513.
- (9) *Dawson v. Linton* (1822), 5 B. & Ald. 521; 106 E.R. 1281.
- (10) *Bank of England v. Vagliano Bros.*, [1891] A.C. 107.
- (11) *Irrawaddy Flotilla Co. v. Bugwandas* (1891), 18 I.A. 121.
- (12) *Jwaladutt R. Pillani v. Bansilal Motilal* (1929), 56 I.A. 174.
- (13) *Mohori Bibee v. Dhurmodas Ghose* (1902), 30 I.A. 114.

July 14. The following judgments were read by direction of the court:

Judgment

Forbes V-P: This is an appeal from a judgment and decree of the Supreme Court of Kenya, dated November 6, 1958, dismissing with costs a suit which had been brought by the appellants as plaintiffs against the respondent.

The following statement of the facts of the case is taken from the judgment of the learned trial judge:

“No witnesses were called in this case which I have to decide upon the admissions in the pleading including the facts found by the Court of Appeal in *Oriental General Stores v. B. R. Patel and Others* which is reported in [1957] E.A. 77 (C.A.) and certain admissions which were made before me.

“The admitted facts are that in September, 1955, the defendant bought a hardware business known as Bhasker & Co. from the first plaintiff and another person who had been in partnership with the first plaintiff, from which time until January 11, 1956, the defendant carried on the business as sole proprietor and incurred liabilities in the business. The defendant then, as the Court of Appeal found, disposed of the whole of the business of Bhasker & Co. to a partnership called Universal Steelwares consisting of himself and the three plaintiffs and almost immediately after that transfer the defendant resigned from the partnership. Subsequently, the defendant published a notice that Bhasker & Co. has ceased to do business, but the plaintiffs carried on a similar business to that which had been carried on by Bhasker & Co. in the premises which had been occupied by Bhasker & Co. and with virtually all the assets of Bhasker & Co., even including the office furniture. No notice under the Fraudulent Transfer of Businesses Ordinance was given of the transfer to the plaintiffs or to the partnership consisting of the plaintiffs and the defendant of the business of Bhasker & Co. There was no written agreement or instrument setting out the terms of the transfer of the business of Bhasker & Co. the partnership consisting of the defendant and the plaintiffs or of the terms upon which the defendant resigned from that partnership. The transfer appears to have been effected mainly by the transfer of all the assets of Bhasker & Co. including the right of occupation of the premises in which the business of Bhasker & Co. had been carried on and even the name board. A company called Oriental General Stores was one of the creditors of Bhasker & Co. before this business was transferred. Oriental General Stores sued the defendant and the plaintiffs for a debt owed by Bhasker & Co. The defendant admitted the debt but the plaintiffs denied liability on the ground that only certain assets of the business of Bhasker & Co. had been transferred to them and that there had been no transfer of the business of Bhasker & Co. within the meaning of the Fraudulent Transfer of Businesses Ordinance. This case went to appeal and the decision of the Court of Appeal is reported in [1957] E.A. 77 (C.A.). The present defendant having admitted the debt in the court of first instance was not a party to that appeal. The Court of Appeal held that there had been a transfer of the whole of the business of Bhasker & Co. within the meaning of the Fraudulent Transfer of Businesses Ordinance and that the present plaintiffs, as well as the present defendant, were liable to the Oriental General Stores for the debt which Bhasker & Co. had incurred to them, prior to the transfer of the business of Bhasker & Co.

.....

“Judgment was therefore entered:

“1. For Oriental General Stores against the present defendant and the present plaintiffs:

- (a) for Shs. 3,697/10c.
- (b) for interest thereon at 8 per cent. per annum from March 29, 1956, to September 17, 1956.
- (c) for the Oriental General Stores’ taxed costs of the suit up to September 17, 1956, being a date when the present defendant admitted liability and judgment was entered against him, and,
- (d) for interest on that decretal amount at 6 per cent. per annum from September 18, 1956, until payment.

“2. For Oriental General Stores against the present plaintiffs:

- (a) for the Oriental General Stores’ taxed costs of the suit from September 18, 1956 onward, and,
- (b) for the interest on the amount of such last mentioned costs at 6 per cent. per annum from September 17, 1956, until payment, Oriental General Stores to have its taxed costs of the appeal

.....

“Five other suits by creditors of the business of Bhasker & Co., before its transfer, have been instituted against the present plaintiffs and the defendant for recovery of debts due to the creditors by the business of Bhasker & Co. The defendant admits liability to the respective plaintiffs in the suits and admits that the debts sued for in these suits were debts incurred by him in the business of Bhasker & Co. before its transfer to the plaintiffs. The particulars of these five suits and the amounts involved in each are set out in the plaint and admitted by the defendant. The trial of these suits was delayed pending the result of the case brought by the Oriental General Stores which was treated as a test case and which went to the Court of Appeal.”

The appellants’ claim against the respondent was for:

- “(a) Shs. 5,000/- paid by plaintiffs to Oriental General Stores Ltd. under judgment of E.A.C.A. Civil Appeal No. 81/56;
- (b) A declaration that defendant is bound to pay to the plaintiffs and to indemnify them and each of them in respect of:
 - (i) R.M.C.C. No. 2769/56 claim by Oriental General Stores Limited for Shs. 1,476/51 with interest and costs.
 - (ii) R.M.C.C. No. 3673/56 claim by Electro Service and Equipment Limited for Shs. 905/00 with interest and costs.
 - (iii) R.M.C.C. No. 3049/56 claim by Nairobi Steelwares Limited for Shs. 1,980/23 with interest and costs.
 - (iv) S.C.C.C. No. 407/56 claim by Commercial Hardwares for Shs. 3,306/99 with interest and costs.
 - (v) S.C.C.C. No. 418/56 claim by C. C. Patel & Co. Ltd. for Shs. 4011/79 with interest and costs.
 - (vi) S.C.C.C. No. 332/56 claim by Oriental General Stores Ltd.
 - (a) for Shs. 3,697/10.
 - (b) for interest thereon at 8 per cent. p.a. from March 29, 1956 to September 17, 1956.
 - (c) for the said Oriental General Stores Limited’s taxed costs of the suit up to September 17, 1956.
 - (d) for interest on that decretal amount at 6 per cent. p.a. from September 18, 1956, until payment.
 - (e) for the said Oriental General Stores Limited’s taxed costs of the suit from September 18, 1956, onwards.
 - (f) for interest on the amount of such last mentioned costs at 6 per cent. p.a. from September 27, 1956, until payment. The said Oriental General Stores to have its taxed costs of the appeal of two counsel.

- (c) All sums hereafter paid to the said Oriental General Stores Limited under the said judgment and order of the said Court of Appeal in Civil Appeal No. 81/56.
- (d) All debts and liabilities (not included above) incurred by the defendant in the business of Bhasker & Co. from September, 1955 or thereabouts to the first quarter of 1956 or thereabouts which the defendant has or shall have failed to pay.
- (e) Costs.
- (f) Interest.”

We were informed by counsel for the appellants that the claim in item (c) above should be read as exclusive of costs paid by the present appellants to the appellant in Civil Appeal No. 81 of 1956 in respect of that appeal.

The appellants’ case was argued in the court below on the basis of an implied contract of indemnity, and the appellants relied principally on s. 69 and s. 70 of the Indian Contract Act, which applies in Kenya.

In the course of his judgment dismissing the appellants’ claim the learned trial judge said:

“I have already dealt with para. 3 (e) of the defence. The only comment I have to make on para. 5 of the plaint is that the Court of Appeal stated that the whole of the business of Bhasker & Co. had been transferred and the Court of Appeal pointed out that after the transfer, Universal Steelwares paid money into the banking account of Bhasker & Co. in reduction of its overdraft. Looking at these pleadings I find it quite impossible to say that they raise a necessary implication that the defendant was to indemnify the plaintiffs from liability under the Fraudulent Transfer of Businesses Ordinance. No doubt it was the intention of all parties to the transfer to attempt to avoid the provisions of that Ordinance, but that does not necessarily involve an indemnity by either of the parties in the event of that attempt being unsuccessful.

“I consider that the payments by Universal Steelwares of monies to the credit of Bhasker & Co.’s banking account in discharge of its overdraft may well be an indication that Universal Steelwares were prepared to discharge at least one of the liabilities of Bhasker & Co. In my opinion, the plaintiffs have not established a right to re-imbursement or indemnity by the defendant under s. 69 of the Indian Contract Act.

“I think that very similar considerations apply to the contention that the plaintiffs are entitled to compensation from the defendant under s. 70 of the Indian Contract Act. In my opinion, neither s. 69 nor s. 70 can be applied so as to import into a contract specific terms which were neither expressly agreed nor necessarily impliable from the circumstances in which the contract was made. It appears to me that both these sections were enacted to create a liability arising from a sort of quasi-contract and to avoid the necessity of applying a somewhat fictional contract where, in fact, the parties were not in an actual contractual relationship in the ordinary sense of the term. I do not think that these sections apply where the parties have been in direct contract with each other on the matter which gave rise to their obligation.”

Before us Mr. Nazareth for the appellants criticised certain aspects of the learned trial judge’s judgment, in particular, the fact that the learned judge had had regard to facts found by the Court of Appeal in Civil Appeal No. 81 of 1956 which were not admitted in the pleadings. The main questions on the appeal, however, are whether the learned judge was wrong in law in holding that the appellants were not entitled to reimbursement or compensation under

either s. 69 or s. 70 of the Indian Contract Act, and the further question, argued by Mr. Nazareth, whether, if neither s. 69 nor s. 70 applies, the appellants nevertheless are entitled to be indemnified by the respondent under the common law.

So far as the facts found in Civil Appeal No. 81 of 1956 are concerned, with respect, I agree that the learned trial judge should not have had regard to them, except such as were admitted in the pleadings or before him. The respondent and the appellants were co-defendants in the suit which was the subject of the appeal in Civil Appeal No. 81 of 1956, but as between co-defendants

“if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains”

(*Cottingham v. Earl of Shrewsbury* (1) 3 Hare 627, cited with approval in *Munni Bibi v. Tirloki Nath* (2) (1931), 58 I.A. 158 at p. 165). In the instant case the respondent was not even made a party to the appeal arising out of the case in which he was co-defendant, and there was certainly no decision in that appeal of any case between the respondent and the appellants. I do not think either party can be bound as between themselves by the facts found in that appeal. This aspect of the matter, however, does not seriously affect this appeal.

Before dealing with the main issues on the appeal it is convenient to dispose of a matter that was argued by Mr. Nowrojee for the respondent, both at the trial and on appeal. Mr. Nowrojee contended that the finding of the Court of Appeal in Civil Appeal No. 81 of 1956 that the transaction fell within the scope of the Fraudulent Transfer of Businesses Ordinance (Cap. 286) showed fraud; that even apart from that finding the facts were such that this court should draw the conclusion that the transaction between the parties was in fraud of creditors; that the parties were in *pari delicto* in the matter, and that the court should not assist a party coming to the court with unclean hands; and that therefore the appellants should not be entitled to recover from the defendant.

The learned trial judge dealt with this aspect of the matter as follows:

“With regard to this last submission, I consider that if the facts established are such that an implied contract of indemnity in favour of the plaintiffs should be implied, there is not sufficient evidence before me to defeat that implication on the ground that the transactions between the parties were fraudulent, illegal, or contrary to public policy. The Fraudulent Transfer of Businesses Ordinance does not make a transfer of even an insolvent business without notice in accordance with the Ordinance illegal. Its only effect is to provide that the transferee as well as the transferor shall be responsible for the liabilities of the business which has been transferred. If it had been expressly agreed between the parties that as between them the defendant alone would continue to be responsible for the previous liabilities of the business that was transferred or that the plaintiffs alone should assume responsibility for such liabilities I think that the express agreement would certainly be given effect by the courts and therefore in my view if the facts are such as to raise an implication to the same effect I see no reason why such implication should not be given effect by the court.”

I would respectfully agree with the view expressed by the learned trial judge.

I come now to the main issues in the case, and I think it is convenient to deal with them in the reverse order from that in which they were argued, that is to say, first s. 70 of the Contract Act, then s. 69, and finally the common law.

Section 70 of the Indian Contract Act, omitting the illustrations, reads as follows:

- “70. Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.”

It was conceded by Mr. Nowrojee, I think correctly, that the words “does anything” include the making of money payments—see Indian Contract and Specific Relief Acts by Pollock and Mulla (8th Edn.) (hereinafter referred to as Pollock and Mulla p. 429. Mr. Nowrojee, however, contended that the payment in the instant case was not made “for” the respondent, but was a payment made by the appellants on their own behalf, since it was one for which they were liable by virtue of the Fraudulent Transfer of Businesses Ordinance; and he referred to *Binda Kuar v. Bhonda Das* (3) (1885), 7 All. 660; *Raghavan v. Alamelu Ammal* (4) (1908), 31 Mad. 35; and *Tangya Fala v. Trimbak Daga* (5) (1916), 40 Bom. 646.

Sub-s. (1) of sub-s. 3 of the Fraudulent Transfer of Businesses Ordinance reads as follows:

- “3 (1) Whenever any business or any portion of any business is transferred, with or without the goodwill or any portion thereof, the transferee shall, notwithstanding any agreement to the contrary, become liable for all the liabilities incurred in the business by the transferor, unless due notice in accordance with this section shall have been given and shall have become complete at the date of the transfer.”

The cases referred to by Mr. Nowrojee indicate that a payment, which otherwise would fall within the terms of s. 70, will not do so if it is a payment made by the plaintiff for his own benefit and on his own account. None of the cases cited is directly in point, the nearest being *Raghavan v. Alamelu Ammal* (4). In that case the plaintiffs were assessed to tax by the income tax authorities in respect of income which they alleged had actually been received by another person. Payment of the tax was enforced against the plaintiffs, who sought to recover from the person said to have been in receipt of the income. In the course of the judgment the High Court of Madras said:

“Nor can the plaintiffs be said in our opinion to have made the payment for the defendants not intending to act gratuitously so as to bring the case within s. 70. It was from the plaintiffs themselves that payment was demanded and enforced by the income-tax authorities, and it cannot be said to have been made by the plaintiffs for the defendant merely because the income-tax authorities ought, it is suggested, to have demanded and exacted payment from the defendants instead of from the plaintiffs.”

Mr. Nazareth sought to distinguish the instant case by pointing out that under the Fraudulent Transfer of Businesses Ordinance the respondent as well as the appellants were liable. He argued that the primary liability was that of the respondent and that the appellants only paid because the respondent had not discharged his primary liability.

It is true that in *Raghavan's* case (4) the learned judges added

“We may further observe that there is no evidence in the case that the defendants had been in receipt of income which would have rendered them liable to assessment for the year in question”;

while in the instant case the respondent, as well as appellants, was liable for the debt in question. Nevertheless I think the principle in *Raghavan's* case

(4), with which I respectfully agree, applies here. It is true that the original debt in this case was that of the respondent, the appellants being made liable for the debt by virtue of the Fraudulent Transfer of Businesses Ordinance. In that sense the “primary” liability was the respondent’s. The Fraudulent Transfer of Businesses Ordinance does not, however, provide for any priority or contribution as between the transferor and transferee of a business, but merely states that the transferee “shall become liable” for the liabilities incurred in the business by the transferor. It makes the transferee liable in his own right for the debts of the business, and, as I see it, if the transferee is compelled to pay, he pays in discharge of his own statutory liability. Accordingly I think the payments made by the appellants were payments made for themselves and not “for” the respondent within the meaning of s. 70 of the Contract Act.

Section 69 of the Contract Act, omitting the illustration, is as follows:

“69. A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.”

The question at issue is the meaning to be attached to the word “interested” in the section.

In the first place Mr. Nowrojee argued that this was a suit for contribution and that s. 69 does not apply to such cases. As appears from Pollock and Mulla, p. 419, there have been conflicting decisions in India on the question, but the better authority appears to support Mr. Nowrojee’s contention that s. 69 does not apply to a suit for contribution. Mr. Nazareth, however, argues that this is a suit for reimbursement and not for contribution. He submitted that by virtue of s. 11 of the Partnership Ordinance (Cap. 284) the appellants were not jointly liable with the respondent for debts incurred before the respondent was taken into partnership by them; that the liability of the respondent was transferred to the appellants by virtue of the Fraudulent Transfer of Businesses Ordinance; that the respective liabilities of the respondent and the appellants arose at different times; that therefore such liabilities were several and not joint and several; and accordingly that no question of contribution between them arose.

I do not accept that joint liability cannot arise where the liability of the parties was incurred at different times, but I do not think it necessary to go into the question here. So far as the transferor and transferee of a business affected by the Fraudulent Transfer of Businesses Ordinance are concerned, I can see nothing in the Ordinance to suggest that there is any right of contribution as between themselves in respect of the debts of the business. It seems to me that, in the absence of agreement, a transferee who is compelled to pay a debt by virtue of the Ordinance must either be entitled to reimbursement of the whole amount paid, or not be entitled to recover anything from the transferor. The position in the instant case, however, is complicated by the fact that the respondent, at first sight, appears to figure in the transaction both as transferor and as transferee. Under s. 11 of the Partnership Ordinance

“Every partner in a firm is liable jointly with the other partners for all . . . obligations of the firm incurred while he is a partner . . .”

It might well have been pleaded and argued that the liability of the firm arising under the Fraudulent Transfer of Businesses Ordinance was an obligation incurred by the firm while the respondent was a partner; that as such he was jointly liable with the other partners in respect of that obligation; and that, as between the partners, there was only a right to require contribution towards the partnership liability. This, however, was not the way the transaction was pleaded in this case, neither is it the way in which it seems to have been regarded

by this court in Civil Appeal No. 81 of 1956. Paragraph (5) of the plaint alleges, *inter alia*, that
“the defendant transferred to the plaintiffs a large amount of the assets of the said business carried on by him under the said name and style of Bhasker & Co.”

This allegation is not denied in the defence, which, in para. (3) pleads:

- “(3) With regard to para. (5) of the plaint the defendant states:
- (a) in September, 1955, he acquired from the plaintiff No. 1 Bhailalbhai Rambhai Patel and his then partner Gurbachan Singh a business carried on under the style of Bhasker & Co., on plot No. 2742, Hasrat Road, Nairobi;
 - (b) on January 11, 1956, another business known as Universal Steelwares was commenced, with each of the plaintiffs and the defendant herein as partners; and it carried on the same kind of trade as had Bhasker & Co. and from the same place of business, viz. plot No. 2742, Hasrat Road, Nairobi;
 - (c) the aforesaid Bhasker & Co. ceased to carry on business as from January 12, 1956;
 - (d) the defendant retired from the aforesaid Universal Steelwares, as from January 15, 1956, which was thereafter carried on by the three plaintiffs herein;
 - (e) the several transactions mentioned in sub-paras. (a) to (d) above were declared by Her Majesty’s Court of Appeal for Eastern Africa in its Civil Appeal No. 81 of 1956, to constitute a transfer within the Fraudulent Transfer of Businesses Ordinance, . . .”

The facts pleaded in para. (3) of the defence were expressly admitted by Mr. Nazareth for the plaintiffs/appellants at p. 16 of the record. It is clear that the parties regarded the several steps in the matter (including the retirement of the respondent) as one transaction having the effect of an outright transfer from the respondent to the appellants. It seems that it was this transfer from the respondent to the appellants which has been held by this court to be a transfer of the business within the meaning of the Fraudulent Transfer of Businesses Ordinance, and which is now the subject of the present proceedings. Accordingly no question of contribution as between partners arises, and the case rests on the basis of the respective rights of transferor and transferee under the Fraudulent Transfer of Businesses Ordinance. As I have said, in the absence of agreement, this question seems to me to be one of reimbursement.

Mr. Nowrojee, however, relied on *Jagapatiraju v. Sadrusannama* (6) (1916), 39 Mad. 795, where, at p. 802, it is said:

“ ‘The person interested in the payment of money’ must, we think, be a person who is not himself bound to pay the whole or any portion of the amount.”

Mr. Nowrojee argued that in the instant case the appellants were themselves bound to pay the whole of the amount by virtue of the Fraudulent Transfer of Businesses Ordinance, and that therefore, on the authority of that case, they could not be persons “interested” in the payment of the money.

Jagapatiraju’s case (6) was a suit for contribution. And I think the passage cited should be read in the light of an earlier passage at p. 801 where it is said:

“It is clear therefore that the person who is interested in the payment mentioned in s. 69 must be a person who as between himself and the defendant was not bound to pay . . .”

I stress the words “as between himself and the defendant was not bound to pay . . .”. The example given in *Jagapatiraju’s* case (6) on which that dictum is based makes it clear that the court contemplated a case where a plaintiff had been obliged by law to pay, but the circumstances were such as to imply a covenant of indemnity on the part of the defendant.

As I have already remarked, the original debt here is that of the respondent, the appellants’ liability being a liability imposed by statute “for all the liabilities incurred in the business of the transferor”. Mr. Nazareth referred to the English case of *Brooks Wharf v. Goodman Bros.* (7), [1936] 3 All E.R. 696. The headnote in that case reads as follows:

“By an agreement between the plaintiffs, bonded warehousemen, and the defendants it was agreed that the defendants should pay to the plaintiffs certain wharf charges and that the plaintiffs should warehouse certain goods which the defendants were importing, undertaking in respect of them the usual obligations of bonded warehousemen. The goods were duly imported, customs duties becoming due. The goods were stolen before the duty had been paid. The plaintiffs paid the duty, pleading obligation to H.M. Customs and alternatively their obligations as bonded warehousemen, and sued for the sum paid. The defendants contended that the duty was paid as a personal liability of the plaintiffs as bonded warehousemen and counterclaimed for the value of the goods stolen, alleging negligence:

“**Held** –

- (i) there was no evidence that the theft of the goods was due to negligence of the plaintiffs who had taken such precautions as reasonable and prudent care demanded.
- “(ii) duty becomes due on importation, though it is not payable whilst the goods remain warehoused, and it only ceases to be due on being actually paid when the goods are taken out for home use or if they are entered for exportation or ships’ stores.
- “(iii) the defendants therefore, as the importers, were and remained liable for duty.
- “(iv) the plaintiffs were entitled to recover the amount paid in respect of duty as money paid to the use of the defendants.”

At p. 706 Lord Wright, M.R., said:

“They make their claim as for money paid to the defendants’ use on the principle stated in Leake on Contracts. The passage in question is quoted in the Exchequer Chamber by Cockburn, C.J., in *Moule v. Garrett*, at p. 104, and is in these terms:

“Where the plaintiff has been compelled by law to pay, or, being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability; under such circumstances the defendant is held indebted to the plaintiff in the amount.

“This passage remains, with a slight verbal alteration, in the eighth edition of Leake on Contracts, at p. 46. The principle has been applied in a great variety of circumstances. Its application does not depend on privity of contract . . . The essence of the rule is that there is a liability for the same debt resting on the plaintiff and the defendant and the plaintiff has been legally compelled to pay, but the defendant gets the benefit of the payment, because his debt is discharged either entirely or pro tanto, whereas the defendant is primarily liable to pay as between himself and the plaintiff. The case is analogous to that of a payment by a surety which has the effect

of discharging the principal's debt and which, therefore, gives a right of indemnity against the principal."

Lord Wright then referred to the cases of *Pownal v. Ferrand* (8) (1827), 6 B. & C. 439, and *Dawson v. Linton* (9) (1822), 5 B. & Ald. 521, and continued:

"These statements of the principle do not put the obligation on any ground of implied contract or of constructive or notional contract. The obligation is imposed by the court simply under the circumstances of the case and on what the court decides is just and reasonable, having regard to the relationship of the parties. It is a debt or obligation constituted by the act of the law, apart from any consent or intention of the parties or any privity of contract."

I think that is precisely the position here. The appellants have pleaded that the respondent transferred to the appellants a large amount of the assets of the business which had been carried on by him. This allegation as I have already remarked, was not denied in the defence. It is nowhere alleged that the liabilities of the respondent were, apart from the effect of the Fraudulent Transfer of Businesses Ordinance, to be taken over by the appellants in addition to the assets of the business, and no such inference can be drawn from the mere transfer of "a large amount of the assets". Apart from statute, therefore, the liability in respect of the debts of the respondent's business rested on the respondent. The appellants have been legally compelled to pay, but as between the appellants and the respondent the debt is primarily that of the respondent. With respect, I do not agree with the learned judge that

"the parties have been in direct contract with each other on the matter which gave rise to their obligation."

So far as the statutory liability of the appellants is concerned, on the facts before the court there was no agreement between the parties, and no consent or intention on the part of the appellants to take over the liabilities of the respondent. Accordingly I agree with Mr. Nazareth's submission that under the common law in England the appellants would be entitled to recover from the respondent. And I am inclined to the view that the case does also fall within s. 69 of the Contract Act. Apart from statute the appellants were not, as between themselves and the respondent, bound to pay the respondent's debts, nor is the suit one for contribution. Accordingly I do not think the dictum in *Jagapatiraju's* case (6) on which Mr. Nowrojee relied has any application. Section 69 of the Contract Act is derived from the principles of the common law, though it goes further than the common law. While the learned authors of Pollock and Mulla state at p. 412 that s. 69 lays down a wider rule than appears to be supported by English authority, they do not indicate that s. 69 may in some aspects be more restricted than English law. It is true that it is the words of the section that must be construed, and that the words in the section must be construed according to their ordinary meaning; but where, as here, the meaning is doubtful, I think it is permissible to refer to the common law to ascertain the construction to be adopted (*Bank of England v. Vagliano Bros.* (10), [1891] A.C. 107 at p. 145). On this basis I would hold that s. 69 of the Contract Act does apply in the instant case, that the appellants are persons "interested" in the payment of money within the meaning of the section, and that they are therefore entitled to recover from the respondent any moneys paid by virtue of their liability for his debts under the Fraudulent Transfer of Businesses Ordinance.

If I am wrong as to this I would hold that the appellants are still entitled to recover under the common law. The common law, of course, applies in Kenya, subject to statutory provision, by virtue of s. 4 of the Kenya Colony

Order-in-Council, 1921. And it has been held by the Privy Council that the Contract Act

“does not profess to be a complete code dealing with the law relating to contracts. It purports to do no more than to define and amend certain parts of that law . . . there is nothing to show that the legislature intended to deal exhaustively with any particular chapter or sub-division of the law relating to contracts.”

(*Irrawaddy Flotilla Co. v. Bugwandas* (11) (1891), 18 I.A. 121 at p. 129; *Jwaladutt R. Pillani v. Bansilal Motilal* (12) (1929), 56 I.A. 174 at p. 178). It is true that in *Mohori Bibee v. Dhurmodas Ghose* (13) (1902), 30 I.A. 114 at p. 125 the Privy Council also said that the Contract Act “so far as it goes, is exhaustive and imperative”. In that case, however, the Privy Council was considering a provision of the Act relating to the competency of an infant to contract, which, as their Lordships stated,

“does provide in clear language that an infant is not a person competent to bind himself by a contract of this description.”

There is no such clear language in the instant case negating any right that would arise under the common law.

In the result, therefore, I would allow the appeal with costs in this court and the Supreme Court and order:

- (1) that judgment be entered for the appellants for Shs. 5,000/- and interest thereon from the date of the suit;
- (2) that it be declared that the respondent is bound to indemnify the appellants and each of them in respect of the claims set out in the plaint, and to repay to the appellants any sum which may be paid out by the appellants in respect of such claims.

The declaration in respect of

“sums hereafter paid to the said Oriental General Stores Limited under the said judgment and order of the said Court of Appeal in Civil Appeal No. 81 of 1956”

shall be exclusive of costs paid by the present appellants in respect of that appeal. I would certify that this appeal was a proper one for the employment of two counsel.

Sir Kenneth O'Connor P: I agree, with some hesitation, with the conclusion reached by the learned Vice-President. He has pointed out that it might well have been pleaded and argued that the transfer of a large part of the assets of Bhasker & Co. to United Steelwares, in the circumstances of this case and before the retirement of the respondent, constituted a transfer within the Fraudulent Transfer of Business Ordinance so as to make all the partners in United Steelwares (including the respondent) jointly liable for the liabilities incurred by the business of Bhasker & Co.: See Fraudulent Transfer of Businesses Ordinance s. 3; Partnership Ordinance s. 11. Had this position been established, either on the pleadings or by evidence, I should have held that this was a case of joint liability of all four partners in United Steelwares and therefore of contribution, not of indemnity; and that s. 69 of the Indian Contract Act and the rule of the common law mentioned in *Brooks Wharf v. Goodman Bros.* (7) did not apply. I agree that s. 70 of the Indian Contract Act does not apply.

However, as the case has been pleaded, and as neither side saw fit to call any evidence to establish what the transaction between the parties really was,

I concur, with some hesitation, in treating this as a case of primary and secondary liability giving rise to a right of indemnity. The appeal will be allowed with costs. There will be an order and a certificate as proposed by the learned Vice-President.

Gould JA: I agree with the reasoning and conclusions of the learned Vice-President. I would add only that in my view, on the pleadings, it is unnecessary to consider the legal position which obtained during the three days in which the respondent was a partner in United Steelwares; that is a question to which I should like to give further consideration if and when the necessity arises.

Appeal allowed.

For the appellants:

JM Nazareth QC and A Jamidar

Arvind Jamidar, Nairobi

For the respondent:

EP Nowrojee

EP Nowrojee, Nairobi

Ali Ahmed Saleh Amgara v R
[1959] 1 EA 654 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	7 July 1959
Case Number:	12/1959
Before:	Forbes V-P, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court, Kenya—Sir Ronald Sinclair, C.J and Rudd, J

[1] Customs – Importing restricted goods without a licence – Onus of proof placed on accused by statute – Quantum of proof required to discharge such onus – Control of Imports Order, 1941, s. 2 (K.) – East African Customs Management Act, 1952, s. 147 (a) (ii) and s. 167 (b) – Indian Evidence Act, 1872, s. 105 – Evidence Act (Amendment) Ordinance (Cap. 12), s. 3 (K.).

Editor's Summary

The appellant was convicted by a magistrate at Mombasa on two counts of importing restricted goods, namely gold, contrary to paragraph (a) (ii) of s. 147 of the East African Customs Management Act, 1952. Section 2 of the Control of Imports Order, 1941, prohibits the importation of goods except by licence

granted by the Imports Controller subject to various exceptions, the material one in this case being that no licence was required in respect of goods in transit. The appellant who was on his way by sea from Djibuti to Dar-es-Salaam had no licence to import gold and the point at issue was whether the gold had been imported in transit. The first count concerned fifty bars of gold found on the person of the appellant whilst in transit at Mombasa and the second count concerned two hundred bars of gold found in the appellant's cabin on board the ship "Jean Laborde". The appellant had no entry permit for Tanganyika, but held an exchange voucher for an air passage from Dar-es-Salaam to Mombasa. The Supreme Court having dismissed a first appeal from the conviction the appellant brought a further appeal against his conviction on the second count only. The main grounds argued were that on the evidence the magistrate's findings were unreasonable and could not be supported, and that on the first appeal the Supreme Court "had not treated the evidence as a whole to that fresh and exhaustive scrutiny which the appellant was entitled to expect". Another point argued at the hearing of the appeal which was not raised in the

memorandum of appeal, was that the Supreme Court had misdirected itself as to the standard of proof and should have directed itself that it was sufficient for the appellant to raise a reasonable doubt as to whether or not the goods were in transit.

Held –

- (i) the fact that the judgment of a first appellate court fails to refer in terms to every item of evidence is no ground for concluding that a proper evaluation of the evidence has not been made.
- (ii) the first appellate court had itself considered and weighed the evidence and had not simply given formal approval to the findings of the magistrate; on a second appeal the court had no jurisdiction to intervene unless some material misdirection or non-direction in the judgment of the courts below could be shewn.
- (iii) where there is specific provision in a statute placing the burden of proof regarding a particular matter on the accused, there is no need for the prosecution to rely upon s. 105 of the Indian Evidence Act; the application of that section must be excluded and the principles of English law, which are not materially different from s. 105 apply.
- (iv) where the burden of proof rests on the accused by statute or common law, the burden may be discharged by evidence satisfying the court of the probability of that which the accused is called upon to establish; it still remains, however, for the court to be satisfied beyond reasonable doubt as to the guilt of the accused on the whole of the evidence and this, in substance, is all that is enacted by the second proviso to s. 105 of the Indian Evidence Act.
- (v) the trial magistrate was satisfied affirmatively that the appellant was guilty as charged; he rejected the appellant's own evidence as unworthy of belief and it was clear that it had raised no doubt at all in his mind.

Appeal dismissed.

Cases referred to in judgment

- (1) *Pandya v. R.*, [1957] E.A. 336 (C.A.).
- (2) *Ruwala v. R.*, [1957] E.A. 570 (C.A.).
- (3) *Mandan Devraj v. R.* (1955), 22 E.A.C.A. 488.
- (4) *R. v. Carr-Briant*, [1943] K.B. 607; [1943] 2 All E.R. 165.

Judgment

Forbes V-P: read the following judgment of the court: This is a second appeal from a conviction by the Senior Resident Magistrate, Mombasa.

The appellant was charged and convicted on two counts of importing restricted goods contrary to a condition regulating the importation of such goods, contrary to paragraph (a) (ii) of s. 147 of the East African Customs Management Act, 1952 (hereinafter referred to as the Customs Act). The goods in question were bars of gold, the importation of which, at the time of the alleged offences, was restricted by virtue of the Control of Imports Order, 1941. Section 2 of that Order prohibited the importation of

goods except in accordance with a licence granted by the Imports Controller subject to various exceptions, the material one in this case being that no licence was required in respect of goods imported in transit. No licence for the importation of gold was held by the appellant, and the point at issue was whether the gold had been imported in transit. The first of the two counts concerned fifty bars of gold found on the person of the appellant, contained in a body belt, when the appellant was apprehended within the customs area at Mombasa. The second count concerned

two hundred bars of gold found in the appellant's cabin on board the ship "Jean Laborde" packed in four similar body belts. It was accepted that the appellant himself was travelling by the "Jean Laborde" from Djibuti to Dar-es-Salaam. He had no entry permit for Tanganyika, however, and held an exchange voucher for an air passage from Dar-es-Salaam to Mombasa. This appeal concerns the count relating to the two hundred bars of gold only, no appeal having been preferred to us in respect of the conviction on the first count.

Four grounds of appeal are set out in the memorandum of appeal, and all relate to matters of fact, though two of them allege that there was no evidence to support certain of the learned magistrate's findings of fact and, as such, raise questions of law. Counsel for the appellant, arguing in support of these grounds, contended that the case fell within the principles of the decision of this court in *Pandya v. R.* (1), [1957] E.A. 336 (C.A.). He reviewed the evidence in the case in detail and argued, first, that on that evidence the learned magistrate's findings were unreasonable and could not be supported, and, secondly, that on first appeal the Supreme Court

"had not treated the evidence as a whole to that fresh and exhaustive scrutiny which the appellant was entitled to expect"

—*Pandya v. R.* (1).

We do not think it necessary to go into the facts of the case in detail. It is sufficient to say that we are satisfied that there was evidence to support the learned magistrate's conclusions. We are also satisfied that there is no justification in the criticism directed at the first appellate court. In *Ruwala v. R.* (2), [1957] E.A. 570 (C.A.) at p. 573 this court, in considering the decision in *Pandya's* case (1), said:

"The case made before this court depended on two propositions, first, that on first appeal the appellant is 'entitled, as well on questions of fact as on questions of law, to demand the decision' of the appellate court, which must itself weigh conflicting evidence and draw its own conclusions, bearing in mind that it has neither seen nor heard the witnesses. We do not take this to mean that the appellate court should write a judgment in a form appropriate to a court of first instance. It is sufficient on questions of fact if the appellate court, having itself considered and evaluated the evidence, and having tested the conclusions of the court of first instance drawn from the demeanour of witnesses against the whole of their evidence, is satisfied that there was evidence upon which the court of first instance could properly and reasonably find as it did. If the conclusions of the appellate court are merely expressed in terms such as these, that, in itself, is no indication that the appellate court has failed to make a critical evaluation of the evidence. In *Pandya's* case the second proposition was that the first appellate court had failed to appreciate its duty in this respect, and had in consequence given a merely formal approval of the learned magistrate's findings . . . It is, first, to be observed that this court intervened, not because the first appellate court had made an incorrect decision on the facts, but because it failed to consider and weigh the evidence. Next, it must be noted that the facts were such that, if the trial court had understood them correctly, it could not possibly have convicted, and, if the High Court had understood them correctly, and made its own findings, it must have reversed the conviction. Thirdly, it is important that the High Court's failure to evaluate the evidence was clearly apparent from its own judgment."

In the instant case it is perfectly clear from the judgment that the Supreme Court has itself considered and evaluated the facts and reached the conclusion that the learned magistrate's finding "was competent upon the evidence". The

salient facts are set out in the judgment of the Supreme Court. The fact that every item of evidence is not referred to in terms is no ground to conclude that a proper evaluation of the evidence has not been made.

Where the first appellate court has considered and weighed the evidence, and in the absence of any material misdirection or non-direction, it is not open to this court to intervene on second appeal on the ground that the first appellate court has reached an incorrect decision on the facts. We are far from saying that we think the decision in the instant case was an incorrect one, but since we are satisfied that the first appellate court did not merely give formal approval to the learned magistrate's findings, but did itself consider and evaluate the evidence, we consider that we have no jurisdiction to intervene unless there is some material misdirection or non-direction in the judgments of the courts below.

Counsel for the appellant has, in fact, complained of two alleged misdirections in the judgment of the Supreme Court. The first concerns a question of fact, counsel alleging that an important fact was mis-stated by the Supreme Court, namely, that it was not correct that the appellant

“was actually arrested when trying to bring one belt containing fifty bars of gold through the customs barrier”.

The relevant evidence is that of Preventive Customs Man No. 160 Musebe who said in examination-in-chief:

“He [i.e. the appellant] went towards gate 12. A car passed. He tried to stop it but it did not stop. The car was going from shed 7 to shed 9. I stopped accused at the gate. I asked what he had. He replied ‘Mirfishi’ i.e. nothing. I took him to Mr. Brennan . . .”

And in cross-examination:

“If accused had not wanted to come with me I would have arrested him. I arrested him. He was about half a mile from gate 12 when I arrested him. I stopped him in the road past the shrubs.”

Counsel for the appellant argued that if the appellant was stopped half a mile from gate 12 he could not be said to have been arrested when trying to go through the customs barrier. Assuming that “stopped” and “arrested” have been used by the witness in the same sense, the two statements themselves are so utterly inconsistent as to give rise to a suspicion that the evidence has been wrongly recorded. This is confirmed by a glance at the plan of the dock area (exhibit 8) from which it is apparent that the stopping of the appellant by Musebe could not have taken place half a mile from gate 12. The ship “Jean Laborde” itself was lying about half a mile from gate 12, while shed 7 (which the appellant must have passed in view of Musebe's evidence that he tried to stop a car going from shed 7 to shed 9) is only some 350 yards from gate 12. In these circumstances we cannot say that the Supreme Court was wrong in accepting as correct, as it clearly did, Musebe's statement that he stopped the appellant “at the gate”. It may be noted that the point was not taken either in argument addressed to the learned magistrate or on first appeal.

The second alleged misdirection complained of concerns the onus of proof. The point was not raised in the memorandum of appeal, but we nevertheless heard argument on the matter. Under s. 167 (b) of the Customs Act, in any proceedings under the Act the onus of proving, *inter alia*, the lawful importation of any goods is on the person prosecuted. In respect to this the learned judges of the Supreme Court directed themselves as follows:

“Under s. 167 (b) of the Act the onus of proving that this gold was imported lawfully—that is to say, that this unlicensed gold was in transit and that there was no intention to dispose of it in Kenya—lay upon the appellant. We recognise that this onus is not as heavy as the onus which lies upon the Crown in an ordinary criminal case, but nevertheless we consider that on the facts which we have stated there was evidence upon which the lower court was entitled to find that this onus had not been discharged.”

Council for the appellant submitted that this direction was wrong and that the learned judges should have directed themselves that it was sufficient for the appellant to raise a reasonable doubt as to whether or not the goods were in transit. He referred to s. 105 of the Indian Evidence Act as amended by s. 3 of the Evidence Act (Amendment) Ordinance (Cap. 12), and *Mandan Devraj v. R.* (3) (1955), 22 E.A.C.A. 488, and argued that the onus on an accused person under s. 105 of the Evidence Act and under s. 167 of the Customs Act is no more than to raise a reasonable doubt, and that if the learned judges had properly directed themselves they must have held that there was a reasonable doubt in this case.

Where, as in the instant case, there is a specific provision in a statute placing the burden of proof regarding a particular matter on the person accused, there is no need for the prosecution to rely upon s. 105 of the Indian Evidence Act and we think that the application of that section must be excluded, even though it would otherwise have been applicable, and that the principles of English law would apply. Nevertheless, even if it might be thought that by analogy the degree of the burden on the accused should be drawn from s. 105, we do not think that there is any material difference between s. 105 of the Evidence Act and the English law on the point. The position under English law is stated in Phipson on Evidence (9th Edn.) at p. 38 as follows:

“When, however, the burden of an issue is upon the accused, he is not, in general, called on to prove it beyond a reasonable doubt or in default to incur a verdict of guilty; it is sufficient if he succeed in proving a *prima facie* case, for then the burden is shifted to the prosecution, which has still to discharge its original onus that never shifts, i.e. that of establishing, on the whole case, guilt beyond a reasonable doubt.”

We accept that statement of the law. In *R. v. Carr-Briant* (4), [1943] K.B. 607, which is one of the cases cited in Phipson in support of the proposition just stated (and is also cited in the commentary on s. 105 of the Indian Evidence Act in Sarkar on Evidence (4th Edn.) at p. 808) the Court of Criminal Appeal said, at p. 612:

“In our judgment, in any case where, either by statute or at common law, some matter is presumed against an accused person ‘unless the contrary is proved’, the jury should be directed that it is for them to decide whether the contrary is proved, that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt, and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish.”

We would respectfully agree with this view, and on this basis, we do not think that the learned judges’ direction to themselves as to the matter which the appellant is required by s. 167 of the Customs Act to establish can be said to be wrong. It still, of course, remains for the court to be satisfied beyond reasonable doubt as to the guilt of the accused on the whole of the evidence and this, in substance, is all that is enacted by the second proviso to s. 105 of

the Indian Evidence Act. As to this it is clear that the learned magistrate was satisfied affirmatively that the appellant was guilty as charged. He rejected the appellant's own evidence as unworthy of belief and it is clear that it raised no doubt at all in his mind. Upon consideration of the other evidence in the case, which he describes as "external evidence", he states:

"I am satisfied that the accused intended to smuggle this gold into Kenya . . . I have no hesitation in finding him guilty on each count as charged."

The learned judges of the Supreme Court noted this in their judgment. After the passage relating to onus of proof which is set out above, they proceed:

"The lower court in fact found that the appellant intended to smuggle this gold into Kenya. In our opinion this finding was competent upon the evidence . . ."

The conviction of the appellant therefore rests, not so much upon any question as to the onus of proof as upon a finding that, upon the evidence, it was established affirmatively that he was guilty of the offence charged. We have already indicated our view that there was evidence upon which this conclusion could be reached.

We accordingly dismiss the appeal.

Appeal dismissed.

For the appellant:

BR Sharma

J O'Brien Kelly, Mombasa

For the respondent:

JC Summerfield (Deputy Legal Secretary, East Africa High Commission)

The Legal Secretary, East Africa High Commission

Marwa s/o Robi v R
[1959] 1 EA 660 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	17 July 1959
Case Number:	89/1959
Before:	Forbes V-P, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court, Kenya–Wicks, J

[1] *Criminal law – Murder – Defence of property – Deceased killed when driving off cattle belonging to appellant – Whether killing in defence of property justified – Penal Code, s. 18 (K.).*

[2] *Criminal law – Murder – Provocation – Deceased killed when driving off cattle belonging to appellant – Whether sufficient provocation to reduce charge of murder to manslaughter.*

Editor's Summary

The appellant was convicted of murder for spearing to death the deceased after a dispute over cattle which the deceased claimed and had gone to the appellant to collect. On appeal it was assumed in the appellant's favour that the deceased had gone to reclaim cattle to which he had no legitimate claim and that the deceased actually attempted to drive away the cattle. The trial judge had found that no force was used against the appellant, although the deceased had carried a stick when he went towards the appellant's boma. On appeal, it was argued for the appellant that the trial judge misdirected himself as to the law applicable to cases of homicide in defence of property and that he had erred in finding that there was no sufficient provocation to reduce the offence to manslaughter.

Held –

- (i) it must be a question of fact in each case whether the degree of force used in defence of property which caused death was, in the particular circumstances of the case, justifiable, or, if not justifiable, whether it was such as to amount only to manslaughter, or was so excessive as to constitute the offence of murder.
- (ii) in driving off the cattle the deceased was no doubt committing a trespass, but the means adopted by the appellant to resist the taking of the cattle were utterly out of proportion to the tort which was being committed.
- (iii) the court was satisfied that the trial judge had adequately dealt with the question of provocation and saw no reason to differ from his conclusion.

Per curiam: (Referring to the case of *Yusufu s/o Lesso v. R.* (1952), 19 E.A.C.A. 249) “That decision which differed from an earlier decision of this court in *R. v. Murume s/o Nayboba* (1945), 12 E.A.C.A. 80 must no doubt be considered in relation to the facts of that case, and we should not be prepared to accept the proposition that no act of trespass to property could ever amount to “a wrongful act or insult . . . done to . . . a person”.

Appeal dismissed.

Cases referred to in judgment

- (1) *Yusufu s/o Lesso v. R.* (1952), 19 E.A.C.A. 249.
- (2) *R. v. Murume s/o Nayboba* (1945), 12 E.A.C.A. 80.

July 17. The following judgment was read by direction of the court:

Judgment

The appellant was convicted of murder by the Supreme Court of Kenya on May 12, 1959, and was sentenced to death. He has appealed to this court on two grounds: first, that the learned trial judge misdirected himself as to the law applicable to cases of homicide in defence of property; and, secondly, that the learned judge erred in finding that there was no sufficient provocation to reduce the offence to manslaughter.

The facts are that at about 1 p.m. on November 15, 1958, the deceased left the boma of one Chacha s/o Ngoso and went towards the boma of the appellant, who was his father-in-law. The deceased told Chacha that he was going to claim his cattle from his father-in-law. The appellant's boma was about 1/4-mile distant from that of Chacha. Shortly after the deceased left, Chacha heard a shout from the direction of the appellant's boma, and, on going in that direction, met the deceased who was suffering from a spear wound through his right upper arm into his chest. The deceased walked with Chacha for some distance towards the latter's boma, then collapsed, lost consciousness and died. On post mortem examination the deceased was found to have an incised wound six inches long through the skin and muscle of the right arm and a stab wound into the right side of the chest about seven inches long going between the ribs and entering the middle and lower lobes of the right lung. The cause of death was haemorrhage from the wounds in the right arm and right chest. The two wounds appeared to have been caused by a single blow of a long shafted weapon such as a spear. When charged with the murder of the deceased the appellant said in answer to the charge: "I wish to say that I speared my son-in-law Gati s/o Mahanga to death." At the trial the appellant made an unsworn statement in the course of which he said:

"The deceased came and said he was going to take the cattle by force from me . . . The deceased would not obey what the elders told him and he came to my boma and started to take the cattle by force and that is when I killed him."

It is clear that the appellant speared the deceased, causing the wounds from which he died, and the learned judge so found. It is clear also that the spearing occurred as a result of a dispute between the appellant and the deceased over cattle, when the deceased had gone to the appellant's boma to get cattle which the deceased claimed. There was a conflict of evidence as to whether the cattle in question were part of the bride-price for the appellant's daughter which the deceased was reclaiming, or whether they were cattle (or possibly a cow) given to the appellant by the deceased to look after. The learned judge made no specific finding on the point, and it was conceded by counsel for the Crown that, in view of the conflict of evidence and the absence of a finding, it must be assumed in favour of the appellant that the deceased had gone to reclaim cattle which were part of the bride-price, that is to say, cattle to which the deceased, so far as the evidence went, had no legitimate claim. Again, there is little evidence, and no specific finding, as to whether or not the deceased actually attempted to drive away cattle from the appellant's boma as alleged by the appellant. The learned judge does, however, appear to accept appellant's statement when he says:

"The accused says in his uncautioned [this should read 'unsworn'] statement that Gati 'came to my boma and started to take the cattle by force and that is when I killed him.' There is no suggestion that Gati used force against the person of the accused . . ."

At any rate, as again was conceded by counsel for the Crown, for the purposes of the appeal it must be

assumed in the appellant's favour that the deceased did actually attempt to drive away the cattle. There is, however, no reason

to differ from the learned judge's finding that no force was used against the person of the appellant, though the deceased had carried a stick when he went towards the appellant's boma.

In these circumstances the question arose whether the appellant had killed the deceased in defence of his property and, if so, whether the killing was excused, or, at least, reduced from murder to manslaughter.

The learned judge correctly referred to s. 18 of the Penal Code, which provides that criminal responsibility for the use of force in defence of person or property shall be determined according to the principles of English common law, and proceeded:

"Whilst not attempting to set out a comprehensive statement of the law, the broad outline of the English common law is that it is a good defence that the battery was committed by the prisoner in defence of his possession, force may be opposed by force, but only such force is justified as is necessary for the defence of the property, that is, it must not be excessive. see Archbold, 33rd Edn., p. 998 . . . and p. 999 . . . The assessors were unanimous in their opinion that Gati did not receive his injuries under circumstances which establish the defence of defence of his property and I agree with their opinion and so find."

Mr. Malik for the appellant contended that this passage amounted to a misdirection in that the passage in Archbold on which the learned judge relied was one referring to common assault and not to homicide; that the deceased was a trespasser; and that the relevant law is that at p. 944 of Archbold, (33rd Edn.), where it states:

"What we have now said relates to *felonies* by force. In the case of forcible *misdemeanours*, such as trespass in taking goods, although the owner may justify beating the trespasser, in order to make him desist, yet, if he kills him, it will be manslaughter:"

Counsel for the Crown conceded that the learned judge had referred to the chapter of Archbold which deals with assault instead of to the chapter dealing with homicide, but he contended that this error did not in fact mislead either the judge or the assessors as to the law applicable; that the appellant had made use of a deadly weapon, namely a spear; that in the circumstances the use of such a weapon was unwarranted and the resulting death amounted to murder; and he referred to a sentence in Archbold, (33rd Edn.), p. 944, following that relied on by Mr. Malik, which reads:

"Or if, instead of beating him, he attacks him, [i.e. the trespasser] with a deadly weapon, it would perhaps be murder, . . ."

The authorities on this branch of the law appear to be of considerable antiquity. In Russell on Crime (11th Edn.), at p. 490, the learned author says:

"In considering the law of this matter as it is set out by the older authorities such as Hale, Foster, Blackstone and East, it should be remembered that the views of these authors rested upon the legal principles governing homicide as they existed at the period in which they were writing. For example, it is not certain that at the present day the courts would agree that it is necessarily at least manslaughter if a householder in ejecting a trespasser happened to kill him, nor on the other hand that a killing would be justifiable if the trespasser had resisted and assaulted the householder when the latter justly laid hands upon him in order to turn him out. It would seem more probable that the courts would now hold that only such force can be justified as is reasonable under modern conditions, but that if without exceeding such reasonable bounds, the householder

should unintentionally bring about the death of the invader, then the case should be treated as homicide by misadventure.”

There is no necessity in this case to consider the cases which relate to the degree of force which may be used to resist forcible felonies. Although, as I have said, it must be assumed in the appellant’s favour that the deceased believed he had a claim of right to cattle. The dispute was not a new one and the deceased did not act in a stealthy manner. He went openly to the appellant’s boma to exercise a right to which he obviously believed he was entitled. In these circumstances he would not be guilty of any criminal offence: Penal Code, s. 9. Nevertheless his act amounted to a serious trespass, and we think the appellant was entitled to take reasonable steps to preserve his property. The cases relating to the steps which may be taken to prevent trespass, so far as they are available to us, indicate that only so much force as is reasonably necessary in order to turn a trespasser out will be justified. Roscoe’s Criminal Evidence, (16th Edn.), at p. 782, citing Foster 291, says:

“A finding a trespasser on his land, in the first transport of his passion beateth him, and unluckily happened to kill; this hath been holden to be manslaughter. (1 Hale, P.C., 473 is cited but there the trespasser does mischief.) But it must be understood that he beat him not with a mischievous intention, but merely to chastise . . . and to deter him . . . ; for if he had knocked his brains out with a bill or hedgestake, or had given him an outrageous beating with an ordinary cudgel, beyond the bounds of a sudden resentment, whereof he had died, it had been murder.”

This passage, it is true, relates to the extent to which trespass may amount to provocation, but it does give an indication of the degree of force which may be regarded as reasonable. At p. 796 of Roscoe (*supra*) under the heading of “Defence of Person or Property” it is stated:

“Deadly weapons must not be used to prevent trespass. Capt. Moir discharged a gun at a person who persisted in trespassing on his land, and the man died. He had gone home for pistols on seeing the trespasser, and angry words passed. He was found guilty of murder and executed. Moir (1828) cited in Price (1835) 7 C. & P., 178.”

Upon such authority as we have been able to find we think it must be a question of fact in each case whether the degree of force used in defence of property which caused death was, in the particular circumstances of the case, justifiable, or, if not justifiable, whether it was such as to amount only to manslaughter, or was so excessive as to constitute the offence of murder.

In the instant case the learned trial judge stresses that the appellant was “well aware of the existence of a peaceful method of settling the dispute.” Mr. Malik criticised this approach and submitted that the learned judge should have taken “the objective view that there was a definite trespass.” We think, however, that all the circumstances must be taken into account, including this aspect of the matter. As we see it, this was no case of an attempt to commit a forcible crime. It was the culmination of a civil dispute between a father-in-law and son-in-law. There is no suggestion that any violence was used or threatened to the person of the appellant, or that he believed himself to be in any danger. No doubt in driving off the cattle the deceased was committing a trespass, but the means adopted by the appellant to resist the taking of the cattle seems to us to have been utterly out of proportion to the tort which was being committed. The appellant was no doubt entitled to use reasonable force to prevent the taking of the cattle, and if, in good faith, he had used more force than was reasonable and had thereby killed the appellant, no doubt the offence would only have amounted to manslaughter. The force actually used,

however, was a thrust with a spear through the chest which was clearly calculated to kill. We can see no distinction between such use of a lethal weapon like a spear, and the use of a firearm. The weapon and its method of use leave no doubt that the intent was to kill, and not merely to prevent the removal of the cattle. There can be no justification in law for deliberate homicide in these circumstances, and we have no doubt that, subject to the question of provocation, the offence is murder. Although the learned judge referred to the passage in Archbold relating to assaults and an extent to which the use of force in the defence of property is a defence to a charge of assault, and not to the chapter on homicide, we think that he did, in fact, apply correct principles and that his decision must have been the same had he had regard to the relevant law as stated in the chapter on homicide.

As regards the question of provocation, Mr. Malik submitted that the deceased's acts amounted to sufficient provocation to reduce the killing to manslaughter. Counsel for the Crown drew our attention to the case of *Yusufu s/o Lesso v. R.* (1) (1952), 19 E.A.C.A. 249, in which it was held that the definition of provocation in the Tanganyika Penal Code (which is similar to the Kenya Penal Code) is

“confined to wrongful acts done to the person and does not extend to wrongful acts done to property.”

That decision, which differed from an earlier decision of this court in *R. v. Murume s/o Nayboba* (2) (1945), 12 E.A.C.A. 80, must no doubt be considered in relation to the facts of that case, and we should not be prepared to accept the proposition that no act of trespass to property could ever amount to “a wrongful act or insult . . . done to . . . a person” cf. the passage from Roscoe's Criminal Evidence, p. 782 which is cited above. We think that each case must be judged on its own facts. In the instant case, however, it is sufficient to say that we are satisfied that the learned judge has dealt adequately with the question of provocation, and we see no reason to differ from his conclusion.

We are accordingly of opinion that the appeal must be dismissed.

Appeal dismissed.

For the appellant:

AQ Malik

MH Malik & Co, Kisumu

For the respondent:

Stephen Davies (Crown Counsel, Kenya)

The Attorney-General, Kenya

The Attorney-General v Ivan Eriya Kafero Mambule
[1959] 1 EA 665 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	16 July 1959
Case Number:	25/1959
Before:	Sir Kenneth O'Connor P, Gould and Windham JJA

Sourced by: LawAfrica

Appeal from: H.M. High Court of Uganda–Lyon, J

[1] *Highway – Nuisance – Repairs – Re-alignment and road level raised four feet – Obstruction of and interference with right of access to land adjoining – Business loss incurred by roadside store and petrol station during roadworks – No statutory powers of repair – Liability of government for loss – Assessment of damages – Crown Lands Ordinance (Cap. 117), s. 28, s. 29 (U.) – Crown Lands (Declaration) Ordinance (Cap. 118) (U.) – Roads Ordinance (Cap. 165), s. 2, s. 4, s. 6 (U.) – Traffic Ordinance, 1951, s. 111 (U.) – Uganda Agreement, 1900, art. 15 – Uganda Order-in-Council, 1902, s. 15 (2) – Highway Act, 1835 – Public Health Act, 1875.*

Editor’s Summary

The respondent who owned and managed a general store and petrol filling station three miles from Kampala on the Kampala-Gayaza road sued the Attorney-General under the Suits against the Government Ordinance, for damage which he alleged he had suffered through the closure of that road from January to July, 1956. He claimed that when the Public Works Department was then remaking the road, access by his customers to his premises had been blocked, that the level of the road had been raised by four feet from its former level whereby reasonable access by motor vehicles had become impossible, and that the alignment of the road had been so altered and the road so widened as to bring part of his premises which were mailo land within the road reserve. As a result of the road works he said his sales had suffered and his premises had been flooded due to inadequate drainage. The appellant admitted that part of the road had been closed at times for proper reasons, that the level of the road had been raised and the alignment altered but contested the other allegations. The trial judge found *inter alia* that the respondent had suffered a loss in 1956 through the road works, that through the raising of the level of the road access was at times very difficult, and he awarded the respondent Shs. 6,200/- damages. The Attorney-General appealed on the grounds that the evidence disclosed no cause of action and that there had been misdirection on the question of damages. The respondent cross-appealed for increase of the damages.

Held –

- (i) although the Director of Public Works had power under s. 111 of the Traffic Ordinance to close the road, there was no evidence that the Director had made an order so to do; in any event s. 111 could only apply to closure of the road and did not empower raising the road level and thus interfering with the access of owners of adjoining land.
- (ii) there appeared to be no legislation in Uganda empowering authorities to repair and reconstruct roads and to pay compensation to frontagers affected, and in its absence the Public Works Department was liable to the owner of adjoining land for obstruction of his right of access or for a highway nuisance from which the owner suffered damage.
- (iii) the trial judge was correct in treating the respondent as an owner of land adjoining a highway; the respondent had a cause of action for interference with his right of access and his damages should include not only the time when

access was cut off but also the period during which there was partial interference with his access and the permanent injury (if any) caused by raising the level of the road.

- (iv) there had been no finding by the trial judge whether the road-making operations constituted a public nuisance as being unreasonable in conduct, quantum, duration or otherwise; it was not for the appellate court to make a finding thereon and the case should be remitted to the trial judge to make a finding whether the works were a public nuisance, as if that were so, the respondent had clearly suffered damage.

Appeal and cross-appeal allowed in part. Case remitted to trial judge to make a finding whether the works constituted a public nuisance and for assessment of damages, if any.

Cases referred to in judgment

- (1) *East Fremantle Corporation v. Annois*, [1902] A.C. 213.
- (2) *Burgess v. Northwich Local Board* (1880), 6 Q.B.D. 264.
- (3) *Marshall v. Blackpool Corporation*, [1935] A.C. 16.
- (4) *Lyon v. Fishmongers' Co.* (1876), 1 App. Cas. 662.
- (5) *Attorney-General v. Conservators of the River Thames*, 71 E.R. 1.
- (6) *Fritz v. Hobson* (1880), 14 Ch. D. 542.
- (7) *Harper v. G.N. Haden & Sons Ltd.*, [1933] Ch. 298.
- (8) *Herring v. Metropolitan Board of Works* (1865), 19 C.B. (N.S.) 510; 144 E.R. 886.
- (9) *Iveson v. Moore* (1699), 1 Ld. Raym. 486; 91 E.R. 1224.
- (10) *Wilkes v. Hungerford Market Co.*, 132 E.R. 110.

July 16. The following judgments were read by direction of the court:

Judgment

Sir Kenneth O'Connor P: The respondent is the sole proprietor of a petrol filling station selling petrol and kerosene oil. He is also a shopkeeper dealing in tobacco, groceries and other goods. His premises are situate at a spot about three miles from Kampala on the Kampala-Gayaza road. He is an accredited agent of the Shell Company and a sub-agent of the East African Tobacco Company. He sued the appellant, the Attorney-General of Uganda, in the High Court of Uganda, as representing the Government of Uganda. The suit was brought under the Suits against the Government Ordinance (Cap. 7 of the Laws of Uganda).

The respondent alleged that from January to July inclusive the Public Works Department of Uganda closed Gayaza road adjacent to his premises and remade the road, thereby blocking ingress to the respondent's premises and preventing reasonable access by his customers to the premises, whereby he suffered damage. He also averred that the Public Works Department had raised the level of the road by approximately four feet from its old level, so that it was four feet higher than the existing level of the ground floor of his premises and that thereby reasonable access by motor vehicles to his premises had been made impossible, whereby he had suffered damage. He also alleged that the alignment of the road

had been altered and the road widened, so that his premises or part thereof had been caused to be within the road reserve and that he had suffered, or might thereby suffer, damage. He alleged that his sales of commodities and petrol and kerosene oil had been reduced, that had suffered and would continue to suffer damage, and that the Public Works Department had failed to provide drainage to take away the rain. He claimed:

- (i) damages for loss of profits on sales for six months;

- (ii) a declaration that by reason of the acts of the Public Works Department his premises were within the road reserve and damages therefore;
- (iii) a perpetual injunction to restrain the appellant or his agents at any future time from causing the premises to be removed by reason of the fact that they were within the road reserve;
- (iv) damages for flooding;
- (v) further and other relief; and
- (vi) costs.

The defendant (appellant) denied that the Gayaza road adjacent to the respondent's premises was closed from January to July inclusive, but admitted that parts of the Gayaza road were from time to time closed for good and proper reasons, and he said that adequate diversions were provided as necessary. He denied that ingress to the respondent's premises was blocked from January to July inclusive and said that if ingress was blocked, it was not the result of an unlawful act of the appellant. He denied that the respondent's customers were prevented from having reasonable access to the respondent's premises during the aforesaid period; if reasonable access was prevented, it was not the result of any unlawful act or omission of the appellant. The appellant admitted that the level of the road was raised about four feet, but denied that reasonable access by motor vehicles or members of the public was thereby made impossible; if reasonable access was made impossible; this was not the result of any wrongful act or omission of the appellant. The appellant admitted that the alignment of the road was altered, but denied that the premises were thereby caused to be within the road reserve. He averred that they were already within the road reserve. He denied that the respondent had suffered reductions in sales and said that if he had suffered such reductions, that was not the result of any wrongful act or omission of the appellant. The appellant denied the allegations of flooding and failure by the Public Works Department to provide drainage.

The learned judge held that from about December, 1955 to July, 1956, the Mowlem Construction Co. Ltd. (referred to as "Mowlems"), under contract to the Public Works Department, were reconstructing several miles of the Kampala-Gayaza road. Before the reconstruction, the respondent had had a petrol station with one mobile pump, and a small shop, on marshy ground near the road. After the reconstruction, the respondent had five permanent petrol pumps on a hard standing, and his takings in 1957 and 1958 were very much higher than before the road was rebuilt.

It was common ground that the appellant also carried on from the premises a "safari trade" in tobacco, that is to say he used to send out a van from which wholesale sales of tobacco were made to persons in the neighbourhood or further afield. Notwithstanding difficulties of access to his shop during the relevant period, he was able to get his van in and out and this trade was not materially affected. Accordingly, the learned judge (I think rightly) left this "safari trade" out of account when assessing damages.

The learned judge found that the respondent did suffer a loss in 1956

"as a direct result of the road being in a very bad condition; and at those times customers who had been buying petrol from him no longer did so."

The learned judge also found that the road opposite the respondent's petrol station was raised four feet; and, therefore, there were times when access to the petrol station was, "to put it at its lowest, very difficult".

The learned judge found that the respondent had proved that his total sales, less tobacco takings, were about Shs. 62,000/- less in January to July, 1956, than they had been in the same months of 1955. He

declined to take into account the betterment accruing to the respondent in 1957 by the reconstruction

of the road. He held that the respondent had been making at least 10% profit on his sales of petrol, oil etc., and he assessed the damages in relation to the petrol station at Shs. 6,200/- for which sum he gave judgment.

The learned judge held, and this I think was not disputed, that as a result of re-alignment of the road, the respondent's premises were caused to be partially within the road reserve; but only approximately three feet more than they had been before the re-alignment. The judge granted a declaration to that effect, but refused damages, because he said that the respondent's interests were safe guarded by statutory provisions to which he referred. He refused the injunction asked for in para. (iii) of the claim, and he refused damages for flooding, as he was satisfied that the drainage near the respondent's premises was now adequate, and he said that he was not satisfied that the damages to the shop goods had been caused by the reconstruction of the road; the respondent's shop had all along been in a swamp and, if he feared flooding, he could have taken easy and reasonable steps to see that his flour and sugar were not damaged. In the result, the learned judge gave judgment for the respondent for Shs. 6,200/- damages and costs.

The appellant appeals on the grounds that the learned judge failed to direct his mind to the question whether the evidence disclosed a cause of action, and misdirected himself in awarding damages in the absence of any finding whether the appellant had been negligent or had committed trespass or an actionable nuisance; and that, in any event, the damages were too remote. The appellant also alleges that the quantum of damages was erroneous and says that the learned judge should not have awarded damages on the basis of 10 per cent of profit but at the most on 4.5 per cent.

There is a cross-appeal in which the damages are sought to be increased.

Mr. Few in opening the appeal for the appellant contended that, difficult though access might have been, there was reasonable access to and from the respondent's shop during the whole of the reconstruction period, except for three days, when it would have been possible to have got him in and out by towing with tractors. It appeared, however, from the evidence of the appellant's own witness, Mr. Gladstone, the area manager for Mowlems, that there were barriers across the road (which were only entirely removed at the end of April) and diversion of traffic. A long section of road was closed from mid-February to the end of April though local people could get through. For a fortnight another section was impassable and cars would have to be left. A permanent ramp to the plaintiff's shop was only constructed in April. Mr. Gladstone said that the earth on the road by plaintiff's premises was a serious inconvenience, the road was raised four feet "at times a road under construction is a complete mess" and "is in a mess while they are working on it". The respondent's claim was for loss of trade suffered during January to July, 1956. He proved that he had lost trade at his petrol station. His petrol station trade was with passing cars and lorries. If the respondent has a cause of action in nuisance at all (which will be considered later) it is, to my mind, idle to say that he did not suffer damage because he was only cut off completely for three days and, for all the rest of the time, a vehicle could have been got to his premises by being assisted or by driving through loose earth. The respondent's trade was with passing vehicles which stop for petrol. It is notorious that motorists will follow (as indeed they may be legally compellable to follow) a traffic diversion, and that they will not stop for petrol where road conditions are such as they were described to be in the neighbourhood of the respondent's premises during the months in question. I find it difficult to take seriously the suggestion (if that was the suggestion) that damages should be confined to the three days during which access to the respondent's premises was completely cut off.

Mr. Few, while admitting that the respondent had suffered some loss did not admit its amount or that

it was actionable.

He submitted that negligence by the Public Works Department was not proved and nuisance was not proved; nor was trespass to land.

In answer to the court Mr. Few said he was not relying specifically on any statutory authority which permitted the making of roads and payment of compensation; and that nothing, in the present case, was done under the Land Acquisition Act; there was no question of acquiring land for road widening and paying for injurious affection less an allowance for betterment. As, however, the learned judge seemed to indicate in his judgment that the authority of the Government to make or reconstruct or raise roads would be found in the Crown Lands Ordinance (Cap. 117) of Uganda and in certain provisions of the Buganda Agreement, 1900, it will be desirable at the outset to examine the position under any possibly relevant treaties and Ordinances. If there is statutory authority for reconstruction and raising of highway in Buganda by the Public Works Department, an action could not be maintained by an individual against the Public Works Department or their authorised agent for injury caused by the reconstruction or raising of a highway if the work was done in a proper manner and the powers exercised with judgment and discretion, unless a remedy was provided by the statute; *East Fremantle Corporation v. Annois* (1), [1902] A.C. 213.

Under art. 15 of the Uganda Agreement, 1900, land in Buganda was allotted as therein set out. There is a provision that Her Majesty's Government reserves the right to carry through or construct roads . . . on any property, public or private, with the condition that not more than 10 per cent. of the property in question should be taken up for these purposes without compensation, and that compensation should be given for disturbance of growing crops or of buildings. Even if it be assumed that a private individual could take advantage of these provisions in a treaty, this article would appear to apply to the carrying through and construction of roads and not to their reconstruction or repair. In any event, this article would have a very minor, if any, application to the present case, as no land belonging to the appellant was taken for constructing the road, unless it can be said that the re-alignment of the road, which placed his premises three feet further into the road reserve than previously, was such a taking. There was no, or negligible, actual physical disturbance to his building. If this provision has any application at all, its only effect would be to place upon the Government an obligation to compensate the respondent for the widening of the road reserve if that constituted a disturbance to his building; but I incline to the view that it has no application, except with regard to the shelter for the portable pump which was removed.

I understand Mr. Few to argue that the Government had a right to do what it did in this case because under the Crown Lands (Declaration) Ordinance (Cap. 118) there is a presumption that all lands in the Protectorate are the property of the Crown unless they have been recognised by a document to be the property of any person or until the contrary has been proved. He said that, under s. 28 and s. 29 of the Crown Lands Ordinance, where a sale or lease of land under that Ordinance transferred less than 100 acres, there was power for the Governor to enter and construct roads across such land or enter and construct railway sidings or other public works, paying compensation for the land. In my view, these provisions, which apply to Crown lands, have no application to the present case. It was admitted in the defence that the respondent was the sole proprietor of the filling station and he proved that his land was Mailo land. That was sufficient to rebut the presumption that it was Crown land. In any event, the sections referred to deal with entering upon land and constructing roads etc., thereon, paying compensation for the land, and do not deal with denial of access to an existing highway or the creation of a nuisance on an existing highway.

Road reserves are created by the Roads Ordinance (Cap. 165 of the Laws of Uganda) and “road reserve” is defined by s. 2 of that Ordinance to mean

“an area bounded by imaginary lines parallel to and distant fifty feet from the centre line of any road.”

That Ordinance only applies to the roads set out in the Schedule to it, of which the Kampala-Gayaza road is one. By s. 4 of the Roads Ordinance, no person, without permission of the road authority, may erect any building within a road reserve and if he does, he may, under s. 6, be required to pull it down or remove it and may be convicted and fined if he fails to do so. There is no evidence whether or not the respondent or any of his predecessors in title, obtained permission to erect that portion of the building which was originally about eight feet (and is now about eleven feet) within the road reserve. It will be noted that the Roads Ordinance does not contain any statutory authority permitting the Public Works Department or their agent to interfere with the access to a highway of adjoining frontagers, or to block or obstruct, or repair or reconstruct, a highway, or to divert traffic. Although no evidence was led for the purpose of proving that the Gayaza road is a highway, I understand it to be common ground that it is, and, having regard to the fact that it appears in the Schedule to the Roads Ordinance and to the evidence in this case, I am prepared to hold that it is a road over which the public may lawfully pass and is a highway.

Under s. 111 of the Traffic Ordinance (No. 34 of 1951) the Director of Public Works or his duly authorised representative, if he thinks that any road or part of a road under his control is unfit for motor traffic or for any particular kind of motor traffic, may, by order under his hand, close such road or part of a road to all or such particular kind of motor traffic for such period as may be necessary. This section (though its primary object is probably the closure of earth roads to motor traffic or heavy motor traffic, during the rains) would have provided statutory authority for the closing of the Gayaza road during the period required to reconstruct it, if it had been proved that the section had been operated. There was no proof that the Director of Public Works or his duly authorised agent had made an order under his hand closing the road for the necessary period. In the absence of such proof, I do not think that the appellant can rely on s. 111 of the Traffic Ordinance. In any event, s. 111 would only cover the closing of the road and not everything that was done to the road. It does not, for instance, give statutory powers to raise a road and thus interfere with the access of owners of adjoining land.

It is difficult to believe that at this date there is no statutory provision in Uganda empowering or obliging the Public Works Department or other authority in rural districts to repair or reconstruct roads and providing for payment of compensation to frontagers affected (otherwise than by the taking of land) less an allowance for betterment. But we were referred to none by the representative of the Government; in fact we were told that none existed, and I have not been able to find any such. None of the English statutes such as the Highway Act, 1835, or the Public Health Act, 1875, can, I think, be said to be a “statute of general application” so as to be imported into Uganda by s. 15 (2) of the Uganda order-in-Council, 1902; and there are obvious difficulties (which make the proviso to s. 15 (2) applicable) in the way of importing the doctrine of the common law making highways repairable by the inhabitants of the parish. What, in Uganda, would correspond to an English parish? It would seem that legislation on the subject is overdue. In the absence of legislation regulating the rights and liabilities of the Public Works Department in relation to the reconstruction and repair of roads, it seems that they would be liable to an owner of adjoining land if they obstruct his private right of access to a highway or cause a highway nuisance from which he suffers particular damage.

Was the respondent an owner of land adjoining the highway? He swore that his land was Mailo land and that he bought it before January, 1956, although it was not transferred until September, 1956, or registered until February, 1957. It was admitted in the defence that the respondent was the sole proprietor of the filling station and shop. Although Mr. Few at one time said that it could not be assumed that the appellant owned the land between the front of the shop and the main road, that suggestion was later withdrawn. The learned judge took the respondent to be the owner of the land occupied by the shop and filling station adjacent to the road. There was an admission and evidence on which he could so find and I think that it was correct to treat the respondent as an owner of land adjoining a highway.

Mr. Few submitted that there had been no trespass to the respondent's land. He argued that trespass to land is only constituted where there is physical touching, entry or intrusion on the land, and he quoted the definitions of trespass to land in text books on Torts by Winfield, Salmond, and Clerk & Lindsell. He argued that the respondent could not maintain trespass for the raising of the highway unless he was the owner of the soil under the highway (*Burgess v. Northwich Local Board* (2) (1880), 6 Q.B.D. 264 at p. 275) which he (the respondent) was not. It may be correct that what was done was not trespass; but *Burgess v. Northwich* (2) also shows

“that the right of a person, who has a house or land abutting on a highway, to pass and repass from one to the other is incontrovertible.”

That right does not depend on his ownership of the soil subjacent to the highway: *Marshall v. Blackpool Corporation* (3), [1935] A.C. 16, 22. *Burgess v. Northwich* (2) makes it clear that where an owner of adjoining land is not the owner of the soil of the highway,

“his right so to pass and repass is a consequence of the dedication of the highway to the public.”

If the plaintiffs in that case could have shown

“that the highway had been dedicated to the public at the level at which it accidentally sank, they would have had a right of access to that level and a right of action if such level were altered to their detriment.”

In *Burgess v. Northwich* (2) the plaintiffs could not recover because the level of the road which caused them damage was only a restoration to the level at which it had been dedicated to the public. In the present case, the raising of the road is an interference with the level at which it was dedicated to the public and if it has caused damage to the respondent, he has a right of action whether it is a right in trespass or not. Interference with a private right of access may not sound in trespass and it is distinct from a right sounding in nuisance; but it is unnecessary to label it more precisely. That such interference gives rise, in appropriate cases, to a right of action is, as Lindley, J., (as he then was) said in *Burgess v. Northwich* (2) “incontrovertible”. (See also *Lyon v. Fishmongers' Co.* (4) (1876), 1 App. Cas. 662, 675, 676). A highway authority not acting under statutory powers cannot justify the raising or lowering of the road so as to interfere with the right of access of the adjoining owner whether the latter is the owner of the soil or not. 19 Halsbury's Laws (3rd Edn.) 80, para. 121.

In my opinion, the respondent had a cause of action for interference with his private right of access to the road (as distinct from any right which he may have had sounding in nuisance) and his damages should not be confined to the three days when access was totally cut off, but the period when access was interfered with by the piling up of earth and other road work at or near his premises, and permanent injury (if any) caused by the raising of the level of the road, should also be taken into account in assessing damages under this head.

Whether damages are also recoverable for barriers, diversion of traffic and road works further along the road causing loss of trade to the respondent depends, in my view, on whether the works carried out by Mowlems as agents for the Public Works Department did or did not amount to a public nuisance. If they did, the plaintiff, having proved his loss of trade, is undoubtedly a person who has suffered particular damage in respect of that public nuisance.

Unfortunately, there is no express finding by the learned judge whether or not the works carried out by Mowlems constituted a public nuisance. The learned judge dealt with the matter as follows:

“I do not consider that the law in this case is difficult; and I am of opinion that, in the circumstances I have set out, plaintiff is entitled to recover damages which flow directly from the reconstruction of the road between mile 2 and mile 5 of the Gayaza road. In Pratt and Mackenzie’s Law of Highways (19th Edn.) at p. 126 the learned editors have included a paragraph ‘Remedy for interference’. The passage continues: ‘The owner of the land whose access to or from the highway is obstructed, may maintain an action for the injury, whether the obstruction does or does not also constitute a nuisance, but, where the obstruction is also a highway nuisance, the plaintiff may be able to claim also as a person suffering particular damage in respect of the nuisance.’ And in *Fritz v. Hobson* where the defendant had rendered access to the plaintiff’s shop so difficult that the natural effect was to drive away persons who might have become customers . . . Fry, J., held that the plaintiff’s private right of access to the highway had been unlawfully interfered with and that he was entitled to recover damages from the defendant to the extent of his loss of profits. There is a very similar passage in Halsbury (3rd Edn.), Vol. 19, p. 79 and p. 80 where in para. 121 the learned editors deal with the question of the raising of a highway.”

There is a distinction in law between (a) a cause of action based on interference with a private right of access to and from a highway of an owner of adjoining land; and (b) a cause of action based on a public nuisance from which the plaintiff suffers particular damage: *Attorney-General v. Conservators of the River Thames* (5), 71 E.R. 1 at p. 14; *Lyon v. Fishmonger’s Co.* (4). That distinction is maintained in the passage from Pratt and Mackenzie cited above. It is not clear, however, whether the learned judge found that the respondent was entitled to recover for nuisance as well as for interference with private access. *Fritz v. Hobson* (6) (1880), 14 Ch. D. 542 which he cited was a case of a householder who was held entitled to recover damages because he had suffered particular damage from a public nuisance. A public nuisance had been created by the use of the defendant in that case of the highway in an unreasonable manner. In the present case there was no finding whether the operations of Mowlems constituted a public nuisance because they were unreasonable in conduct, quantum or duration or for any other reason.

I take the following statement of the law from the judgment of Lord Hanworth, M.R., in *Harper v. G.N. Haden & Sons Ltd.* (7), [1933] Ch. 298. That was a case, not of interference with the plaintiff’s right of access to a highway, but of an alleged public nuisance caused by the erection by the defendant of a hoarding for building purposes which rendered the plaintiff’s premises less obvious to passers by and affected his trade takings. Lord Hanworth said at p. 304:

- “1. A temporary obstruction to the use of the highway or to the enjoyment of adjoining premises does not give rise to a legal remedy where such obstruction is reasonable in quantum and in duration.

- “2. If either of those limitations is exceeded so that a nuisance to the public is created the obstruction is wrongful, and an indictment to abate it will lie.
- “3. If an individual can establish:
 - (a) a particular injury to himself beyond that which is suffered by the rest of the public;
 - (b) that the injury is directly and immediately the consequence of the wrongful act;
 - (c) that the injury is of a substantial character, not fleeting or evanescent, he can bring his action and recover damages for the injury he has suffered: see *Ricket v. Metropolitan Ry. Co.*, L.R. 2 H.L. 175, 189; *Benjamin v. Storr*, L.R. 9 C.P. 400; *Fritz v. Hobson*, 14 Ch. D. 542, 555.

These conditions mean that there must be a wrongful act in the sense that the user complained of was unreasonably exercised: *Fritz v. Hobson* *ibid.* 554; something ‘exceptive and unreasonable’: *Gaunt v. Fynney* (1872) L.R. 8 Ch. 8, 12; and an injury thereby directly caused to the plaintiff.”

Lord Justice Romer at p. 318 quoting from the judgment of Byles, J., in *Herring v. Metropolitan Board of Works* (8) (1865), 19 C.B. (N.S.) 510, 524, said

“The construction of the hoarding being necessary for the due performance of works by the Board, and the obstruction not having been more than was necessary, or kept for an unreasonable time, would give the appellant no cause of action.”

Totally blocking a highway for more than a month may well be a nuisance: *Iveson v. Moore* (9) (1699), 1 Ld. Raym. 486; 91 E.R. 1224. In *Wilkes v. Hungerford Market Co.* (10), 132 E.R. 110, an authorised obstruction across a public thoroughfare, continued for three months, whereby a shopkeeper lost trade was considered to be actionable. But each case must depend upon its own facts.

In the present case no finding has been made whether the activities of Mowlems were or were not reasonable in conduct, quantum and duration. Mr. Thacker for the respondent asked us to find that they were not. He drew our attention to the evidence of Mr. Firman, the Executive Engineer of the Public Works Department, to the effect that Mowlems did all they could to get the work done as quickly as possible

“but they had to study their own economy. Subject to that they tried to minimise inconvenience.”

Mr. Thacker also stated that tractors repeatedly and negligently broke a water pipe causing unnecessary delays and he argued that much more interference with the plaintiff was caused than was necessary: for instance half the road, he said, might have been dealt with at a time and single-line traffic maintained, or the reconstruction could have been done in smaller sections than three miles, and he contended that a ramp to the respondent’s premises could have been constructed earlier. There may well be force in these arguments; but these were matters to be considered by the learned judge who heard the evidence. I do not see how this court can make a finding whether the works of which the respondent complains were or were not reasonable in conduct, quantum and duration.

I would remit the case to the learned judge for him to make a finding whether or not the works complained of constituted a public nuisance. If the obstruction

was a nuisance, it is no defence, in the absence of statutory powers, that it is in other ways productive of public benefit: Pratt and Mackenzie, p. 94 and cases there cited. It should be borne in mind that the present case is not a case merely of repairs to the highway but of substantial reconstruction affecting a stretch of road measuring some miles and extending over a considerable period and that the highway was to some extent diverted. *Prima facie* any stopping or diversion of a highway without lawful authority is a nuisance: Pratt and Mackenzie, p. 128. But the principles quoted from *Harper v. Haden* (7) should be applied.

If a public nuisance was caused, clearly the respondent suffered particular damage thereby. The damages for nuisance would not, in my view, be confined to the operations at or near the respondent's premises; but diversion of his potential customers by road barriers and road work further away, if unreasonable in conduct, quantum or duration, would fall to be considered under this head. If the respondent is entitled to recover on this head as well as for interference with his private right of access to the highway, the learned judge need not (as the total will be unaffected) apportion the damages to each head of claim. If the respondent is not entitled to recover for nuisance, the judge should say how much he apportions to interference with the respondent's private right of access and give judgment for that amount.

Betterment should not be taken into account: *East Fremantle v. Annois* (1) at p. 217.

It is not clear whether the learned judge has dealt with a claim for Shs. 200/- for the demolition of the temporary building housing the portable pump. This, if not included, should be included.

I understand it to be agreed that the Government will pay to the respondent the sum of Shs. 525/- cost of enlarging the drain.

I do not think that we should interfere with the principle of assessing damages at 10 per cent. of proved losses.

I agree that the respondent was not entitled to the mandatory injunction asked for in prayer three.

The learned judge has found that the damage to shop goods by flooding was not shown to have been caused by the reconstruction of the road. I do not think that we can interfere with that finding.

In the result, I would set aside the decree dated December 30, 1958, and remit the case to the learned judge to make a finding (following the provisions of law above set out) whether or not a public nuisance was caused by the operations of Mowlems in addition to the interference with the respondent's private right of access to the road which was proved. If so, all the damages for loss of trade can stand. If not, the learned judge should award damages only for interference with the private right of access which may have involved some loss of trade. The claim for Shs. 200/- should be dealt with.

The learned judge should deal with the costs below according to his findings which should be embodied in a fresh decree.

As to the cross-appeal, I would dismiss paras. 1 and 4. The respondent should pay two-thirds of the appellant's costs of the cross-appeal.

With regard to the costs of the appeal, the appellant has failed on the issues of the private right of access and the proper percentage of damages and the remoteness of damage. He has succeeded to a limited extent on the nuisance issue, that is to say he has succeeded in getting this point remitted for decision. I would order that the appellant pay to the respondent two-thirds of the costs of the appeal to be

taxed.

The costs of the appeal and cross-appeal should be set off.

Gould JA: I agree.

Windham JA: I also agree.

Appeal and cross-appeal allowed in part. Case remitted to trial judge to make a finding whether the works constituted a public nuisance and for assessment of damages, if any.

For the appellant:

HSS Few (Crown Counsel, Uganda)

The Attorney-General, Uganda

For the respondent:

RS Thacker

RS Thacker, Kampala

Paulo Mukasa v R
[1959] 1 EA 675 (HCU)

Division:	HM High Court for Uganda at Kampala
Date of judgment:	27 July 1959
Case Number:	172/1959
Before:	Bennett J
Sourced by:	LawAfrica

[1] Street traffic – Driving permit suspended – Conviction for carrying passengers in commercial vehicle – Whether conviction is offence “in connection with the driving of motor vehicle” – Traffic Ordinance, s. 60, s. 77 (U.) – Motor Car Act, 1903, s. 4.

Editor’s Summary

The appellant appealed against both conviction and sentence in respect of a charge under s. 77 of the Traffic Ordinance for carrying passengers in a commercial vehicle. He had been sentenced to a fine of Shs. 300/- and his driving permit was ordered to be suspended for six months. At the hearing, the appellant abandoned his appeal against conviction and only sought to have the order for suspension of his driving permit set aside.

Held –

- (i) the offence of which the appellant was convicted was connected with the driving of a motor vehicle and he was therefore liable to have his driving permit suspended under s. 60 (1) of the

Traffic Ordinance.

- (ii) the appellant was a first offender and a driver by occupation so that the suspension had the effect of preventing him earning a living by following his occupation for six months; since a substantial fine had been imposed, it was not a case in which suspension of the appellant's driving permit was also called for and the order for suspension would be set aside.

Appeal allowed in part.

Cases referred to in judgment

- (1) *R. v. The Yorkshire Justices, Ex parte Shackleton*, [1910] 1 K.B. 439.
- (2) *Brown v. Crossley*, [1911] 1 K.B. 603.
- (3) *Simmonds v. Pond* (1919), 88 L.J.K.B. 857.

Judgment

Bennett J: The appellant was convicted of carrying passengers on a commercial vehicle in contravention of s. 77 of the Traffic Ordinance and fined Shs. 300/-. In addition, his driving permit was suspended for six months. The appellant has abandoned the appeal in so far as it relates to conviction and his only complaint concerns the suspension of his driving permit. In making an order for suspension the learned magistrate was presumably acting under s. 60 (1) of the Traffic Ordinance which enables a court to suspend a driving permit when a person is convicted of any offence in connection with the driving of a motor vehicle. The question for consideration is whether a contravention of s. 77 of the Ordinance is an offence in connection with the driving of a motor vehicle. Sub-s. (3) of that section provides that if persons are carried on a commercial vehicle in contravention of sub-s. (1), the persons using the vehicle on a road shall be guilty of an offence. Now it is clear that a person who drives a commercial vehicle in which passengers are unlawfully carried is using the vehicle within the meaning of sub-s. (3).

In *R. v. The Yorkshire Justices, Ex parte Shackleton* (1), [1910] 1 K.B. 439 it was held that a breach of art. 4 of the Motor-cars (Use and Construction) Order, 1904, in allowing a motor-car to stand on a highway so as to cause an unnecessary obstruction was not an offence in connection with the driving of a motor-car, within the meaning of s. 4 of the Motor Car Act, 1903. In that case Lord Alverstone, C.J., said:

“Inasmuch as a person wilfully obstructing the free passage of a highway may be convicted under other statutes independently of the Motor Car Acts and the regulations made under them, there is no reason for construing the words in question so as to include that offence. It seems more reasonable to take them as applying to offences in respect of the actual locomotion of the car, and not as including the mere leaving of the car at rest in the highway, which cannot properly be said to be an offence in connection with the driving of the car.”

In *Brown v. Crossley* (2), [1911] 1 K.B. 603 it was held that the using of a motor-car at night on a public highway without having a lamp burning on the back of the car as required by art. 11 of the Motor Car (Registration and Licensing) Order, 1903, was an offence in connection with the driving of a motor-car within the meaning of s. 4 of the Motor Car Act, 1903. In that case Lord Alverstone said at p. 608:

“Art. XI says in terms that the light shall be so contrived as to illuminate every letter or figure on the identification plate. The obvious purpose of that requirement is that a person, who is driving a car in such a manner that it becomes necessary to identify the car, shall by means of the rear lamp be easily identified. It is quite impossible to my mind to contend successfully that driving a car at night without a rear lamp is not an offence in connection with the driving of a motor-car . . .”

Avory, J., agreed with that view although the third member of the court considered that the appeal should be allowed on other grounds. In *Simmonds v. Pond* (3) (1919), 88 L.J.K.B. 857 the respondent in driving a motor-car unlawfully used petrol for a purpose other than one of the purposes expressly authorised by the Motor Spirit (Consolidation) and Gas Restriction Order, 1918, made under the Defence of the Realm Regulations. It was held that the contravention of the Order was an offence in connection with the driving of a motor-car within the meaning of s. 4 of the Motor Car Act, 1903. Darling, J., said at p. 858:

“When the respondent committed the offence of wrongfully using petrol for the purpose of driving a motor-car, he committed an ‘offence in

connection with the driving of a motor-car' within s. 4, sub-s. (1) of the Motor Car Act, 1903. If the petrol had been used for a purpose totally unconnected with the driving of a motor-car, there would have been no necessity for the respondent to have his licence indorsed . . . In the present instance, although the offence charged against the respondent is not one constituted by the Motor Car Act, 1903, it is nevertheless an offence, and the only thing to be considered is whether it is an offence in connection with the driving of a motor-car. Inasmuch as the offence was committed by the use of petrol in driving a car, I think that, upon the authorities cited, there was an offence in connection with the driving of a motor-car, . . ."

The other members of the court concurred. It seems to me that that decision is authority for the proposition that if an offence consists of the doing of an act which does not necessarily involve driving a motor-car, but that in committing the offence a motor-car is, in fact, driven, then the offence is one which is connected with the driving of a motor-car.

In the cases to which I have alluded the words of sec. 4 (1) of the Motor Car Act which the courts had to construe were:

"Any court before whom a person is convicted of an offence under this Act, or of any offence in connection with the driving of a motor-car, . . ."

The sub-section was aimed not only at offences under the Motor Car Act but also at offences under other laws. It may well be that the word "offence" in s. 60 (1) of the Traffic Ordinance of Uganda should be construed as applying only to offences under the Traffic Ordinance and not as including offences under other laws. It is, however, unnecessary for me to decide the point, since the appellant was convicted of an offence under the Traffic Ordinance and the offence was connected with the driving of a motor vehicle. He was therefore liable to have his driving permit suspended. Whether a driving permit ought to be suspended for an offence of this nature is quite another matter. Had the appellant been a persistent offender an order for suspension of his permit might have been appropriate. The appellant was in fact a first offender. He carried only three passengers. He was a driver by occupation so that the effect of suspending his driving permit was to prevent him from earning a living by following his occupation for a period of six months. Taking these matters into account and the fact that a substantial fine was imposed, I cannot see that this was a case in which any suspension of the appellant's driving permit was called for.

Accordingly, the order for suspension is set aside and the appeal is allowed to that extent.

Appeal allowed in part.

The appellant in person.

For the respondent:

MT Maloney (Crown Counsel, Uganda)

The Attorney-General, Uganda

Kerementi Lyangombe and another v R
[1959] 1 EA 678 (HCU)

Division: HM High Court for Uganda at Kampala

Date of judgment: 7 July 1959

Case Number: 71 and 72/1959

Before: Bennett Ag CJ

Sourced by: LawAfrica

[1] *Criminal law – Company – Director – Failure to hold general meeting to produce accounts and to comply with statute – Evidence given of default – Whether evidence necessary proving that director knew of default – Companies Ordinance, s. 111, s. 113, s. 124, s. 347 (U).*

Editor's Summary

The appellants were prosecuted as directors of a company for failure to comply with the Companies Ordinance. Evidence was given that no general meeting had been held in 1957, that no balance sheet or profit and loss account had ever been produced by or for the company, that no annual return had been made within eighteen months from incorporation or for 1957 and that although the company had been formed as a private company there were more than fifty members. Having been convicted on eight counts of default in compliance with the Companies Ordinance, the directors appealed and contended that there had been misjoinder of charges and persons, that there was no evidence proving that the directors knew there had been any default or were parties thereto and that even if there were more than fifty members, the company had not thereby become a public company.

Held –

- (i) since the appellants had been represented by counsel at the trial who had not objected to the charges it was too late to object on appeal to the particular charges laid.
- (ii) the evidence established a *prima facie* case against the appellants for default under s. 111, s. 113 and s. 124 of the Companies Ordinance and since they had not given evidence themselves the convictions were justified.
- (iii) by s. 28 of the Companies Ordinance a private company which fails to comply with the restrictions imposed on it by its articles of association, ceases to be entitled to the privileges and exemptions conferred on private companies; accordingly on the remaining counts which alleged that the company was a public company the appellants were properly convicted.

Appeals dismissed.

Cases referred to in judgment

- (1) *R. v. Baker*, 2 Cr. App. R. 249.
- (2) *Edmonds v. Foster and Another* (1875), 33 L.T. 690.

Judgement

Bennett Ag CJ: The two appellants were convicted by the district court of Ankole of a number of contraventions of the Companies Ordinance and appeal to this court against their convictions and sentences.

The convictions have been attacked on a number of grounds. Firstly, it is argued that there was a misjoinder of accused persons and a misjoinder of charges and the appellants have been prejudiced. The appellants were jointly charged with a co-director named Busasi on twelve counts, and Busasi was charged alone on the thirteenth count. I am inclined to the view that the count against Busasi ought not to have been included in the charge, but should

have been the subject of a separate charge. However that may be, the appellants were represented by Counsel at the trial and no objection was taken to the inclusion in the charge of the count against Busasi alone; nor was any application made for separate trials. The case of *R. v. Baker* (1), 2 Cr. App. R. 249 is authority for the proposition that if a co-prisoner does not apply to be tried separately no objection on a ground of a joint trial will be entertained on appeal. This ground of appeal therefore fails. I may add that I am not satisfied that any prejudice was caused to the appellants.

Count 2 charged the appellants with failing to hold an annual general meeting in the year 1957, contrary to s. 113 (1) of the Ordinance. Sub-s. (2) provides that if default is made in holding a meeting, as required by sub-s. (1), the company and every director or manager who is knowingly a party to the default shall be liable to a fine. The company itself was not charged with the offence, but that is no reason why the directors should not be charged. On behalf of the appellants it is contended that there was no evidence that the appellants knew of the default or that they were parties to it, and that the magistrate was wrong in convicting the appellants. I am unable to accept that contention. There was evidence that no annual general meeting was held and that the appellants were directors. This was *prima facie* evidence that they were knowingly parties to the default: see *Edmonds v. Foster and Another* (2) (1875), 33 L.T. 690. In that case, in which a director was convicted under s. 27 of the Companies Act, 1862, of knowingly and wilfully authorising or permitting a default of the company in complying with the requirements of s. 26 of the Act, Lord Coleridge, C.J., said at p. 693:

“I must assume for this purpose that this gentleman was a director of the company; then is that evidence that he permitted the default knowingly and wilfully? I think it is *prima facie* evidence, for if he has the power of showing that he did not knowingly and wilfully authorise and permit the company’s default, a *prima facie* case is made out against him which he ought to answer. The directors are responsible for the management of the affairs of the company, as is pointed out by Blackburn, J., in *Gibson v. Barton* (L. Rep. 10 Q.B. 336, 337). Of course he might rebut the presumption, but if he does not do so it seems to be enough to show that he is a director, and the company is in default.”

In the instant case neither of the appellants gave any evidence or made any unsworn statement. They were therefore properly convicted on count 2.

Counts 3 and 5 charged the appellants with failing to lay before the company a profit and loss account within eighteen months of the date of the incorporation of the company and in respect of the year 1956 respectively, contrary to s. 124 (1) of the Ordinance; and counts 4 and 6 charged them with failing to lay before the company a balance sheet during the years 1956 and 1957 respectively, contrary to s. 124 (2) of the Ordinance. Sub-s. (3) of s. 124 provides that any director who fails to take all reasonable steps to comply with the provisions of the section is guilty of an offence. On behalf of the appellants it is contended that the offences alleged in these four counts were not proved and that there was no proof that the appellants failed to take reasonable steps to comply with the requirements of the section. There was *prima facie* evidence that the appellants had contravened the section, to be found in the evidence of Mr. Mayanja who said that no balance sheet or profit and loss account had ever been produced by the company. If no balance sheet or profit and loss account were ever prepared it is difficult to see how the appellants can be said to have taken reasonable steps to comply with the requirements of the section. If they did take any steps it was a matter especially within their knowledge, and since they did not choose to give evidence about the steps which they had taken they cannot be heard to complain of the magistrate’s finding that they took no steps at all.

In my judgment the appellants were properly convicted on counts 3, 4, 5 and 6 of the charge.

Counts 7 and 8 charged the appellants with failing to make an annual return contrary to s. 111 (1) and (3) of the Ordinance; in the case of count 7, within eighteen months of the date of incorporation of the company; and, in the case of count 8, in respect of the year 1957. Sub-s. (3) of s. 111 provides that if a company fails to comply with the section every officer of the company who is in default shall be liable to a default fine. Section 347 (2) of the Ordinance defines the expression “officer who is in default” as meaning any director, manager, secretary or other officer of the company who knowingly and wilfully authorises or permits the default. It is contended that the appellants were not officers in default because they did not knowingly or wilfully authorize or permit the default. There was evidence that the company was in default and that the appellants were directors. This was *prima facie* evidence that they authorised or permitted the default. See *Edmonds v. Foster and Another* (2). Counts 7 and 8 alleged that the company was a public company. The evidence of Mayanja shows that it was originally incorporated as a private company. On behalf of the appellants it is contended that the fact that there were more than fifty members does not make the company a public company and that, accordingly, s. 111 (3) was not applicable. Section 111 (3) was applicable because s. 28 of the Ordinance provides that where the articles which every private company must have are not complied with, the company ceases to be entitled to the privileges and exemptions conferred on private companies for the purposes of s. 111 (3), and that the provisions of this sub-section apply to the company as if it were a private company. It follows that the appellants were properly convicted on these counts.

Lastly it is said that the sentences were harsh. I do not agree. In my view there was ample evidence to justify the magistrate’s conclusion that the appellants’ failures to comply with the requirements of the Ordinance were deliberate and were designed to conceal the manner in which the funds of the company were being manipulated in defraud of the shareholders.

Both appeals are dismissed.

Appeals dismissed.

For the appellants:

BD Dholakia

Parekhji & Co, Kampala

For the respondent:

MT Maloney (Crown Counsel, Uganda)

The Attorney-General, Uganda

**National and Grindlays Bank Limited v The Official Receiver as Liquidator
of Kentiles Ltd**
[1959] 1 EA 681 (CAN)

Division: Court of Appeal at Nairobi

Date of judgment: 16 July 1959

Case Number: 24/1959
Before: Forbes V-P, Gould and Windham JJA
Sourced by: LawAfrica
Appeal from: H.M. Supreme Court of Kenya–MacDuff, J

[1] *Company – Winding-up – Application for leave to commence action after winding-up order made – Debenture holder’s application for leave to enforce security – validity of debenture disputed in other proceedings pending – Whether leave should be granted – Companies Ordinance (Cap. 288), s. 176, s. 184 (K.) – Banks Title to Land (Amendment of Laws) Ordinance, 1958, s. 1 (K.) – Civil Procedure Code, s. 6 (K.) – Civil Procedure (Revised) Rules, 1948, O. XL. r. 1 (K.).*

Editor’s Summary

In 1951, K. Ltd. obtained an advance of £90,000 from the bank to enable the company to purchase land for a factory. As security for the advance the company issued to the bank a debenture conferring a floating charge on the moveable assets and gave a collateral mortgage on the land acquired. In 1956 when a petition to wind up the company was presented the company had unsecured liabilities of about £150,000 as well as a liability under a second debenture for £30,000. The bank thereupon claimed repayment of its advance and on November 20, 1956, in default of payment appointed a receiver and manager. On January 11, 1957, an order for compulsory winding-up of K. Ltd. was made and the Official Receiver challenged the validity of the bank’s security. on substantial grounds which led to negotiations between all the banks and Government and to the enactment of the Banks’ Title to Land (Amendment of Laws) Ordinance, 1958. By s. 1 of this Ordinance it was provided *inter alia* that nothing in the Ordinance should affect any action or suit commenced before May 13, 1958. The liquidator had already on May 7, 1958, commenced proceedings claiming *inter alia* a declaration that the company’s land was unincumbered by the bank’s alleged mortgage and thereby contesting the bank’s security. On December 13, 1958, the bank applied by summons to the Supreme Court for leave pursuant to s. 176 of the Companies Ordinance to commence an action to enforce its debenture. Leave was refused on the grounds that if granted there would be two actions before the court dealing with the same issue and unjustified added expense. The bank appealed and contended that it was entitled to the leave sought as a matter of course, that the difficulties envisaged would not arise and that the refusal was contrary to public policy.

Held – a discretion exists to grant or refuse the leave sought; there were special, indeed unique, grounds for refusing leave in this case; there must be a determination of the rights of the parties in the action brought by the liquidator before it could be known whether the bank’s status is, in fact, that of debenture holder.

Appeal dismissed.

Cases referred to in judgment

- (1) *In re St. Cuthbert Lead Smelting Co.*, 35 Beav. 384; 55 E.R. 944.
- (2) *In re David Lloyd & Co.* (1877), 6 Ch. D. 339.

July 16. The following judgments were read:

Judgment

Forbes V-P: This is an appeal from an order of the Supreme Court of Kenya.

Kentiles Limited (hereinafter called the company) is a company, incorporated under the Companies Ordinance (Cap. 288), which is now in the course of being wound up by the court. The respondent, the Official Receiver, is liquidator of the company by virtue of s. 184 of the Companies Ordinance and of a resolution adopted at a meeting of the unsecured creditors of the company on January 11, 1956.

In 1951 the company borrowed money from the appellant bank (hereinafter called the bank) which was then known as the National Bank of India. The object of the loan was apparently to enable the company to purchase a plot of land on which to carry on its business of brick and tile manufacturer. To secure the loan, the company issued a debenture dated October 1, 1951, creating a first charge on all the assets and property of the company in favour of the bank to secure the repayment to the bank of such sums as might be due to the bank not exceeding the sum of one million eight hundred thousand shillings (£90,000) together with interest thereon. The debenture provided that the charge created should be a fixed charge as regards immoveable property of the company and a floating charge as regards all other property charged. The company duly purchased freehold premises near Nairobi known as L.R. No. 57 Kasarini. A small portion of the premises was re-sold shortly after the purchase by the company. The remainder (hereinafter called the suit premises) constitutes the principal asset of the company. On November 1, 1951, the company, as collateral security for the moneys secured by the debenture, executed a legal mortgage in favour of the bank conveying to the bank the suit premises subject to the usual proviso for redemption. The company, further, on or about December 19, 1951, deposited the title deeds of the suit premises with the bank. We were informed that the amount now due to the bank and believed to be secured by the debenture is approximately £120,000 including interest; that there is in existence a second debenture created by the company in favour of the East African Marketing Co. Ltd., as security for a sum of about £30,000; and that the unsecured debts of the company amount to about £150,000.

On November 19, 1956, a petition for the winding-up of the company by the court was filed. The bank, realising that the company was about to go into liquidation, made a formal demand for the moneys due, and, in default of payment, on November 20, 1956, appointed a receiver and manager of the property of the company under the powers conferred by cl. 7 of the first debenture. The receiver and manager was put in possession of the suit premises the following day, and still remains in possession. On January 11, 1957, an order was made by the court for the winding-up of the company, and, as already stated, the Official Receiver (hereinafter referred to as the liquidator) thereupon became liquidator of the company.

It seems that on October 28, 1957, the liquidator wrote to the bank challenging the validity of the bank's security. The letter is not on the record, but it seems that the points raised by the liquidator caused considerable anxiety in the banking world of Nairobi, as, if the liquidator's contention was correct, the validity of many debentures and mortgages held by the banks would be affected, the points raised apparently not having been appreciated before. Negotiations ensued between the banks and Government as a result of which legislation was enacted to safeguard the bank's position. This legislation was the Banks'

Title to Land (Amendment of Laws) Ordinance, 1958 (No. 36 of 1958) (hereinafter referred to as the amending Ordinance). The amending Ordinance effected amendments to s. 328 of the Companies Ordinance (Cap. 288), to s. 7 of the Land Control Ordinance (Cap. 150), and to s. 88 of the Crown Lands Ordinance (Cap. 155), and in each case the amendment was given retrospective effect to the date when the section amended had come into force. Section 1 of the amending Ordinance, however, contained the following proviso:

“Provided that nothing contained in the said sections [i.e. the sections of the amending Ordinance which effected the amendments mentioned above] shall affect any action, suit or other proceedings commenced before the 13th day of May, 1958.”

May 13, 1958, was the date on which the Bill for the amending Ordinance was published in the *Gazette*.

In the meantime the liquidator, no doubt aware that the amending Ordinance was contemplated, on May 7, 1958, filed a suit (hereinafter referred to as the liquidator's action) against the bank and the receiver of the company's assets appointed by the bank, claiming, *inter alia*, a declaration that the company “is the free and unincumbered owner of the freehold estate” in the suit premises. It is clear that the object of the liquidator's action is to challenge the validity of the bank's security. The grounds on which the challenge is based are not apparent from the plaint itself, but we were informed that they were three, namely that, under the law as it stood prior to the enactment of the amending Ordinance, which, the liquidator contends, is the law to be applied in the suit by virtue of the proviso to s. 1 of the amending Ordinance:

- (a) the consent of the Land Control Board to the debenture and mortgage in favour of the bank had not been obtained as required by s. 7 of the Land Control Ordinance;
- (b) the consent of the Governor to the debenture and mortgage in favour of the bank had not been obtained as required by s. 88 of the Crown Lands Ordinance, nor had the debenture been registered as required by s. 126 of that Ordinance;
- (c) the bank was precluded from acquiring the suit premises by virtue of the proviso to s. 328 of the Companies Ordinance.

The pleadings in the liquidator's action are not complete yet, the bank and the bank's receiver having been granted leave to amend their defences, but apparently not yet having done so.

On December 13, 1958, the bank applied to the Supreme Court by way of Chamber summons for:

“an order that notwithstanding the order for the winding-up of the above-named company made by the court on the 11th day of January, 1957, the said National Overseas and Grindlays Bank Limited may be at liberty to commence an action in this honourable court at Nairobi against the above-named company to enforce the debenture created by the above-named company on the 1st day of October, 1951, in favour of the said bank by its then name of The National Bank of India Limited by obtaining the appointment by the court of a receiver and such further or other relief as may seem to it to be expedient . . .”

The leave of the court before the proposed action can be commenced is necessary by reason of s. 176 of the Companies Ordinance, which reads as follows:

“176. When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court, and subject to such terms as the court may impose.”

Certain preliminary questions in regard to this chamber summons were dealt with by the learned judge of the Supreme Court who heard the application, in a written ruling which appears at p. 50 of the record. In particular, the heading to the summons was amended by giving it the number assigned to the first proceeding in the winding-up and not, as had originally been done, assigning it a new civil case number. There is no appeal against this ruling.

Arguments on the merits of the application were heard by the learned judge on December 30, 1958, and on January 2 he delivered a "judgment" refusing the application with costs.

It is against this refusal that the present appeal has been brought.

In his "judgment" the learned judge says:

"I accept that the law as stated in Palmer's Company Precedents (16th Edn.) at p. 422 and the other textbooks referred to is correct, that is to say—

'When the winding-up is compulsory, or under supervision, and it is desired to bring an action to enforce the securities of debenture and debenture stockholders, the leave of the court is necessary . . . ; the court will give leave very much as a matter of course.'

"There is, however, a discretion as to whether leave should be granted. In any case of this nature that I have been concerned with the usual question has been whether leave should be granted if it will be to the material detriment of the creditors while the position of the debenture-holder will not be prejudiced. That is not the position in this case."

The learned judge then sets out briefly the facts leading up to the application for leave, and continues:

"What then is going to be the position if I grant the leave asked for? In the suit commenced by the liquidator the test of the validity of the security will be the law applicable before the passing of Ordinance No. 36 of 1958. That in my view is the effect of the proviso above quoted. If a suit is commenced now the test will be the law applicable after the passing of Ordinance No. 36 of 1958. Mr. Harris in reply to this argument says that if the second suit is not maintainable this is a matter which should be raised on the suit itself. He admitted the possibility, and to my mind it is more than a possibility, that the hearing of any suit to be instituted now by the applicant may require to be stayed pending decision in the present suit on the validity of the applicant's security. Under those circumstances I cannot see that the applicant bank has anything to gain by instituting a suit now, except the few weeks that may be required for pleadings. On the other hand if in the present suit the applicant's security is held not to be valid the costs of the liquidator in defending this further action would be an unjustified added expense, and if the applicant's security is held to be valid the applicant can then obtain leave as a matter of course and there will be no defence to his suit to enforce his debenture. In that event any costs incurred by the liquidator in defending a present suit to enforce the debenture would be costs thrown away.

"In my view the issue of validity of its security is raised in the present suit, it is obviously an arguable point, it will decide the real issue between the parties and it can be brought to that within a reasonable period, if the parties are not quite so dilatory as they have been so far, certainly before the hearing of any suit instituted after this date. In view of the wording of the proviso to s. 1 of Ordinance No. 36 of 1958 which, in my view, if leave were granted at the present time, would result in two actions before this court causing the same issue to which a different test of law may apply I think I would be wrong in granting the leave asked for at this stage."

The formal order against which the appeal is brought is in the following terms:

“It is Ordered that:

- “(1) leave to the applicant to commence an action in this honourable court against Kentiles Limited named in the title hereof to enforce the debenture created by the said Kentiles Limited on the 1st day of October, 1951, in favour of the applicant by its then name of “National Bank of India Limited” by obtaining the appointment by the court of a receiver and such further or other relief as may seem to it to be expedient, be and the same is hereby refused, but without prejudice to the applicant’s right to renew its application to this court for such leave upon the final determination of the suit now pending in this court and intituled ‘Civil Case No. 658 of 1958. Kentiles Limited (in liquidation) and the Official Receiver, as liquidator thereof–plaintiff versus Hubert Richard Brice–first defendant, and National Overseas and Grindlays Bank Limited–second defendant.’
- “(2) the applicant do pay to the Official Receiver, as such liquidator, the taxed costs of and incidental to the said summons and this order.”

A number of grounds of appeal are set out in the memorandum of appeal, but substantially the argument for the bank is that the bank is entitled to the leave sought as a matter of course; that no difficulties as envisaged by the learned judge will arise if the proposed action is commenced or that, if they do arise, they will not be insuperable; that the same issues, and, in particular, the issue of the validity of this debenture, will not arise in both suits; that the refusal of leave will prejudice the bank and the second debenture-holder in that the business is being run at a loss and it is in the interests of everyone to secure an early sale of the suit premises, but the receiver at present in possession cannot give a title that will be accepted by a purchaser owing to the dispute as to the validity of the security whereas a receiver appointed by the court would be able to give a good title; and that refusal of leave is against public policy and will set a precedent which will be detrimental to the transaction of normal financial business.

A good deal of the argument on the appeal concerned issues which will require to be considered on the trial of the liquidator’s action, e.g. the effect of the proviso to s. 1 of the amending Ordinance, and whether on the pleadings it will be open to the liquidator to challenge the validity of the debenture and mortgage. It was conceded that if it is open to the liquidator on the pleadings to challenge the validity of the debenture and mortgage on the law as it stood before the enactment of the amending Ordinance, there will be substantial matters to be decided. I do not think it would be proper to prejudge any of the issues, preliminary or otherwise, which will arise on the trial of the liquidator’s action. It is sufficient to say that I am not satisfied that the bank must inevitably succeed on the preliminary issues, that I am satisfied that the object of the suit is to challenge the bank’s security and, if the bank fails on the preliminary issues, that there will be matters of substance to be considered.

Section 176 of the Companies Ordinance is identical with the corresponding provision of the English law relating to companies which has been in force at least since the Companies Act, 1862, was enacted. English authorities are accordingly relevant. Mr. Harris for the bank contended in effect that the bank ought to have leave as a matter of course. In putting his submission he did qualify the proposition by saying that leave should be granted to file a debenture-holder’s action as a matter of course unless some very unusual

circumstance existed. But he argued that the refusal of leave was without precedent, and, as I understood it, that virtually no circumstances could arise which would justify refusal.

It is true that no case was cited in which an application made in a winding-up for leave to bring a debenture-holder's action was refused; though Mr. Georgiadis for the liquidator did draw attention to *In re St. Cuthbert Lead Smelting Company*, (1) 35 Beav. 384; 55 E.R. 944, where liberty to a mortgagee to institute a suit for foreclosure pending a winding-up was refused. However, I think it is clear, both from the wording of s. 176 of the Companies Ordinance itself, and from the reported cases and the textbooks, that a discretion does exist and that it is envisaged that circumstances can arise which would justify refusal of leave. In *Buckley on the Companies Acts* (12th Edn.) at p. 501 the learned author says:

"Except in special circumstances, a mortgagee will have leave, as a matter of course, to continue a foreclosure action, unless the company offer to give him at once foreclosure or sale as the case may be, that is, practically offer him at once judgment in his action. The mortgagee is independent of the winding-up proceedings, and his action is to enforce a claim, not against the company, but to his own property."

This statement is based on *In re David Lloyd & Co.* (2) (1877), 6 Ch. D. 339, a case on which Mr. Harris relied strongly. In that case (at p. 343) Jessel, M.R., said:

"Now, as a rule, a mortgagee has a right to realize his security, and of course, as incidental to that, a right to bring an action for foreclosure. Those who say that he should be restrained from bringing or proceeding with such an action must either show some special ground for restraining him, or must say, 'We can offer the mortgagee all he is entitled to, foreclosure or sale, as the case may be, at once, without any proceeding in the action.' That, of course, would be a reason for refusing leave to proceed with an action if commenced, or for not giving leave to commence a threatened action. But, short of that, it appears to me that the court ought not under the 87th section of the Act to interfere with the rights of a mortgagee."

Other authorities cited to us were substantially to the same effect, and I would respectfully accept the passage I have cited from the judgment of Jessel, M.R., as a correct statement of the law. In the passage, however, the learned Master of Rolls does envisage the possibility that "special ground" can be shown for restraining a mortgagee from proceeding to foreclosure in a winding-up. The question in the instant case appears to me to be whether any such special ground has been shown by the liquidator.

In my view the liquidator has shown special ground. The position as I see it is that the liquidator is seeking to challenge *inter alia* the validity of the bank's debenture and has commenced an action for the purpose. It is conceded that the grounds of the challenge are substantial. It may be that, as contended by Mr. Harris, the plaint, in the liquidator's action, as framed, is ineffective to raise the issue of the validity of the debenture. But this again is an arguable matter which will require to be decided in the liquidator's action. There is no doubt that the object of the liquidator's action is to challenge the validity of the bank's debenture, and to challenge it on the law as it stood before the enactment of the amending Ordinance. If the proposed debenture-holder's action is commenced, the issue of the validity of the debenture will also arise on it and, were it not for the existence of the liquidator's action, protected as it is by the proviso to s. 1 of the amending Ordinance, the basis on which the validity must be determined in the debenture-holder's action would be the law

as it stands after the enactment of the amending Ordinance. It seems to me abundantly clear that the effect of the proviso to s. 1 of the amending Ordinance is such that, if the liquidator's action does raise the issue of the validity of the debenture, the rights of the parties in relation to it must be finally determined in that action. Mr. Harris argued that if the issue of the validity of the debenture did arise in the liquidator's action it could only arise on a proposed counter-claim, and that a counter-claim must rank as a separate action and in such case would be one commenced after the material date, i.e. after May 13, 1958. I express no opinion on this aspect of the matter. It will no doubt require to be decided in the course of the action. It is sufficient that the liquidator is seeking to challenge the debenture in his action and that, if that action is effective for the purpose, certain vested rights are created by the proviso to s. 1 of the amending Ordinance which cannot be defeated by the device of filing a subsequent action raising similar issues. Section 6 of the Civil Procedure Ordinance (Cap. 5) provides for the stay of the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties which is pending in any court in the Colony. It would seem that that section would apply to the proposed debenture-holder's action, but, even if it does not, I have no doubt that, in the circumstances of this case, the debenture-holder's action, if commenced, would require to be stayed. The pending of the liquidator's action at the date of publication of the bill for the amending Ordinance is a fact which may affect fundamentally the rights of the parties, and the questions arising from that fact can only be determined in the liquidator's action. Any other action in which the result would be dependent on the result of the liquidator's action must of necessity await the determination of the liquidator's action before it can itself be determined. In my opinion, the proposed debenture-holder's action is an action the result of which is dependent on the result of the liquidator's action. In these circumstances I think there are special, indeed, unique, grounds for refusal of leave to institute the debenture-holder's action at this stage.

Mr. Harris argued that refusal of leave would be contrary to public policy in that it would set a precedent tending to weaken the rights of debenture-holders in general. I do not see why this should be. I do not think refusal of leave in this case in any way departs from existing law or tends to vary existing practice. As I have remarked, the circumstances here are unique, and it is most unlikely that they will ever arise again. It may be noted that the refusal of leave is not final but is without prejudice to the bank's right to renew its application upon the determination of the liquidator's action.

Mr. Harris also argued that the refusal of leave was detrimental to the rights of all interested parties since an early sale was in the interests of all creditors, but no one at present could offer a title which would be acceptable to a purchaser of the suit premises. There may be some substance in this, though, on the information available to the court, it would seem unlikely that the bank will suffer, assuming that it establishes the validity of its security. It may be that the second debenture-holders will be affected, but they are not parties to the present proceedings. It was suggested for the liquidator that the bank could overcome this difficulty by applying for the appointment of a receiver under O. XL, r. 1 of the Civil Procedure (Revised) Rules, 1948. It is not clear to me that this course is open to the bank—see Mulla, Code of Civil Procedure (12th Edn.) Vol. II, p. 1169, where it is stated that under the corresponding provision (O. 40, r. 1) of the Indian Civil Procedure Rules the court has no jurisdiction to appoint a receiver of a company—but, assuming that it is not, I think the possibility of the bank's security being adversely affected is too remote to affect the matter. It ought not, in fact, to be impossible for the interested parties and their advisers to come to an arrangement whereby an

advantageous offer of sale could be taken advantage of, pending the final determination of the rights of the parties. It seems to me that the essential feature is that there must be a determination of the rights of the parties in the liquidator's action before it can be known whether the bank's status is, in fact, that of debenture-holder. Consequently, I think the learned judge of the Supreme Court was right in refusing to give leave to the bank to commence a debenture-holder's action until the liquidator's action had been determined. Until that has happened the status and rights of the parties cannot be known with certainty.

Accordingly I would dismiss the appeal with costs.

Gould JA: I agree and have nothing to add.

Windham JA: I also agree.

Appeal dismissed.

For the appellant:

LGE Harris

Hamilton, Harrison & Mathews, Nairobi

For the respondent:

B Georgiadis and RH Munro (Deputy Official Receiver, Kenya)

Byron Georgiadis, Nairobi

Nayinda s/o Batungwa v R [1959] 1 EA 688 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	23 July 1959
Case Number:	99/1959
Before:	Sir Kenneth O'Connor P, Forbes V-P and Windham JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika—Jefferies, Ag. J

[1] *Criminal law – Evidence – Extra-judicial statement – Statement recorded by magistrate without caution while accused in police custody – Application of Judges' Rules to magistrates when taking statements – Indian Evidence Act, 1872, s. 24 and s. 29.*

Editor's Summary

The appellant was convicted of murder by setting fire to the house in which the deceased was sleeping. The evidence against the appellant consisted of an extra-judicial statement made by him to a magistrate

which amounted to a confession and certain evidence given by the appellant's wife which tended to corroborate the appellant's confession, though insufficient in itself to sustain a conviction. The evidence showed that the magistrate who recorded the statement had failed to caution the appellant but the trial judge admitted the statement in evidence taking the view that by virtue of s. 29 of the Indian Evidence Act he had no discretion to exclude the statement. On appeal it was argued that the statement was inadmissible since it had been recorded without the accused being cautioned, the failure to administer a caution occasioned a failure of justice and that the appellant's statement was not voluntary. It was also objected that the magistrate who recorded the statement took the preliminary enquiry.

Held –

- (i) failure to comply with the Judge's Rules when taking a statement from a prisoner will usually result in the rejection of the statement as evidence but the Judges' Rules are administrative rules, and a breach of these does not automatically result in the exclusion of a statement.

- (ii) there is nothing in s. 29 of the Evidence Act which negatives the discretion of a judge to refuse to admit in evidence a statement made by a prisoner if the trial judge “thinks that the statement was not a voluntary one or was an unguarded answer made under circumstances that rendered it unreliable, or unfair for some reason to be allowed in evidence against the prisoner”.
- (iii) the Judges’ Rules having been drawn up for the guidance of police officers engaged in criminal investigations are not applicable to the taking of statements by magistrates, but to ensure that a statement taken by a magistrate is voluntary it is advisable that a magistrate who is about to take a statement should administer a caution in the normal form as laid down in the Judges’ Rules.
- (iv) a preliminary enquiry is not automatically a nullity simply because the presiding magistrate has previously taken an extra judicial statement from the prisoner, but it might be necessary to order that proceedings be re-commenced ab initio if actual prejudice to the prisoner is shown to have thereby occurred.

Appeal dismissed.

[**Editorial Note:** The court dismissed this appeal subject to the medical report referred to at the end of the judgment being produced in case the contents differed from the information received by Crown Counsel. However, when the specialist psychiatrist’s report was later seen by the court it confirmed the information given to the court by Crown Counsel.]

Cases referred to in judgment

- (1) *Njuguna s/o Kimani and Others v. R.* (1954), 21 E.A.C.A. 316.
- (2) *R. v. Voisin*, [1918] 1 K.B. 531.
- (3) *Mohamed Warsama v. R.* (1956), 23 E.A.C.A. 576.
- (4) *R. v. Bass*, [1953] 1 All E.R. 1064.
- (5) *R. v. Kinguru s/o Kabutui* (1935), 2 E.A.C.A. 60.

Judgment

Forbes V-P: read the following judgment of the court:

This is an appeal from the High Court of Tanganyika against a conviction of murder and sentence of death.

The deceased, Ndabilende w/o Nzobakenga, met her death when the house in which she had been sleeping with her husband and child was burnt down. The case against the appellant was that he had set fire to the house at the behest of one Rungwiza, the brother of the deceased’s husband, who had paid him Shs. 10/- for burning the house. The evidence against the appellant consisted of an extra-judicial statement made by the appellant to a magistrate, Mr. Osmond, which amounted to a full confession to the burning of the house, and certain evidence given by the appellant’s wife which tended to corroborate the appellant’s confession, though insufficient in itself to sustain a conviction. At the commencement of the trial the point was taken that the preliminary inquiry was a nullity because it appeared that the appellant’s extra-judicial statement had been taken by the magistrate who later held the preliminary inquiry. The

extra-judicial statement itself had not been put in evidence at the preliminary inquiry, but notice of additional evidence to prove it at the trial had been filed by the Crown. Subsequently, the admissibility of the extra-judicial statement was challenged on the ground that the magistrate who recorded it had failed to caution the appellant before the statement was made. Both these objections were over-ruled by the learned trial judge. The appellant made a short unsworn statement to the effect that he did not burn the house and was not paid money for burning the house, but was convicted of the murder of the deceased by the learned trial judge, who relied on the appellant's extra-judicial

statement and the corroboration of the statement supplied by the appellant's wife.

At the hearing of the appeal the appellant was not present or represented, but we considered the points raised in the memorandum of appeal, which read as follows:

- “(1) That the learned judge erred in holding that the preliminary inquiry was not a nullity as it was held by the same magistrate who had taken the confession from the appellant.
- “(2) That the appellant was prejudiced in his defence as the same magistrate who took the confession and held the preliminary inquiry also appeared and gave evidence at the trial.
- “(3) The learned judge also erred in holding that the confession made by the appellant before Mr. C.N. Osmond, was admissible although the appellant was not cautioned before the confession was recorded.
- “(4) That looking to the circumstances of the case and taking into consideration that the appellant was from a primitive part of Africa such a caution was necessary and failure to give it has occasioned failure of justice.
- “(5) That the appellant would not have made the alleged confession had he been cautioned.
- “(6) That there was no corroboration from the evidence of Nyancima d/o Kilanyagala whose evidence was full of discrepancies and unsatisfactory and it ought to have been rejected entirely.
- “(7) That the words ‘I was sent to you from the police station at once’ uttered by the appellant before the alleged confession was recorded meant that the appellant was compelled to go to the magistrate and hence his statement was not a voluntary one.”

As regards ground 6 in the memorandum of appeal, we are satisfied that the learned judge correctly directed himself as to the danger of acting on a retracted confession without corroboration, and that he was justified in finding corroboration in the evidence of the appellant's wife. We think there is no substance in this ground of appeal.

Similarly, we do not think there is any substance in grounds 1 and 2 of the memorandum of appeal. We agree that it is undesirable that the same magistrate who has recorded the statement of a prisoner should take the preliminary inquiry into the offence with which the prisoner is charged, but we appreciate that in country districts it may not always be easy to have access to more than one magistrate. It may be that if actual prejudice were shown it would be necessary to order that proceedings be re-commenced *ab initio*, but we do not think that a preliminary inquiry is automatically a nullity merely because the presiding magistrate has previously taken an extra-judicial statement from the prisoner. The preliminary inquiry is not the trial, and the magistrate holding a preliminary inquiry is only required to consider whether a *prima facie* case has been made out. In the instant case it does not appear that the appellant suffered any prejudice.

Grounds 3, 4, 5 and 7 of the memorandum of appeal raise a more substantial matter. As already remarked, objection was taken to the admissibility of the extra-judicial statement made by the appellant. The statement in question was one made before Mr. Osmond, a class III magistrate. When the statement was challenged, the procedure of holding a “trial within a trial” was duly followed, and Mr. Osmond gave evidence of the circumstances in which he came to take the statement. He said, *inter alia*:

“I took the statement you show me. On 17.10.58 Nayinda Batungwa the accused whom I recognise was brought before me. I was told by the

inspector that he wished to make a statement. I was told he was charged with murder. The accused was brought by a police askari, he was placed in the custody of my messenger Cuthbert. The askari was told to leave the office and he went away.

"I told the accused he was before a magistrate and I asked if he wished to make a statement. He said yes I wish to explain this matter.

"I examined his body. I found no marks suggestive of any violence.

"I asked how long he had been in custody—he said he had been arrested the previous day 16.10.58 at Rutenge Trading Centre, Monday at 8 a.m. He said he and the police escort had slept the night there and caught the bus the next day to Ngara by bus, that at the police station they discovered he wished to make a statement and brought him straight to me.

"He was brought before me at 3.15 having got off the bus that arrived at 2.30 p.m.

"I wrote in the statement that he arrived at 2.30. I must have asked him specifically.

"I had no reason whatever to doubt that his statement was voluntary."

In cross-examination, in answer to the question:

"Did you caution him he was not bound to make a statement and that if he did it would be used at the trial"?

Mr. Osmond said:

"I see nothing in the record to show that I did caution him."

Mr. Osmond also stated that the statement had been read back to the appellant and found correct and that the appellant had thumb printed it with his right hand.

No evidence other than that of Mr. Osmond was taken at the "trial within a trial", counsel for the appellant stating:

"My only objection is that the statement was not taken under caution. There is no objection to hearing arguments as to admissibility now without calling the interpreter."

The learned trial judge delivered a written ruling in which he said, *inter alia*:

"The Judges' Rules apply to Tanganyika and therefore before taking a statement from a person in custody a police officer should administer the caution prescribed by r. 5 of the Judges' Rules . . .

"In my view a magistrate who is recording an extra-judicial statement should give the person making the statement the same caution. In fact it is usually done and there has been a High Court Circular some time ago saying that it should be done. No doubt, the reason why the caution was not administered in this case was that Mr. Osmond was working from the Handbook for Magistrates which is an old publication and does not say that a caution should be given.

"It seems illogical in the extreme to say that if one is accused of a crime one is entitled to a caution before making a statement to a police officer who, if the statement amounts to a confession, cannot give evidence regarding it, whereas one is not entitled to a caution before making a statement to a magistrate who can, even if it does amount to a confession, give evidence regarding it.

"For this reason I have on a previous occasion refused to allow in evidence an extra-judicial statement taken without a caution by a magistrate but on that occasion learned counsel for the Crown did not argue the effect of s. 29 of the Evidence Act."

The learned judge then sets out the material part of s. 29 of the Evidence Act, and continues:

“This seems to me to cover the position precisely. The Judges’ Rules are rules of practice only and I cannot see that they can override a specific statutory provision.”

The learned judge then refers to the decision of this court in *Njuguna s/o Kimani and Others v. R.* (1) (1954), 21 E.A.C.A. 316, and says:

“It had at first occurred to me that the case to which I have referred might amount to an authority for the proposition that the Judges’ Rules over-ride s. 29, at least with regard to questioning but on consideration I see that that cannot be so. Section 29 must be read with the other sections of the Act and in India (or Tanganyika) a confession to the police is not admissible and s. 29 can, therefore, have no application to confessions obtained by questioning by the police.

“I cannot, therefore, say that despite s. 29 the Judges’ Rules apply to questioning by the police, why not to cautioning by a magistrate?

“I am reluctant to admit the extra-judicial statement which was taken without a caution. As I have, I hope, already made clear, I do not attribute any sinister motives to Mr. Osmond but I am by no means satisfied that (if) a caution had been administered the statement would have been made—the accused had not given evidence on this point but I have as a magistrate had persons brought to me who have changed their minds about making a statement when I have cautioned them . . .

“In this territory, the law as I interpret it, does not in relation to extra-judicial statements, contain the comparable safeguard of the Judges’ Rules.

“The position seems to me most unfair and had I a discretion to refuse to admit the statement I would refuse to do so but I have come to the conclusion that I have no such discretion.

“I hold that the extra-judicial statement is admissible.”

With respect, this ruling discloses an entirely wrong conception of the question. In the first place, the issue in this case, and in every case where the admissibility of a statement or confession is in question, whether taken by a magistrate, or, where the law allows it, by a police officer, is whether the statement was voluntary in the sense that it has not been obtained by force or threats or hope of advantage exercised or held out by a person in authority. The learned judge, although he remarks that the Judges’ Rules are rules of practice only, nevertheless clearly contemplates that any breach of the Judges’ Rules automatically renders a statement inadmissible in the case of a statement taken by a police officer. This is not correct—*R. v. Voisin* (2), [1918] 1 K.B. 531. Secondly, the learned judge has held that by reason of s. 29 of the Evidence Act he had no discretion to exclude the statement. This also is incorrect—*Mohamed Warsama v. R.* (3) (1956), 23 E.A.C.A. 576 at p. 579.

The law on the admissibility of statements in England is clearly stated in *R. v. Voisin* (2) where, at p. 537, in the judgment of the Court of Criminal Appeal it is said:

“It is clear, and has been frequently held, that the duty of the judge to exclude statements is one that must depend upon the particular circumstances of each case. The general principle is admirably stated by Lord Sumner in his judgment in the Privy Council in *Ibrahim v. R.* as follows: ‘It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.’ The point of that passage is that the statement must be a

voluntary statement; any statement which has been extorted by fear of prejudice or induced by hope of advantage held out by a person in authority is not admissible. As Lord Sumner points out, logically these considerations go to the value of the statement rather than to its admissibility. The question as to whether a person has been duly cautioned before the statement was made is one of the circumstances that must be taken into consideration, but this is a circumstance upon which the judge should exercise his discretion. It cannot be said as a matter of law that the absence of a caution makes the statement inadmissible; it may tend to show that the person was not upon his guard as to the importance of what he was saying or as to its bearing upon some charge of which he has not been informed.”

Again, in *R. v. Bass* (4), [1953] 1 All E.R. 1064 at p. 1065, the Court of Criminal Appeal said:

“There can be no doubt, having regard to that evidence, that the appellant was in custody, that he was questioned without being cautioned, and thus that there was a breach of r. (3) of the Judges’ Rules. If the deputy-chairman had held—as we think he should have done—that the statement was taken in contravention of the Judges’ Rules, it would have been open to him in his discretion to have refused to admit it. On this matter he did not exercise any discretion because, erroneously as we think, he considered the rules had not been contravened.

“That, however, is not an end of the matter, for this court has said on many occasions that the Judges’ Rules have not the force of law, but are administrative directions for the guidance of the police authorities. That means that, if the rules are not complied with, the presiding judge may reject evidence obtained in contravention of them. If, however, as *R. v. Voisin* shows, a statement is obtained in contravention of the Judges’ Rules, it may nevertheless be admitted in evidence provided it was made voluntarily. The principle to be applied was laid down in *R. v. Thompson*, as approved in *Ibrahim v. Regem*. In the latter case, Lord Sumner said ((1914) A.C. 609):

‘It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale.’

“It is to be observed, as this court pointed out in *R. v. Murray*, that, while it is for the presiding judge to rule whether a statement is admissible, it is for the jury to determine the weight to be given to it if he admits it, and thus, when a statement has been admitted by the judge, he should direct the jury to apply to their consideration of it the principle as stated by Lord Sumner, and he should further tell them that, if they are not satisfied that it was made voluntarily, they should give it no weight at all and disregard it.”

We are not to be taken as minimising the importance of compliance by police officers with the Judges’ Rules. Failure to comply with the Judges’ Rules when taking a statement from a prisoner will, no doubt, usually result in the rejection of the statement as evidence by the judge presiding at the trial. But it must be kept in mind that the Judges’ Rules are administrative rules, and that breach of them does not automatically result in the exclusion of a statement. The breach is but one of the circumstances, though an important

one, for the trial judge to take into account in deciding whether or not the statement was voluntary, or was made in circumstances which render it unfair to the prisoner that it should be admitted in evidence.

Sections 24 and 29 of the Indian Evidence Act read as follows:

“24. A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the court to have been caused by any inducement, threat, or promise, having reference to the charge against the accused person, proceeding from a person in authority, and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

.....

“29. If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.”

In our view the effect of the law embodied in these sections considered with the Judges' Rules is the same as that enunciated in the cases cited above. We see nothing in s. 29 which negatives the discretion of a judge to refuse to admit in evidence a statement made by a prisoner if, to use the words employed in *R. v. Voisin* (2), the trial judge

“thinks the statement was not a voluntary one in the sense above mentioned, or was an unguarded answer made under circumstances that rendered it unreliable, or unfair for some reason to be allowed in evidence against the prisoner.”

This court has in the past rejected a statement made to a magistrate in answer to questions—see *R. v. Kinguru s/o Kabutui* (5) (1935), 2 E.A.C.A. 60. And in connection with *Njuguna's* case (1) referred to by the learned trial judge, it must be borne in mind that by reason of amendments to the Indian Evidence Act which are in force in Kenya, confessions to certain police officers are admissible in evidence. In considering the question whether a statement made to a magistrate should or should not be rejected, however, the circumstances in which such statements are made must be kept in mind. The Judges' Rules are not applicable to the taking of statements by magistrates, since they are rules drawn up for the guidance of police officers engaged in the actual investigation of criminal offences. There is, nevertheless, an established procedure which is normally followed by magistrates and which is designed to the same end, namely, to ensure that a statement taken by the magistrate is a voluntary one. To this end, we certainly think it advisable that a magistrate who is about to take a statement should administer a caution in the normal form as laid down in the Judges' Rules. If there were anything in the evidence in a case to suggest that the failure to administer a caution had resulted in the making of a statement which was not voluntary in the sense explained in *R. v. Voisin* (2), a trial judge might well, in the exercise of his discretion, reject the statement. Nevertheless, we do not think that the absence of a caution by a magistrate would, in general, be as serious a consideration as the absence of a caution in the case of a statement taken by a police officer. The circumstances

in which the statement is taken are entirely different and the normal procedure followed by a magistrate when a prisoner is brought to him for the purpose of recording a statement renders it unlikely that the prisoner

“is not upon his guard as to the importance of what he is saying or as to its bearing on the charge preferred against him.”

In the instant case the learned trial judge did not exercise any discretion since he regarded himself as not having a discretion. He indicated that if he had had a discretion he would have exercised it to exclude the appellant's confession, but he has also made it clear that in so doing he would not have been acting upon a consideration of the essential point, namely, whether, on the evidence, the confession was voluntary in the sense explained above. There is no suggestion whatever in the evidence that the confession was not voluntary in that sense. Nor is there any suggestion that the appellant would not have made the statement if he had been cautioned. The appellant himself never suggested either of these propositions, either at the time the admissibility of the confession was challenged, or later when he made an unsworn statement from the dock. It is to be noted that the magistrate did enquire of the appellant if he wished to make a statement, and that the appellant said yes, he wished to explain the matter. In all the circumstances we can see no ground for excluding the confession, and we think that if the learned judge had exercised his discretion upon the right principles he must have come to the same conclusion.

We think that grounds 3, 4, 5 and 7 of the memorandum of appeal must fail.

We noted that it appeared on the file that after the trial the learned trial judge had asked for a report upon the appellant's mental state. We adjourned the hearing of the appeal to enable the report to be put before us. It is not available today though we understand that it is on its way to Dar-es-Salaam. Crown Counsel, however, has assured us that from information received on the telephone he is instructed that the report is to the effect that there is no reason to suppose the appellant was or is other than sane at the time of the crime, at the time of the trial, and now.

On the footing of this assurance, we dismiss the appeal.

Appeal dismissed.

The appellant did not appear and was not represented.

For the respondent:

AM Troup (Crown Counsel, Tanganyika)

The Attorney-General, Tanganyika

Biharusi d/o Ruanda v R
[1959] 1 EA 696 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	23 July 1959
Case Number:	105/1959
Before:	Sir Kenneth O'Connor P, Forbes V-P and Windham JA

Sourced by: LawAfrica

Appeal from: H.M. High Court of Tanganyika–Davies, C.J

[1] Criminal law – Unlawful possession of diamonds – Meaning of “possession” – Distinction between physical custody and legal possession – Burden of proof – Diamond Industry Protection Ordinance (Cap. 129), s. 3 (1), s. 7 (1) and s. 17 (T.) – Penal Code, s. 5 (T.).

Editor’s Summary

The appellant and one, F., were convicted by a magistrate of being in possession of diamonds contrary to s. 3 (1) of the Diamond Industry Protection Ordinance. The appellant was also convicted of attempting to buy diamonds contrary to s. 7 (1) and s. 17 of that Ordinance. The evidence showed that F. met the appellant near her house and showed her some stones—diamonds—and told her that he wanted to sell them; F. and the appellant then went to a goldsmith’s shop where the appellant showed the stones in a piece of paper to the goldsmith who confirmed that the stones were diamonds and gave them back to her, whereupon the appellant put the stones back in the paper and threw them to F. who was waiting nearby and shouted to a police officer to arrest F. On appeal to the High Court the appellant’s conviction in respect of the charge of possession was upheld but the conviction on the charge of attempting to buy diamonds was quashed. On further appeal the point in issue was whether the prosecution had successfully discharged the burden of proving that diamonds were found in the “possession” of the appellant.

Held –

- (i) “possession” in s. 3 (1) of the Diamonds Protection Ordinance means legal possession and is not satisfied by mere temporary physical control, and knowledge of the presence of the diamonds is an essential ingredient of possession;
- (ii) from the circumstances of the case as proved by the prosecution witnesses it could not be safely presumed that the appellant though she had physical custody of the diamonds, had the power, or intended to deal with them as owner to the exclusion of F.
- (iii) legal possession of stones was throughout with F. and it no more passed to the appellant than possession of goods handed by a shopkeeper to a customer for inspection passes to the customer.

Appeal allowed. Conviction quashed and sentence set aside.

Cases referred to in judgment

- (1) *R. v. Dewji Pragji Mehta* (1946), 13 E.A.C.A. 80.
- (2) *R. v. Chissers* (1678), T. Raym 275; 83 E.R. 142.
- (3) *R. v. Thompson* (1862), Le. & Ca. 225; 9 Cox C.C. 244.

July 23. The following judgments were read:

Judgment

Sir Kenneth O'Connor P: The appellant, an African woman aged about 40, was convicted on March 31, 1959, by the district court, Kigoma, of being in possession of diamonds contrary to s. 3 (1) of the Diamond

Industry Protection Ordinance (Cap. 129 of the Laws of Tanganyika) and of attempting to buy diamonds contrary to s. 7 (1) and s. 17 of that Ordinance, and was sentenced to one year's imprisonment on each count, the sentences to run concurrently. On appeal to the High Court it was conceded by the Crown that the conviction in respect of the charge of attempting to buy diamonds could not be supported and that conviction was quashed. The conviction for possession of diamonds was maintained. The appellant appealed to this court. On July 17, 1959, we allowed the appeal, quashed the conviction and sentence and directed that she be set at liberty. We now give our reasons.

An African named Francis son of John, was tried in the district court with the appellant and convicted. He was the first accused. He has not appealed. After his conviction it appeared that he had two previous convictions involving dishonesty and two under the Diamond Industry Protection Ordinance. Francis was in Ujiji in March last. The appellant who, according to her statement, had not previously known Francis, met him in the road near her house. He told her that he was hungry and had something to sell—diamonds—and he showed her some stones. The appellant suspected him of trying to pass off pieces of bottle as diamonds. It was proved by prosecution witnesses that the appellant and Francis went to the shop of one Devji Harjiwan, a goldsmith. An extract from the evidence of this witness, who was the fourth witness called by the prosecution, is:

"I am a watchmaker in Ujiji and also a goldsmith. I recognise accused 1 and accused 2. On 9.3.59 at about 5 p.m. accused 2 and accused 1 came to my shop. Accused 2 showed me some stones, three, in a piece of paper and asked me if they were diamonds. She spoke loudly and I told her not to do so or we would get into trouble. I told her to go away. Then she threw the stones in their paper outside, saying to accused 1, 'take away your dung'. Accused 1 tried to run away but accused 2 shouted after him 'come and take your things'. Accused 1 came and picked up the packet and went off. Then accused 2 shouted to the inspector 'arrest that man (accused 1) he has some diamonds'. Accused 1 threw the packet down in front of my shop. Inspector Muhyddin arrested accused 1 and Sergeant Jeneby picked up the packet from the drain."

Recalled later this witness said:

"When accused 2 came to my shop it was for the first time. I was sitting on the Baraza of my shop with my wife. She showed me the stones and they appeared to me to be diamonds. I told her not to show these things to me in the open because we could get into trouble. I told her that I thought they were diamonds and gave them back to her. She put them back in their paper and threw them to accused 1 who had been waiting a short distance away. I told accused 2 that it was not my job to look at diamonds. She did not ask me to buy them but simply said 'What are these things, are they diamonds or what'. I told her that I thought they were diamonds."

An extract from the evidence of Inspector Muhyddin (also a prosecution witness) is:

"I am an inspector in Kigoma. On 9.3.59 at 6 p.m. in the evening I was walking from Ujiji Police Station along Kigoma road with Sergeant Jeneby. We were both in uniform. When we passed the post office and drew near to the watchmaker Mr. Devji, I was called by accused 2. She said that accused 1 is pretending to have diamonds. I saw accused 1 and saw him throw something down. I told him to stay where he was and we went up to him. Sergeant Jeneby picked up a small packet from the ground. He opened the paper and found three small stones inside. This occurred

opposite Devji's house on the road. Devji saw these happenings. We took accused 1 to the police station. On arrival I told Constable Jacob to search accused 1 but he found nothing. I told Sergeant Jeneby to look after the three small stones. Because I did not know the stones were diamonds, I charged the accused with attempting to obtain money by false pretences, in that he tried to obtain money from accused 2."

This account of the matter is corroborated by Sergeant Jeneby.

The seventh prosecution witness, the wife of Devji, said that the appellant came to her husband and said that Francis wanted to sell her bits of glass, that he was a thief, and that when her husband said they were bad things and should not be carried about, the appellant threw the stones into the ditch and told Francis to take them away.

It will be observed:

- (a) that the appellant had the stones in her physical possession or custody, as it was she who showed them to Devji;
- (b) that the appellant spoke loudly to Devji and made no attempt at concealment;
- (c) that Devji told her that he thought that the stones were diamonds and gave them back to her;
- (d) that she then put them back into their paper and threw them to Francis who was waiting a short distance away telling him to take his dung away;
- (e) that it was the appellant who called Inspector Muhyddin to arrest Francis.

Accordingly it was proved out of the mouths of prosecution witnesses that as soon as the appellant was told by the goldsmith that he thought the stones were diamonds, she repudiated them and threw them back to Francis, and called to the police to arrest him.

The stones were sent to the Government Geologist for report. At that stage, the police apparently thought that the stones were not diamonds, as they framed a charge against Francis of attempting to obtain Shs. 1,500/- from the appellant by falsely pretending that he would give her diamonds which in fact were heated glass. According to an uncontradicted statement by the appellant's counsel, a witness summons was then issued to the appellant and she was brought to court for the purpose of giving evidence against Francis. When she arrived on March 26, a report had by then been received from the geologist to the effect that two of the stones were in fact diamonds. Two charges were framed against the appellant, and having been summoned as a prosecution witness, she now found herself in the dock with Francis instead of in the witness box. According to her counsel who appeared on the appeal, she was given no time to consider her defence or to engage counsel in the magistrate's court, but the trial proceeded there and then. The procedure thus followed was so gravely prejudicial to the defence of an accused person that, if we had not allowed the appeal on another ground, we should have had to consider whether a conviction thus obtained could be allowed to stand.

The trial magistrate dealt with the case as follows:

"Taking count 1 and count 3 together now in respect of accused 2 I am satisfied from the evidence of P.W. 4 and P.W. 7 and from the obvious lies of accused 2 that she was in possession of diamonds. It is my contention that she took the diamonds prior to buying them to see if they really were diamonds and when she saw P.W. 1 and P.W. 3 she lost her head and threw the diamonds at accused 1 and then to clear herself, told

P.W. 1 and P.W. 3 to arrest accused 1. Had she not wanted to buy the stones there would have been no purpose in her finding out whether or not they were diamonds. I do not consider that the fact that there is insufficient evidence to convict accused 1 of attempting to sell diamonds precludes finding accused 2 guilty of attempting to buy diamonds. Had accused 2 lawfully possessed the diamonds and had gone in all innocence to P.W. 4, she would not have denied going to his shop.

“I have therefore, in view of the foregoing, no hesitation of convicting accused 2 of being in possession of diamonds contra s. 3 (1) Cap. 129 and count 3 of attempting to buy diamonds contra s. 7 (1) and s. 17 Cap. 129.”

It is correct that the evidence of Devji and his wife (the fourth and seventh prosecution witnesses referred to) established that the appellant was in physical possession or custody of the stones. The rest of the passage is mere conjecture unsupported by evidence. The magistrate’s explanation of the appellant’s actions may be correct. On the other hand, there is at least one other hypothesis consistent with innocence, namely, that the appellant thought Francis was attempting to deceive her as to the stones being real and that she took him to the goldsmith in order to have the fraud exposed; when she was told by the goldsmith that the stones were probably diamonds and bad things to carry about, she flung them back at Francis and, either because she thought he was a wrong-doer who should be arrested or to divert from herself suspicion which might arise from the fact that she had had the stones in her custody, called the police. Having afterwards found herself unexpectedly arrested, she did what many ignorant African women would do and told some lies. What her motives were with regard to the diamonds is speculation. Her actions as proved were as consistent with an innocent mind as with a guilty one.

The learned Chief Justice held that s. 3 (1) of the Diamond Industry Protection Ordinance constitutes an absolute offence and that mens rea is unnecessary. The sub-section reads:

“3 (1) If any diamond is found in the possession, power, or control of any person, that person shall, unless he proves that he obtained it lawfully, be guilty of an offence against this Ordinance and shall be liable to a fine not exceeding twenty thousand shillings or to imprisonment for a period not exceeding ten years or to both such fine and imprisonment.”

The appellant in this case was charged with possession. Before she could be called upon under the section to show that her possession was lawful, it was necessary for the prosecution to prove that she was in possession of diamonds. What constitutes “possession” under the section? There is no definition of “possession” in the Ordinance; and the definition in s. 5 of the Penal Code is not of assistance, as it only applies to that Code. We think that “possession” means legal possession and is not satisfied by mere temporary physical control. Knowledge of the presence of the diamonds is an essential ingredient of possession. It has been held that it is a good defence to a charge of possession of diamonds to prove (or to raise a reasonable doubt) that the accused did not know of the presence of the diamonds: *R. v. Dewji Pragji Mehta* (1) (1946), 13 E.A.C.A. 80. The appellant in the present case certainly knew of the presence of the stones. Not having heard argument upon the point, we would wish to leave for further consideration, when it arises, the question whether it would be a good defence to show that the accused did not know that the stones were diamonds. (See the cases on whether it is necessary for the accused to know the quality of the thing, collected in Professor Glanville Williams’ treatise on the Criminal Law in para. 71 (b) p. 248 et seq). The question which first arises in the present case is whether the prosecution proved that the stones were found in the “possession” of the appellant.

The authorities on what amounts to legal possession in the criminal law are inconsistent and conflicting. (See the cases collected in Kenny's Outlines of the Criminal Law (17th Edn.), p. 284 para. 290 et seq. For the distinction between physical control and legal possession see p. 242 para. 228 et seq.) We take the following definition from Stephen's Digest of the Criminal Law (9th Edn.) at p. 304 cited in Stroud's Judicial Dictionary (3rd Edn.) at p. 2245:

“(a) A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.”

Applying that definition to the present case, we are of opinion that it certainly could not be safely presumed from the circumstances of the case as proved by the prosecution witnesses that the appellant, though she had physical custody of the stones, had the power, or intended, to deal with them as owner to the exclusion of Francis. She may have intended (though that was by no means proved) to buy the stones from Francis if the goldsmith said that they were diamonds, but there is no evidence whatever that she intended to exclude Francis from possession of them until she had purchased them; and that stage, if it was ever intended, was not reached. When the appellant went to the goldsmith's shop and while there, she merely had custody of the stones for Francis. We think that the legal possession of the stones was throughout that of Francis and that it no more passed to the appellant than possession of goods handed to a customer by a shop-keeper to enable him to handle and test them on the spot passes to the customer (*R. v. Chissers* (2) (1678), T. Raym 275); or than legal possession of a sovereign handed by a woman to a man in a booking queue for the purpose of purchasing a ticket for her passes to the man: *R. v. Thompson* (3) (1862), Le. & Co. 225; 9 Cox C.C. 244. This was not shown to be a case of joint guilty possession such as that of a thief and a receiver. It was such a case as that instanced by Wightman, J., and approved by Pollock, C.B., in *R. v. Thompson* (3) when he said at p. 245:

“I find this passage in the usual textbook: ‘If the owner of goods deliver them to another, but be present all the time they are in the other's possession, and there be no intention on the part of the owner to relinquish his dominion over them by such delivery, the owner still retains the possession in law, notwithstanding this delivery, . . .’ ”

In our opinion, upon the evidence in this case, the appellant should not have been convicted. As already mentioned, we quashed the conviction and sentence and directed that she be set at liberty.

Appeal allowed. Conviction quashed and sentence set aside.

For the appellant:

NR Sayani

Sayani & Co, Dar-es-Salaam

For the respondent:

AM Troup (Crown Counsel, Tanganyika)

The Attorney-General, Tanganyika

Livio Carli and others v Salem and Mohamed Bashanfer and others
[1959] 1 EA 701 (SCA)

Division: HM Supreme Court of Aden at Aden
Date of judgment: 19 May 1959
Case Number: 926/1957
Before: Campbell CJ
Sourced by: LawAfrica

[1] Sale of goods – Sale by description – Goods not in accordance with description – Goods rejected by buyer – Whether buyer entitled to reject goods.

[2] Insurance – Marine insurance – Insurance by buyer of goods – Goods insured rejected by buyer – Goods damaged while lying at wharf – Endorsement of policy to seller by buyer after goods rejected and after loss sustained – Whether buyer has any interest in policy after rejecting goods – English Marine Insurance Act, 1906, s. 5 (1), s. 6 (1) and (2), s. 7 (1) and (2) and s. 51.

Editor’s Summary

The plaintiffs, a Yugoslavian cement company, and their agent at Aden agreed to sell to the first defendants 200 tons of cement described as “Dalmation Portland Cement B.S.S./12/1947 of Yugoslavian origin. Two Lions brand”. The first defendants insured the shipment with the second defendants. The cement which arrived at Aden was of “Salona Towers” brand which the first defendants refused to accept as not being in accordance with the description. According to the plaintiffs the first defendants had orally agreed to the change in brand and to a change in the description from “Two Lions” brand to “Standard Portland Dalmation Cement”. After refusing to take delivery the cement was damaged by rain whilst lying at the wharf and later the first defendants assigned the insurance policy to the second plaintiffs as assignee. The insurers claimed that as the first defendants had disclaimed any interest in the policy they themselves could not have claimed, and in consequence, their assignment of the policy to the plaintiffs after the loss occurred was of no effect. The plaintiffs suggested that there was an “implied” or equitable assignment of the policy which arose from the nature of the transaction and that it was valid.

Held –

- (i) the first defendants had not agreed to a change of brand or in the description of the cement and accordingly the plaintiffs had failed to tender to the first defendants cement according to the agreed description; since this was a sale by description the first defendants were entitled to refuse to accept delivery;
- (ii) when the first defendants rejected the goods they ceased to have any interest in the cement, and there was nothing for them to assign; accordingly the plaintiffs had no insurable interest in the cement at the time of the loss;
- (iii) there is no implication that by custom or otherwise in contracts of this description the seller is deemed to be a party to the insurance policy from the outset.

Action dismissed.

Case referred to in judgment

(1) *North of England Oil Cake Company v. Archangel Maritime Insurance Company* (1875), 10 Q.B. 249.

Judgment

Campbell CJ: The plaintiffs, who are a Yugoslavian Cement Company, and an Italian merchant who is their agent in Aden, agreed to sell 200 tons of cement to the first defendants Messrs. Salem and Mohamed Bashanfer. The second defendants are the insurance company with whom the first defendants insured the shipment.

It was a “c. & f.” contract with payment by irrevocable letter of credit. The first defendants took out a policy of insurance to the value of £1,910 paying a premium of E.A.S.2785.95.

Under the contract the cement was to be

“Dalmation Portland Cement B.S.S./12/1947 of Yugoslavian origin. Two Lions brand”.

This was the description set out in the application to the Eastern Bank Ltd. for the letter of credit by the defendants.

In fact the plaintiffs sent 200 tons of “Salona Towers” brand cement. The first defendants refused to accept it. It was badly damaged by rain while lying on the wharf and it is in respect of this damage that the suit is brought. The plaintiffs ask that either the first defendants, the buyers, or the second defendants, the insurers, pay them for the cement.

The plaintiffs say that the first defendants agreed to the change in brand. They also say that in any case they were entitled to supply what in fact they sent since the defendants agreed to a change in the description from “Two Lions” brand to “Standard Portland Dalmatian Cement”. The defendants are stated to have done this by their letter to the Eastern Bank Ltd. dated March 3, 1957, exhibit 25, of which the material part reads as follows:

“With further reference to the above letter of credit we shall be obliged if you would extend the expiry and shipment date up to April 30, 1957, and include the following:

“ ‘(1) Standard Portland Dalmation Cement.’

“ ‘(2) The Price is based on a Freight Rate of Shs. 62/- via Suez, per Metric Ton, which freight does not include any surcharge due to the Suez crisis. Any increase to be for our account and amount of l/c to be increased accordingly.’

“Kindly convey the above instructions to your agents in Split/Yugoslavia, by air mail and oblige.”

I am satisfied on the evidence that the first defendants never agreed to any change. They were pressed energetically by the plaintiffs’ Aden agent to change and a letter was drafted for their signature to this effect dated April 14, 1957, exhibit 6. But they did not sign it. I see no reason to accept the verbal evidence given on behalf of the plaintiffs that there was a verbal agreement to accept the change. I do not think it can be said that the probabilities are in the plaintiffs’ favour. All the evidence given was to the effect that “Two Lions” brand was known in Aden and “Salona Towers” brand unknown and that the former would have a better sale. The plaintiffs’ case would be strengthened if they could show that the first defendants only objected after the cement was damaged and had kept silent till then. But this was not the case. They wrote to the manager of the Eastern Bank Ltd. on April 26, 1957, saying that they refused payment since the documents, that is to say the invoice and bill of lading, were not in accordance with the letter of credit.

Nor do I agree that the defendants had agreed to a change of brand by reason of their letter dated

March 4, 1957, exhibit 25. This change (although the first defendants use the word “include” which is vague in this context) can only be taken to mean a substitution of the words “Dalmation Portland

Cement B.S.S./12/1947” by the words “Standard Portland Dalmation Cement”. If the plaintiffs were satisfied that the change on March 4 in the terms of the letter of credit excused them from supplying “Two Lions” brand they would not have displayed such anxiety to get the defendants to agree in writing to a change in brand on April 14, 1957.

I hold that there was a failure by the plaintiffs to tender to the defendants cement according to the agreed description and that as this was a sale by description the first defendants were entitled to refuse to accept. The suit against them is dismissed with costs.

I now turn to the claim against the insurance company, who refuse to pay under the policy saying that since the first defendants had refused to accept the cement it never became their property and that it always remained the cement of the plaintiffs with whom they had no agreement. They contend that as the first defendants had disclaimed any interest in the policy they themselves could not have claimed and, in consequence, their assignment of the policy to the plaintiffs, which was done admittedly after the loss, was of no effect. They also plead that they did not receive notice of the loss under the policy. Lastly they plead that the first defendants, Messrs. Bashanfer, did not “clear and take delivery” of the goods in question.

The policy is between the New India Assurance Co. on the one part and “The Eastern Bank Ltd. a/c Messrs. Salem and Mohamed Bashanfer Aden” on the other. It is in respect of 200 tons of cement to be carried in the “s.s. Abbazia” and no brand names are mentioned. It bears endorsements by the Eastern Bank Ltd., and then by Messrs. Bashanfer, the first defendants, who endorsed it to the second plaintiffs in August, 1957, on being paid the cost of the premium.

The law to be applied is that set out in the English Marine Insurance Act, 1906. It is true that this Act, not being one of general application, has never been in force in this Colony and it was not until 1958, (and after the events in this case), that the Aden Maritime Insurance Ordinance (which is almost identical with the English Act) was enacted. But s. 41 of the Interpretation and General Clauses Ordinance provides that in cases such as this we are to be guided by the English common law. The Marine Insurance Act, 1906, states in its preamble that it is an “Act to codify the Law relating to Marine Insurance”. It sets out what was the common law in England and thus the Act, subject to any local customs or usages, has force here.

The relevant sections of the Marine Insurance Act, 1906, are as follows:

Section 5 (1). Subject to the provisions of this act every person has an insurable interest who is interested in a marine adventure.

Section 6 (1). The assured must be interested in the subject-matter insured at the time of the loss though he need not be interested when the insurance is effected.

(2) Where the assured has no interest at the time of the loss, he cannot acquire interest by any act or election after he is aware of the loss.

Section 7 (1). A defeasible interest is insurable, as also is a contingent interest

(2) In particular, where the buyer of goods has insured them, he has an insurable interest, notwithstanding that he might, at his election, have rejected the goods or have treated them as at the seller’s risk, by reason of the latter’s delay in making delivery or otherwise.

Section 51. Where the assured has parted with or lost his interest in the subject-matter insured, and

has not, before or at the time of so doing, expressly or impliedly agreed to assign the policy, any subsequent assignment of the policy is inoperative: Provided that nothing in this section affects the assignment of the policy after loss.

These sections make it clear that unless the buyer in this case had an insurable interest in the goods at the time of the loss he had nothing to assign



(since it cannot be disputed that he had not prior thereto agreed to assign the policy) and that the policy became inoperative on the cessation of his insurable interest. But for s. 7 (2) it is doubtful whether the buyer ever had an insurable interest. Under the provision of the Sale of Goods Ordinance where there is a contract for the sale of unascertained goods, as here, and goods of that description are unconditionally appropriated to the contract either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Here no goods of the description contracted for were ever appropriated to the contract, and the goods which were in fact appropriated were certainly not appropriated with any assent on the part of the buyer. The only object of s. 7 (2) is to provide for the case where the goods are not of the description contracted for but the buyer has not yet rejected. When, however, the buyer has rejected, there is no place for the hypothesis that he might have rejected. The fact has arisen. Here, on rejection, the buyer ceased to have any interest in the cement, and there was nothing to assign. Nor is this affected by the proviso to s. 51 which permits assignment after loss. This merely allows an assured to assign the benefit of the policy after the loss if he had an insurable interest at the time of loss.

I think that this view is confirmed by the decision in *North of England Oil Cake Company v. Archangel Insurance Co.* (1) (1875), 10 Q.B. 249. In that case a cargo of linseed was insured with the defendant company from Constantinople to London, including the risk of lighterage. Whilst the vessel was on her voyage the original assured sold the cargo to the plaintiffs, the terms of sale being payment in fourteen days from being ready for delivery. The cargo was landed in London in public lighters employed by the plaintiffs, one of which sank. After the loss the original assured, Vagliano Brothers, assigned the policy to the plaintiffs, and the latter thereupon sought to recover the loss from the defendants. It was held that the plaintiffs could not recover. The policy was not expressly agreed to be assigned to plaintiffs by the sold-note; and no such intention could be inferred from the terms of the note, inasmuch as it was necessary that Vagliano Brothers should keep the policy for their own protection until right delivery of the cargo. When the seed was put on board the lighter employed by plaintiffs, the seed was delivered to plaintiffs, and Vagliano Brothers' interest ceased and the policy lapsed; and the subsequent assignment by Vagliano Brothers to plaintiffs was, therefore, of no avail under 31 and 32 Vict. c. 86, s. 1.

Further confirmation is provided by a passage in Chalmers "Marine Insurance Act" (5th Edn.) at p. 15. Here the learned author, who was also the draftsman of the Act, says

"Goods which are inferior to sample are shipped and then partially sea damaged on the voyage: If A. rejects the goods, presumably he could not claim on the policy, but could he assign the policy to the seller and then reject the goods? Presumably not, but various complications may be suggested which still await decision."

Here it will be seen that the author is doubting whether in such a case an assignment would confer any rights if made before rejection. It is not suggested that there is much doubt if the rejection comes first.

It has been suggested on behalf of the plaintiffs that there is an "implied" assignment or an "equitable" assignment of the policy which arises from the nature of the transaction and is valid. It is urged that since it was agreed that the price was to be paid and delivery made through a bank under a letter of credit and against documents, there is an implication that the policy is taken out for the benefit of both buyer and seller, either of whom can benefit from it at choice.

Cockburn CJ: in his judgment in *North of England Oil Cake Company v. Archangel Insurance Co.* (1) says:

“We are agreed on one point, which entitles the defendants to judgment, viz. that, the policy not having been assigned until after the interest of the assignors had ceased, an effective assignment was impossible. If there had been a stipulation in the contract of sale that the policy should be assigned for the benefit of the plaintiffs, the vendees, it might have been otherwise; but not only is there no express stipulation to that effect, but the implication from the nature of the contract is the other way. This is not like the common case of the sale of a floating cargo, where the seller parts with and the buyer takes at once the property, and all risks. In such a case, the policy, according to the established practice, passes as part of the shipping documents, and on assignment the vendee can sue upon it in case of loss. And there is no hardship in this on the insurers, because they insured the safety of the cargo to the end of the voyage, and it is immaterial to them in whom the interest vests at the time of the loss; and there is great convenience in the practice, as it obviates the necessity of the vendee getting a fresh policy and facilitates the sale of cargoes at sea.”

I do not think this passage is appropriate. I find no proof that by custom or otherwise in contracts of this description there is an implication that the seller, who has not insured the goods, is deemed to be a party to the policy from the outset. It does not help that it is said

“the policy, according to the established practice, passes as part of the shipping documents”

since the passage continues

“and *on assignment* the vendee (in this case it would be the vendor) can sue upon it in case of loss.”

What impedes the plaintiffs here is that a valid assignment has not been possible.

The defence of the insurance company is not one which is ordinarily taken in this court. The damage arose within the broad terms of the policy and, although the goods may have remained upon the wharf a few days longer than if there had been no argument as to who should take delivery, this is one of the risks which is foreseen and paid for. Nevertheless it succeeds; and the claim against the second defendants, the insurance company, must be dismissed with costs together with the claim against the first defendants.

Action dismissed.

For the plaintiffs:

PK Sanghani

PK Sanghani, Aden

For the first defendants:

A Bhatt

A Bhatt, Aden

For the second defendants:

GA Taraporwalla

GA Taraporwalla, Aden

Division:	Court of Appeal at Nairobi
Date of ruling:	24 July 1959
Case Number:	35/1959
Before:	Forbes V-P, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya–MacDuff, J

[1] Practice – Mortgage – Sale of mortgaged premises under Order of court – Motion to set aside sale dismissed – Whether appeal without leave competent – Whether Order recording dismissal of motion should confirm sale – Indian Civil Procedure Rules, O. XXI, r. 89, r. 90, r. 91 and r. 92 – Civil Procedure (Revised) Rules, 1948, O. XXI, r. 75, r. 78, r. 79, r. 80, r. 81 and O, XLII, r. 1 and r. 2 (K.) – Eastern African Court of Appeal Rules, 1954, r. 9 and r. 23.

Editor’s Summary

Pursuant to a decree of the Supreme Court of Kenya a property which the appellant had mortgaged was sold to two persons. The appellant then filed two notices of motion under O. XXI, r. 75 and r. 78 respectively of the Civil Procedure (Revised) Rules, 1948, to set aside the sale. The dismissal of both motions was embodied in a formal Order which was confined to recording the fate of each application and costs. On appeal by the mortgagor against this Order, counsel for the purchasers of the property, who had been made parties to the appeal, objected that the appeal was incompetent, since the application for leave to appeal was made after the time prescribed had expired. On the hearing of the preliminary point counsel for the appellant abandoned the appeal so far as the application under O. XXI, r. 75 was concerned and then argued that in considering an application under O. XXI, r. 78 the court must read r. 78 in conjunction with r. 81 of the same Order and that an appeal lay as of right by virtue of O. XLII, r. 1.

Held –

- (i) the effect of O. XXI, r. 81 (i) is that if an application is made and dismissed under any of rules 78 to 80, the court must make an Order confirming the sale and from such an Order an appeal lies as of right.
- (ii) the Order of the Supreme Court dismissing the application under O. XXI, r. 78 should have expressly confirmed the sale to the purchasers, but the dismissal of the application implicitly confirmed the sale and since it was right to regard as done that which ought to have been done the appellant was entitled to proceed with his appeal as a right.

Preliminary objection overruled.

Cases referred to in judgment

- (1) *Seth Nanhelal v. Umrao Singh* (1931), 58 I.A. 50.
- (2) *Asimaddi Sheikh v. Sundari Bibi* (1911), 38 Cal. 339.
- (3) *Kachu v. Trimbak* (1920), 44 Bom. 472.

(4) *Jaggan Nath v. Daud* (1923), 4 Lah. 243.

July 24. The following rulings were read by direction of the court:

Ruling

Pursuant to a decree of the Supreme Court of Kenya in a mortgage suit, a property in the Nairobi Municipality was sold to two persons who are described

in this appeal as the “Interested Persons”. The appellant, who was the mortgagor and the first defendant in the court below, moved that court upon two notices of motion brought respectively under Order XXI, Rules 75 and 78 of the Civil Procedure (Revised) Rules, 1948, (hereinafter called “the Supreme Court Rules”) to set aside the sale. The motions were refused and the refusal was embodied in a formal order of which the operative part is as follows:

“It is Ordered:

- “(1) That the first defendant’s application under O. 21 r. 75 be dismissed with costs to the purchasers of plot No. 209/2821 and costs (not to include costs of opposing) to the plaintiff and the second defendants.
- “(2) That the first defendant’s application under O. 21 r. 78 be dismissed with costs to the purchasers and costs (excluding costs of opposing) to the plaintiff and the second defendants and that the purchasers’ advocates be awarded special costs of Shs. 210/- in respect of receiving instructions to oppose the aforesaid application.”

An appeal was lodged in this court by the appellant against these orders and the first respondent (plaintiff), the second respondents (the first mortgagees) and the interested persons were made parties thereto, but at the hearing of a preliminary objection by counsel for the first interested person, which is all this ruling is concerned with, counsel for the second respondent who also held the brief of counsel for the first respondent, obtained leave to withdraw. The contest before this court has been between the interested persons (counsel for the second having supported the preliminary objection by the first) and the appellant.

The preliminary objection is based on the following facts. The orders above set out were made on March 5, 1959. On April 1, 1959, an application to the court below for leave to appeal to this court was filed by the appellant and leave was granted on April 13, 1959. The order states that the application was made under O. XLII r. 2 of the Supreme Court Rules but this is probably an error for O. XLII r. 1 (2) which reads:

“An appeal shall lie with the leave of the court from any other order made under these Rules.”

The earlier portion of this rule sets out in detail the orders from which an appeal lies of right. It is clear that the application for leave to appeal was lodged some twenty-seven days after the orders complained of and this is contrary to the provisions of r. 23 of the rules of this court, which provides that leave to appeal may be granted by the superior court without formal application at the time when the decision is given and that in all other cases application is to be made by motion or summons which

“shall be made not more than fourteen days after the judgment or decision complained of . . .”

In these circumstances Mr. Khanna argued that the appellant had not complied with a condition precedent to the bringing of his appeal and that it was therefore bad and should be dismissed. In his submission r. 9 of the rules of this court, which gives power for sufficient reason to extend time, might only be utilised, if this court thought fit, to permit the appellant to make a fresh application for leave to the court below.

Mr. Nowrojee for the appellant commenced by abandoning the appeal against the order made pursuant to the application under O. XXI r. 75. He then submitted with regard to the application made under O. XXI r. 78 that this rule must be read together with r. 81 of the same Order and that an appeal

as of right lay from an order under r. 81 by virtue of O. XLII r. 1 (1) (*h*) of the Supreme Court Rules which permits an appeal against

“an order under r. 65 or r. 81 of O. XXI setting aside or refusing to set aside a sale.”

The text of r. 78 (1) and r. 81 is as follows:

“78(1) Where immovable property has been sold in execution of a decree, any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing in court:

- (a) for payment to the purchaser, a sum equal to five per cent of the purchase money, and
- (b) for payment to the decree-holder, the amount specified in the public notification of sale as that for the recovery of which the sale was ordered, less any amount which may since the date of such public notification of sale have been received by the decree-holder.”

“81(1) Where no application is made under r. 78, r. 79 or r. 80, or where such application is made and disallowed, the court shall make an order confirming the sale, and thereupon the sale shall become absolute in so far as the interest of the judgment-debtor in the property sold is concerned.

“(2) Where such application is made and allowed and where, in the case of an application under r. 78 the deposit required by that rule is made within thirty days from the date of sale, the court shall make an order setting aside the sale:

“Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.

“(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made.”

The reference in r. 81 to r. 79 and r. 80, as well as to r. 78, shows the pattern of this legislation. Rule 78 provides for an application to set aside a sale upon payment of certain sums of money; r. 79 provides for a similar application on the ground of material irregularity or fraud; r. 80 gives to the purchaser a right to make a like application on the ground that the judgment-debtor had no saleable interest in the property sold. The effect of r. 81 (1) is that the court must make an order confirming the sale if no application is made under any of the three preceding rules or if (as is the case here) such an application is made and refused. Rule 81 (2) though relied upon by Mr. Nowrojee, has in my view no application to the facts of the present case. From the order confirming the sale an appeal lies to this court.

These rules have been taken from the Indian Code of Civil Procedure in which the corresponding r. 89, r. 90, r. 91 and r. 92 of O. XXI are respectively in the same terms. The words “shall make an order confirming the sale” in r. 92 (r. 81 of the Supreme Court Rules) were held by the Privy Council in *Seth Nanhelal v. Umrao Singh* (1) (1931), 58 I.A. 50, to be mandatory. When, therefore, a right of appeal was given against orders made under r. 92 (r. 81 of the Supreme Court Rules) there can be no question, in my opinion, of limiting the matter to be decided on appeal to whether an application under the preceding sections has been made and refused, but the appellate court must be able to go into the merits of such a refusal if necessary. This has been the practice under the Indian Code as appears from the following notes in The Code of Civil Procedure by Mulla (12th Edn.) Vol. II:

(a) Under r. 89 at p. 896:

“Under the present Code, however, an *order setting aside or refusing to set aside a sale* [r. 92], passed on an application under this r. [r. 89], is appealable *as an order*, for it is included in the list of appealable orders given in O. 43, r. 1 [see cl. (j)]. The result is that under the present Code, *only one appeal* lies from such an order [see s. 104, sub-s. (1) (i) and sub-s. (2)].

An auction-purchaser also can now appeal from an order under this rule. Only one appeal is allowed in his case also.”

(b) Under r. 90 at p. 911:

“An appeal lies from an order under this rule and r. 92 setting aside or refusing to set aside a sale [O. 43, r. 1, cl. (j)].”

(c) Under r. 91 at p. 913:

“An appeal lies from an order setting aside or refusing to set aside a sale made under this rule and r. 92 [O. 43, r. 1, cl. (j)].”

The only difficulty in the present case arises because no formal order confirming the sale, in accordance with the mandatory words of r. 81 (1), appears to have been made when the application under r. 78 to set aside the sale was disallowed. In *Asimaddi Sheikh v. Sundari Bibi* (2) (1911), 38 Cal. 339 it was held that an

“appeal does lie as an appeal from order from an order made on an application under r. 89.”

But in that case an order confirming the sale had been made. In *Kachu v. Trimbak* (3) (1920), 44 Bom. 472, the judgment (at p. 473) reads:

“The original application out of which this appeal has arisen was made under r. 89 of O. XXI by the judgment-debtor. That application was rejected. There was an appeal from that order to the district court of Nasik and that appeal was dismissed.”

There is no specific reference to any order under r. 92 of O. XXI of the Indian Code though one may have been made. In *Jaggan Nath v. Daud* (4) (1923), 4 Lah. 243 where an application to set aside a sale for material irregularity was allowed, the court held that the order to set aside was made under r. 92 (2) of the Indian Code though the only order to that effect was made on the application under r. 90. If that case is rightly decided there is an appeal as of right if an application under any of the three enabling rules is allowed and it would be a strange position if there were no such appeal upon the application being disallowed.

In the present case the order made in the court below should have embodied an order confirming the sale. If any party should have applied for that to be done it was not the appellant, but I incline to the view that the court should, in the circumstances, have included it of its own motion as an automatic consequence of disallowance of the application. I think therefore that the order confirming the sale is implicit in the order of disallowance, it is right to regard as done that which ought to have been done and that the appellant is entitled to proceed with his appeal as of right. Alternatively it is justifiable, I think, having regard to the interwoven nature of r. 81 and the three preceding rules, to regard the right of appeal in the case of r. 81 as wide enough to embrace the basic matters which would fall to be decided in an appeal under that rule.

For these reasons I think the preliminary point fails and that the appeal against the order on the application under r. 78 of O. XXI should proceed; it is not therefore necessary to consider various submissions made by Mr. Nowrojee as alternative to the argument already considered.

Although the interested persons have not succeeded upon the preliminary point, I think that, as the appellant asked leave to appeal from the court below

in respect of both orders it was a point which they were quite entitled to take. The appellant has succeeded upon a different basis and I would make no order for costs of the preliminary point. The interested persons are entitled to have considered in their favour in the matter of costs the abandonment of the appeal against one of the orders, but I would reserve this question to be dealt with on the final disposal of the appeal.

Forbes V-P: I agree and have nothing to add. The appeal against the order on the application under r. 78 of O. XXI will proceed. There will be no order for costs of the preliminary point.

Windham JA: I also agree.

Preliminary objection overruled.

For the appellant:

EP Nowrojee

EP Nowrojee, Nairobi

For the first interested person:

DN Khanna

DN & RN Khanna, Nairobi

For the second interested person:

SS Mandla

Nahar Singh Mandla & Co, Nairobi

For the respondents:

PJS Hewett

Kaplan & Stratton, Nairobi

Daly & Figgis, Nairobi

Mwithiga s/o Kingangi v R
[1959] 1 EA 710 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	12 August 1959
Case Number:	367/1959
Before:	Rudd Ag CJ and Templeton J
Sourced by:	LawAfrica

[1] Criminal law – Plea – Manufacturing native intoxicating liquor – Admission by accused not

amounting to unequivocal plea of guilty to offence charged – Native Liquor Ordinance (Cap. 106), s. 22 (1) (K.).

Editor's Summary

The appellant was convicted by a magistrate of manufacturing native intoxicating liquor on a farm contrary to s. 22 (1) of the Native Liquor Ordinance. When required to plead to the charge he admitted that he was manufacturing pombe and had made one of the ingredients of the liquor. The magistrate treated this admission as a plea of guilty to the charge. On appeal

Held – the appellant had not admitted having made or manufactured any native intoxicating liquor but had merely made preparations so that he could later manufacture pombe; there was no evidence that the appellant intended unlawfully to manufacture intoxicating liquor without a permit and the conviction was quite wrong.

Appeal allowed.

No Cases referred to in judgment in judgment

Judgment

Rudd Ag CJ: read the following judgment of the court: The appellant appealed from a conviction of manufacturing native intoxicating liquor on a farm contrary to s. 22 (1) of the Native Liquor Ordinance. After hearing the appeal we set aside the conviction and stated that we would give reasons in writing for the benefit of the magistrate at a later date. We now give our reasons.

The appellant was convicted upon his plea which was in these terms:

“I was manufacturing pombe but I only made the Kanda and had not added water. I was told by the District Commissioner and the chief that until I added water the police could not catch me. I had no permit to make pombe.”

When this plea is considered as a whole it is quite clear that the appellant did not admit that he had made or manufactured pombe or any other kind of native intoxicating liquor. He merely admitted that he had made one of the ingredients of pombe. It would have been necessary for him to have effected another operation before he could be said to have manufactured any kind of liquor. All he had done was to make preparations so that he could be in a position to manufacture pombe later. There is no absolute prohibition upon the manufacture of native liquor on a farm. It can be lawfully manufactured if a permit is obtained. There is nothing to suggest that the appellant intended to manufacture the intoxicating liquor unlawfully without a permit and the plea is certainly not an admission that he intended to do so.

The conviction was quite wrong and accordingly it was set aside and the fine was ordered to be refunded.

Appeal allowed.

The appellant was not present and was not represented.

For the respondent:

ARW Hancox (Crown Counsel, Kenya)
The Attorney-General, Kenya

Haji Hassanali Mussajee and another v R [1959] 1 EA 711 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	12 August 1959
Case Number:	22 and 23/1959
Before:	Rudd Ag CJ and Templeton J
Sourced by:	LawAfrica

[1] Criminal law – Charge – Receiving stolen property – Several articles found in possession of accused – Articles stolen from different persons – Receipt of each article the subject of distinct count – Whether misjoinder has occurred – Penal Code (Cap. 24), s. 317 (1) (K.) – Indian Evidence Act, 1872, s. 105.

Editor's Summary

The appellants who were husband and wife were convicted by a magistrate on six counts of receiving

property knowing it to have been stolen. They were found in possession of jewellery stolen from different persons on six different occasions specified in the particulars of the several counts. The case for the appellants on appeal was that all the jewellery should have been the subject of one specific count of receiving unless the prosecution established that there were several distinct acts of receiving on several distinct occasions and that there had been misdirection as to the evidence implicating each appellant.

Held –

- (i) the finding of a number of articles stolen from different persons at different times in the possession of one person is no indication that all the articles were received by that person at one time.
- (ii) in any event the occasion or occasions of receipt would be facts specially within the knowledge of the accused the onus of proving which would under s. 105 of the Indian Evidence Act lie upon the accused and there was nothing in the evidence to indicate whether the articles were or were not received at different times.

- (iii) it was more likely that the first appellant received the articles from the thieves and later entrusted them to the second appellant; insufficient consideration had been given to whether the evidence showed that when the second appellant took the articles into her joint possession she had actual knowledge or came to believe the articles were stolen.

Appeal of first appellant dismissed.

Appeal of second appellant allowed.

No Cases referred to in judgment in judgment

Judgment

Rudd Ag CJ: read the following judgment of the court: The appellants who are husband and wife appeal from conviction and sentence on six counts of receiving property knowing it to have been stolen contrary to s. 317 sub-s. (1) of the Penal Code. The appellants were found in possession of a large quantity of stolen jewellery which had been stolen from the persons named in the particulars of the several counts and which had been stolen on six different occasions specified in those particulars.

It was argued that there was a misjoinder and that all the jewellery should have been the subject of a specific count of receiving unless it could be established by the prosecution that there had been several distinct acts of receiving at several distinct times. Although this proposition appears to be supported in India and is stated in Gour's Penal Law (4th Edn.) Vol. II at p. 2117 and in Ratanlal & Thakore's The Law of Crimes (18th Edn.) at p. 1044 we are not in agreement with it as far as this Colony is concerned.

We cannot see that the mere fact that a person is found in possession of a number of articles which had been stolen from different persons at different times is any indication at all that they were all received at one time by the person charged with receiving. Even if they had all been received by the receiver at one time we are by no means satisfied that that would be a bar to separate charges or counts or separate trials. It appears to us that even if a person received on one occasion two articles as, for example, a watch and a tiara which had been stolen from different people at different times, it would be difficult to hold that the receipt of the watch was the same act in law as the receipt of the tiara. In any case, if the articles in question were received at one time and if that were a valid bar to separate counts relating to the articles the fact that they were received at one time and that they were not received on separate occasions would be a fact which was specially within the knowledge of the accused and the onus of establishing the facts as to this or a reasonable doubt as to the facts would, under s. 105 of the Indian Evidence Act as amended in this Colony, lie upon the defence and not upon the prosecution. There is nothing in the evidence to indicate that these articles might not have been received at different times.

We find that there is no substance in this point. Although other grounds of appeal were raised we are satisfied that there was ample evidence to support the finding that the first appellant had received the jewellery in question knowing it to have been stolen. We do not consider that there was any material misdirection. In our opinion his conviction was inevitable upon the evidence.

As regards the second appellant the case is not quite so clear. She was properly held to have been in joint possession with her husband at the time that the jewellery was found in their possession by the police. She told untruths about some of the jewellery claiming that she had given it to her daughter-in-law thirteen years ago which was entirely false. She was not a satisfactory witness or a

witness of truth. The trial magistrate considered her to be a stronger character than her husband and believed that she was the dominant partner, but while this last may be true it was not at all established by the evidence.

The case against the second appellant was one of very strong suspicion. If she had been a feme sole it would have been quite enough to justify her conviction but the magistrate appears to have failed to have considered the possibility that the stolen jewellery had been in fact received from the thieves by the first appellant and later entrusted by him to his wife. This possibility appears to us to be rather more probable than the second appellant had any part in the actual receipt of the jewellery from persons outside her family or that she took any part in or had knowledge of the course of the negotiations and the terms upon which the particular articles of jewellery were received from the actual thieves or their agents. The question then arises as to whether it was clearly established that at the actual time when the second appellant took the jewellery into her joint possession she had actual knowledge or cause to believe that the articles had been stolen. We do not think that this aspect of the matter was properly considered and we are unable to say that if the magistrate had considered it he would inevitably have come to the conclusion that the second appellant was guilty.

We allow the appeal of the second appellant and set aside her conviction and sentence.

The appeal of the first appellant is dismissed.

Appeal of first appellant dismissed. Appeal of second appellant allowed.

For the appellants:

AR Kapila

SR Kapila & Kapila, Nairobi

For the respondent:

JP Webber (Deputy Public Prosecutor, Kenya)

The Attorney-General, Kenya

Khan Stores v Delawer [1959] 1 EA 714 (HCT)

Division:	HM High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	4 August 1959
Case Number:	12/1959
Before:	Law J
Sourced by:	LawAfrica

[1] *Practice – Summary procedure – Conditional leave to defend granted by sub-ordinate court – Application to High Court for revision of order – Powers of High Court to revise interlocutory order – Indian Code of Civil Procedure, 1908, s. 115.*

[2] *Bill of Exchange – Cheque payable to cash or bearer – Whether such a cheque is a “bill of exchange, hundi or promissory note” within O. 37, r. 2 of Indian Code of Civil Procedure, 1908 – Bills*

of Exchange Ordinance (Cap. 215), s. 2 (T.).

Editor's Summary

In a summary suit based on a cheque made payable to “cash” or “bearer” the magistrate granted the applicant leave to defend conditional upon payment into court within seven days. The applicant applied to the High Court for revision of that order under s. 115 of the Indian Code of Civil Procedure on the ground that the cheque upon which the action was founded was not a “bill of exchange, hundi or promissory note” within O. 37, r. 2. It was submitted on behalf of the respondent that the application was incompetent on the grounds *inter alia* that the order being of an interlocutory nature, was not a “case which has been decided” within the meaning of s. 115 of the Code, and that an order granting conditional leave to defend in a summary suit is appealable and therefore the High Court had no jurisdiction in revision.

Held –

- (i) a cheque made payable to “cash” or “bearer” is a bill of exchange and the respondent was the holder thereof within the meaning of the terms “bearer” and “holder” in s. 2 of the Bills of Exchange Ordinance and was accordingly entitled to bring an action on the cheque, as a bill of exchange, under O. 37, r. 2 of the Indian Code of Civil Procedure.
- (ii) an application for revision of an interlocutory order of a subordinate court lies to the High Court under s. 115 of the Code.

Vithaldas Jetha v. Valibai (1935), 1 T.L.R. (R.) 400 disapproved.

Application dismissed.

Cases referred to in judgment

- (1) *Vithaldas Jetha v. Valibai* (1935), 1 T.L.R. (R.) 400.
- (2) *Gurdevi v. Bakhsh* (1943), A.I.R. Lah. 65.
- (3) *Churanjilal & Co. v. A. H. Adam* (1950), 17 E.A.C.A. 92.
- (4) *Emmanuel v. Velissaris* (1933), 1 T.L.R. (R.) 569.
- (5) *North and South Insurance Corporation Ltd. v. National Provincial Bank Ltd.*, [1936] 1 K.B. 328.
- (6) *Cole v. Milsome*, [1951] 1 All E.R. 311.
- (7) *Jacobs v. Booths Distillery Co.* (1901), 85 L.T. 262.
- (8) *Hasmani v. Banque Du Congo Belge* (1938), 5 E.A.C.A. 89.
- (9) *M. S. Aggarwal v. Mt. Durgabai w/o Shantiprasad Jain* (1947), A.I.R. Nag. 124.

Judgment

Law J: This is an application for the revision of an order made by a resident magistrate in Dar-es-Salaam District Court Civil Case No. 1024 of 1959, a summary suit brought under the provisions of O. 37 of the Code of Civil Procedure. The applicant was the defendant in that case, and the order which he seeks to have revised is one dated May 27, 1959, giving him leave to defend conditionally upon payment into court of a sum of money within seven days. The application is made under s. 115 of the Civil Procedure Code, and objection has been taken by Mr. Kesaria for the respondent that the order in question, being of an interlocutory nature, is not a “case which has been decided” within the meaning of that section and that this application is therefore incompetent. The authority of *Vithaldas Jetha v. Valibai* (1) (1935), 1 T.L.R. (R.) 400 is in Mr. Kesaria’s favour, but doubts have recently been cast on the validity of that authority. In particular Davies, C.J., in his judgment in Civil Revision No. 8 of 1959 held that Jetha’s case is of doubtful authority in the light of more recent decisions, particularly *Gurdevi v. Bakhsh* (2) (1943), A.I.R. Lah. 65. The learned Chief Justice said in his judgment:

“It follows that I have come to the conclusion that the High Court has the right to revise an interlocutory order of a subordinate court. The right however is a discretionary one and I have to consider whether it would be proper to interfere with the decision of the resident magistrate to give leave to the defendants to appear and defend the suit. In the exercise of its discretion it is well established that the High Court will not necessarily interfere in every case where a subordinate court has made an irregular order, unless its failure to do so would result in substantial injustice.”

I respectfully agree with and adopt that passage. Mr. Kesaria’s second objection is that an order granting conditional leave to defend in a summary suit is appealable and that therefore the High Court has no jurisdiction in revision. There is a remarkable conflict of judicial authority on this point in India. In England an order refusing unconditional leave to defend under the corresponding English rule (O. 14 r. 1) may be appealed against without leave (Annual Practice 1943 Edn. p. 183). The same position would seem to exist in Kenya (*Churanjilal & Co. v. A. H. Adam* (3) (1950), 17 E.A.C.A. 92). The point has never so far as I know been the subject of a judicial decision in Tanganyika. I prefer to follow what seems to be the preponderance of Indian authority as summarized by Mulla in his notes to O. 37 r. 3, and hold that no appeal is allowed under the Code from an order under that rule. This being so, there is nothing to prevent the present application from being dealt with by the High Court.

Mr. Chaddah’s principal ground for impugning the resident magistrate’s order is that the document sued upon in the suit is not a “bill of exchange, hundi or promissory note” within the meaning of O. 37 r. 2. If that ground is established, then the plaintiff/respondent has invoked a special jurisdiction in circumstances in which such jurisdiction does not attach and the lower court proceedings are invalid ab initio. (*Emmanuel v. Velissaris* (4) (1933), 1 T.L.R. (R.) 569).

The document in question is a cheque drawn on the National Bank of India, signed by the applicant, directing the bank to pay “Cash” or bearer the sum of Shs. 2,000/-. The word “cash” is in manuscript, the word “bearer” is printed. Mr. Chaddah relies on *North and South Insurance Corporation v. National Provincial Bank* (5), [1936] 1 K.B. 328, which decided that a document made out “to cash or order” was not a cheque, because it was not a bill of exchange as defined in the Bill of Exchange Act, and that the words “or order” being inconsistent with the intention of the drawers should be disregarded. Mr. Chaddah submits that in this case, by writing “cash” in the place specified for the name of the payee, the applicant intended the equivalent of a cash payment, and not that the cheque should have effect as a bill

of exchange, and he submits

that the words “or bearer” should be disregarded. Mr. Kesaria relies on *Cole v. Milsome* (6), [1951] 1 All E.R. 311, in which it was held that a document payable to “cash or order” was not payable “to or to the order of a specified person, or to bearer” within the meaning of s. 3 (1) of the Bills of Exchange Act, 1882 (which is identical with s. 3 (1) of the Tanganyika Bills of Exchange Ordinance (Cap. 215)), and he submits that by necessary implication a cheque made payable to “cash or bearer” is a bill of exchange. I agree. A person who uses cheque forms made out to blank “or bearer”, and who fills in the blank either with the word “cash” or with the name of a specified person without deleting the word “bearer”, must be presumed to intend that the words “or bearer” should remain. Such a document is a bill of exchange, being payable to bearer and complying with the other requirements of s.3 (1) of Cap. 215, and the plaintiff/respondent, as the person in possession of the cheque, was the holder thereof within the meaning of the terms “bearer” and “holder” in s. 2 of Cap. 215 and was accordingly entitled to bring an action on the cheque, as a bill of exchange, under O. 37, r. 2.

The next point of substance relied on by Mr. Chaddah is that the resident magistrate, having given leave to defend, must be presumed to have found that there was a triable issue, and accordingly wrongly exercised his discretion in making the leave to defend conditional upon payment of a sum of money into court. The order reads as follows:

“Leave to defend conditionally upon payment into court within seven days”.

It is defective in that it does not purport to say what sum is to be paid. However, from the record of the immediately preceding argument, it appears that what the magistrate had in mind was the difference between the amount claimed (Shs. 2,000/-) and the amount which the applicant through his advocate alleged he had already paid (Shs. 960/-), in other words Shs. 1,040. I have consulted the magistrate, who confirms that this is so, and whose recollection is that this was made clear to all present when the order was made. Now there is ample authority that when a triable issue exists, leave to defend should be unconditional (*Jacobs v. Booths Distillery Co.* (7) (1901), 85 L.T. 262, *Hasmani v. Banque du Congo Belge* (8) (1938), 5 E.A.C.A. 89). On the other hand, O. 37 r. 2 (3) confers a discretion in the matter in the following terms:

“(3) Leave to defend may be given unconditionally, or subject to such terms as to payment into court, giving security, framing or recording issues or otherwise as the court thinks fit.”

At the most, all that can be alleged against the magistrate here is that he wrongly exercised his discretion. There should be no interference in revision unless there has been a complete failure to exercise discretion or unless the exercise was arbitrary and perverse (*M. S. Agarwal v. Mt. Durgabai w/o Shantiprasad Jain* (9) (1947), A.I.R. Nag. 24). In this case the resident magistrate was clearly unimpressed by the legal grounds relied upon by the defendant/applicant in support of his application for leave to defend, and rightly so as all these grounds have now fallen away. On the merits of the case, all that the defendant could urge was that he had made part-payment. In these circumstances it was, in my opinion, a proper exercise of discretion for the lower court to order that the right to defend be made conditional upon payment into court of the disputed balance. There has been an exercise of discretion, which was certainly neither arbitrary nor perverse, nor has it caused any injustice.

This application for revision is dismissed, with costs. The lower court’s order is affirmed, modified as follows:

“Leave to defend conditional upon payment into court of Shs. 1,040/- within seven days from August 4, 1959, written statement within fourteen

days thereafter, reply if any within seven days. Hearing date to be fixed by the resident magistrate, Dar-es-Salaam, on application by the plaintiff.”

Application dismissed.

For the applicant:

MS Chaddah

MS Chaddah, Dar-es-Salaam

For the respondent:

RC Kesaria

RC Kesaria, Dar-es-Salaam

Mohamed Roshan t/a Mohamed Roshan & Company v Santa Singh [1959] 1 EA 717 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	16 July 1959
Case Number:	40/1958
Before:	Forbes V-P, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya—Edmonds, J

[1] Evidence – Admissibility – Contract in writing for excavation work – Alteration made in written contract when further work agreed to be undertaken – Oral evidence admitted as to circumstances in which alteration made – Indian Evidence Act, 1872, s. 91 and s. 92.

Editor’s Summary

The appellant, as sub-contractor, under a written agreement dated June 1, 1956, had agreed with respondent to carry out certain excavation and filling work at the rate of Shs. 15/- per 100 cubic feet. At some stage the appellant’s copy of the agreement was amended by the substitution of the figure 17 for the figure 15 and the alteration was signed by the respondent. The defence pleaded and the judge found as a fact that the work to which the agreement related fell into two stages, that the agreement related originally to the first stage only and that subsequently the appellant undertook to carry out the second stage on similar terms except as to the rate of payment. At the trial evidence was given without objection as to the circumstances in which the alteration was made but counsel for the appellant in summing up his case contended that this evidence was inadmissible. The trial judge ruled that the evidence was admissible. On appeal it was argued *inter alia* on behalf of the appellant that the judge was wrong in

admitting or having regard to this evidence and that under s. 92 of the Indian Evidence Act such evidence was not admissible to contradict the figure of Shs. 17/- which appeared in the agreement upon which the suit was brought.

Held –

- (i) by a subsequent oral agreement the written agreement had been extended to apply to a new task and at the same time an alteration was made in the rate of payment recorded in the written agreement; accordingly evidence under proviso (6) of s. 92 of the Indian Evidence Act was admissible to show how the language of the altered instrument was related to the existing facts.
- (ii) the trial judge was right in admitting evidence to show that the parties intended the alteration in the instrument to apply to the second task only.

Appeal partially allowed on one comparatively minor item of claim.

Case referred to in judgment

(1) *Om Parkash v. Abdul Rahim* (1929), A.I.R. Lah. 511.

July 16. The following judgments were read:

Judgment

Forbes V-P: This is an appeal from a judgment and decree of the Supreme Court of Kenya dated March 6, 1958, whereby the appellant, the original plaintiff, was awarded the sum of Shs. 3,517/51, and costs to be taxed on the basis of a claim for that amount, upon a claim by the appellant for a sum of Shs. 54,931/20 with interest and costs. The sum claimed by the appellant comprised a sum of Shs. 48,481/20 in respect of the balance alleged to be due for work done by the appellant, a sum of Shs. 6,000/- in respect of a steam roller alleged to have been purchased by the respondent from the appellant, and a sum of Shs. 450/- in respect of a labour camp alleged to have been purchased by the respondent from the appellant. The bulk of the claim for work done related to work under a written agreement between the parties dated June 1, 1956, which provided for the carrying out by the appellant as sub-contractor of certain excavation and filling work at a site at Kalini Hills, near Sultan Hamud. The remainder related to certain other items of work alleged to have been done by the appellant at the site which were not covered by the written agreement. The principal matters in dispute at the trial were the volume of earth excavated by the appellant, and the rate at which payment was to be effected under the agreement.

In giving judgment the learned judge summarised his findings as follows:

“In the result, therefore, the plaintiff is entitled to the following sums for work done by him for the defendant:

For Excavation under the Contracts.

Crusher parking area	Shs. 33,715/44
Lorry parking area	47,122/78
Roads	7,855/49
Paragraph (8) of Defence:	
Item 1	Shs. 442/00
” 2	2,340/00
” 3	345/00
” 4	870/00
” 5 (disallowed)	
” 6.	3,142/80
” 7 (disallowed)	
Steam roller	6,000/00
Labour camp	450/00

	<u>102,281/51</u>
<i>Less</i> amount paid to plaintiff	98,764/00
Due to plaintiff	<u>Shs.</u> <u>3,517/51</u>

“I accordingly enter judgment for the plaintiff in the sum of Shs. 3,517/51.”

On appeal Mr. Khanna for the appellant challenged the learned judge’s findings on the following items in this summary:

- (1) The amount allowed for excavation of the crusher parking area.
- (2) The amount allowed in respect of item 4 under “para. (8) of defence”.
- (3) The amount allowed in respect of item 6 under “para. (8) of defence”.

He also argued that interest should be allowed on any amount recovered by the appellant. It is convenient to deal separately with each of the items challenged.

As regards the amount allowed in respect of the crusher parking area Mr. Khanna submitted (a) that at the lowest the learned judge should have allowed a sum of Shs. 48,600/- in respect of that item since that amount was admitted on the pleadings, and (b) that the figure of Shs. 48,600/- was calculated at a rate of 15 cts. per cubic foot, whereas under the agreement the rate payable was 17 cts. per cubic foot, and that, on the basis of 17 cts. per cubic foot, the amount which ought to be allowed was Shs. 69,964/56.

It was pleaded in the defence, and found as a fact by the learned trial judge, that the work to which the agreement related fell into two stages, that is to say, the crusher parking area and the lorry parking area; that the agreement related originally to the first stage only, i.e. the crusher parking area; and that subsequently the appellant undertook to carry out the second stage, i.e. the lorry parking area, on similar terms except as to the question of the rate payable. It was further pleaded and found as a fact by the learned judge that the rate payable under the agreement as applicable to the first stage was 15 cts. per cubic foot, and that when the agreement was extended to the second stage the rate payable was increased, in respect of the second stage, to 17 cts. per cubic foot.

The following passages in the defence are relevant to Mr. Khanna's submission that there was an admission that Shs. 48,600/- was due in respect of the first stage:

- "3. (a) On or about June 1, 1956, the defendant gave a sub-contract to the plaintiff to carry out and complete a contract that the defendant had with a firm called J. L. Kier & Partners for excavation of earth from a site close to the proposed limestone crushing plant at Kalini Hills near Sultan Hamud for a proposed cement factory at Athi River.

"(b) The volume of earth that was to be excavated was 12,000 cubic yards and the contract included removal of the earth to a piece of land close by and the filling of the said piece of land with earth and its consolidation with water . . .
- "4. (a) In or about the month of August, 1956, the defendant was asked by the said J. L. Kier & Partners to excavate another 12,950 cubic yards of earth from another site close to the site mentioned above and to do its removal, filling and consolidation as stated above.

"(b) The defendant gave the sub-contract to the plaintiff in respect of the above-mentioned additional work or extended contract on the same terms as agreed between the plaintiff and the defendant in respect of earlier sub-contract, except as to price which was increased to Shs. 17/- per hundred cubic feet in respect of the said additional work . . .
- "5. The plaintiff failed to carry out and complete the sub-contracts as agreed and after doing only a part of the work he had agreed to do left the site . . .
- "6. The plaintiff having failed to carry out and complete the sub-contracts as stated above, is not entitled to payment of any balance claimed in respect of the said sub-contracts. Without prejudice to the foregoing the defendant states that the defendant himself carried out the work that the plaintiff failed to do in order to complete his own contract with the said J. L. Kier & Partners and after deducting the cost of the work he himself had to do at Shs. 17/- per one hundred cubic feet from the total price that would have been payable to the plaintiff on completion at the rates of

Shs. 15/- and 17/- as stated above, it will be found that the plaintiff has been overpaid to the extent of Shs. 9,836/50 as stated below:

Total excavation work of both sub-contracts	673,650 cu. ft.
Less work done by the defendant	155,000 "
Total	518,650
324,000 cubic feet at Shs. 15/- per 100 cu. ft.	Shs. 48,600/00
194,650 cubic feet at Shs. 17/- per 100 cu. ft.	33,090/50
Total	Shs. 81,690/50
Amount paid to the plaintiff	Shs. 98,764/00
Less due as above	81,690/50
	Shs. 17,073/50
Less amount paid or due in respect of steam roller and other items as stated below	Shs. 7,237/00
	Shs. 9,836/50

Mr. Khanna argued that para. 3 (b) is an admission that the work to be done on the first stage was 12,000 cubic yards, i.e. 324,000 cubic feet, and that in para. 6 there is an admission that this work was in fact completed, since credit is allowed for 324,000 cubic feet at Shs. 15/- per 100 cubic feet. Mr. Khanna called attention to the note at p. 16 of the record of the learned judge's refusal to allow amendment of the defence by the insertion of the word "estimated" before the words "12,000 cubic yards" in para. 3 (b), and submitted that though, as appears from certain passages in the judgment, the learned judge appreciated that the parties were bound by their pleadings, he overlooked this admission and his own refusal to allow amendment. Mr. Khanna also called attention to a letter (p. 17 of Vol. 2 of the record) dated February 11, 1957, written by the advocates for the respondent to the advocates for the appellant which, he asserted, contained a similar admission, and to passages in the respondent's evidence where the respondent said that he had got from J.L. Kier & Partners the figures which he put in his pleadings.

With respect, I am unable to agree with Mr. Khanna's arguments. Accepting that paras. 3 (b) and 4 (a) of the defence are admissions that the volume of earth that was to be excavated was 12,000 cubic yards in respect of the first site and 12,950 cubic yards in respect of the second site, I am unable to read para. 6 as an admission that the whole of the 12,000 cubic yards was in fact excavated at the first site. Paragraph 6 must be read with para. 5, where it is clearly alleged that the appellant failed to complete the work under both sub-contracts. As I read para. 6, it contains, *inter alia*:

- (a) an admission that the total excavation work amounted to 673,650 cubic feet;
- (b) an allegation that the total work on both sub-contracts fell short by 155,000 cubic feet of the amount contracted to be done;
- (c) a claim that the appellant was only entitled to payment at the rate of Shs. 15/- per 100 cubic feet in respect of the first 324,000 cubic feet of the admitted total; and
- (d) a claim that the respondent was entitled to make a deduction in respect of work he was obliged to do at the rate of Shs. 17/- per 100 cubic feet.

In para. 4 of the appellant's reply the account set out in para. 6 of the defence was not admitted. At the commencement of the trial issues were agreed, the first three of which read as follows:

- "1. What were the terms of the contract as to
 - (a) The volume of earth to be excavated.
 - (b) The rate to be paid per hundred cubic feet.
- "2. What volume of earth was excavated by plaintiff.
- "3. Has plaintiff carried out the terms of the contract. If not, to what extent."

Issues 2 and 3 clearly invite an investigation of the amount of work actually completed by the appellant, and the case was conducted on this basis. The learned judge's finding was:

"As regards issue 1 (a), whatever the defendant may have said was the estimated volume of earth to be excavated, the fact, as given by Mr. Augustinus (4 D.W.) and which I accept, is that, exclusive of the roads, the volume excavated was 24,015 cubic yards (or 648,405 cubic feet)."

In my view, on the pleadings and issues as agreed, it was competent for the learned judge to make this finding of fact, and I think he was correct also when he said in his judgment

"I do not think it was any part of the plaintiff's case to recover payment from the defendant on the original estimate rather than on the actual volume of earth excavated."

The learned judge, however, correctly held that the respondent was bound by his admission as to the total work done, though his own findings on the evidence fall short of this amount in so far as work under the agreement is concerned. He deals with the matter, including the deduction in respect of work done by the respondent, as follows:

"I will, there, accept the lower estimate of 20 per cent. as the amount of work which remained to be done and which was done by defendant after the plaintiff left. I have accordingly calculated the following table:

Total Volumes Excavated (Augustinus' Figures)

Crusher parking area (including road to quarry)	10,406	cu. yds.
	=	280,962 cu. ft.
Less 20 per cent.	56,192.4	"
	<hr/>	224,769.6 "
At 15 cts. per cu. ft.	Shs. 33,715.44	
Lorry parking area (including office)	12,833	cu. yds.
	=	346,491 cu. ft.
Less 20 per cent.	69,298.2	"
	<hr/>	277,192.8 "
At 17 cts. per cu. ft.	Shs. 47,122.78	
Total	<hr/>	Shs. 80,838.22

“... It seems clear from defendant’s figures in para. 6 of the defence that he has made some allowance for work done by the plaintiff on the roads at the site. He has given a figure of 673,650 cubic feet as the

total excavation by plaintiff under 'both sub-contracts'. The figures given by Mr. Augustinus for the work at the crusher parking area (which include the road to the quarry) and the lorry parking area (which include the office) total 627,453 cubic feet. The difference between the two figures of 46,197 cubic feet must, therefore, relate to work acknowledged by the defendant to have been done by the plaintiff on the roads, though it may also include work done at the Power House site, there being no evidence as to the exact volume excavated there. The defendant is bound by his pleadings and the plaintiff must therefore be given credit for this additional work of 46,197 cubic feet of earth excavated at 17 cents per cubic foot. This equals the sum of Shs. 7,853.49."

I think the fallacy in Mr. Khanna's argument is that he seeks to treat the figure "324,000 cubic feet" in para. 6 of the defence as an independent admission. On an ordinary reading of the table in para. 6, however, it does not stand alone but is merely a part of the total admitted work. I can see no ground whatever for increasing the figure for the total amount excavated. Accordingly, the result would be that, if Mr. Khanna's submission were accepted and 324,000 cubic feet were allowed at Shs. 15/- per 100 cubic feet (subject, of course, to Mr. Khanna's point as to the rate of payment applicable), there must be a corresponding reduction in the amount to which the rate of Shs. 17/- per 100 cubic feet applies. This of course would be to the appellant's disadvantage. The effect of the learned judge's findings is that he has credited the appellant with the excavation by the appellant of a total of 548,169.4 cubic feet instead of the 518,650 cubic feet set out in para. 6 of the defence. If this figure is divided on the basis that 324,000 cubic feet attracts a payment rate of Shs. 15/- per 100 cubic feet, only 124,169.4 cubic feet would attract payment at the rate of Shs. 17/- per 100 cubic feet. I cannot see that the appellant has any ground of complaint and I think Mr. Khanna's first submission must fail. It may be noted that the learned judge has properly allowed deduction at Shs. 15/- only per 100 cubic feet in respect of work uncompleted by the appellant on the first stage, instead of at Shs. 17/- per 100 cubic feet as claimed in para. 6 of the defence.

Before dealing with Mr. Khanna's second point it is convenient to deal shortly with a matter raised by Mr. Salter for the respondent. Mr. Salter argued that the learned judge was incorrect in holding that the respondent was bound by the figures in his pleadings; that he should not have allowed any amount in excess of his actual findings as to the volume of earth excavated in the crusher parking area and the lorry parking area; and that though no cross-appeal had been filed the court had been invited to reconsider the figures found by the learned judge and that, under r. 74 of the Eastern African Court of Appeal Rules, 1954, it was open to the court to disallow the amount awarded in respect of the difference, namely, Shs. 7,853/49, if the court came to the conclusion the learned judge was wrong. I have already indicated that I do not think the learned judge was wrong in holding the respondent bound by the figure stated in his defence to be the amount of the total excavation; but in any case I do not think it is open to the respondent to ask for this variation in the decision of the court below in the absence of a cross-appeal or leave of this court. Rule 74 of the rules of this court undoubtedly gives wide powers to the court as to matters which may be dealt with on an appeal, but I think that rule must be read with rule 65, which requires a respondent to give notice of cross-appeal if he intends to contend that the decision of the court below should be varied and, in sub-rule (3), provides:

"If the respondent fails to give such notice within the time prescribed, he shall not be allowed, except by leave of the court, to contend on the

hearing of the appeal that the decision of the court below should be varied; but the Court of Appeal may in its discretion hear any such contention and may, if it thinks fit, impose terms as to costs, adjournment or otherwise.”

No leave was applied for in this case. Had it been applied for it could only have been granted on terms as to adjournment and costs.

Mr. Khanna’s second point in regard to the amount allowed in respect of the crusher parking area related to the rate at which payment was to be made. The agreement between the parties, as originally drawn, and signed by both parties read as follows:

“AGREEMENT

“This Agreement is made this 1st day of June, 1956, between Mr. Santa Singh of Bharat Street, P.O. Box 6003, Nairobi, hereinafter called the contractor of the one part and Mohamed Roshan & Co. of Nairobi aforesaid of the second part, witnesseth as follows:

- “1. That the said contractor who holds a contract for the excavation and filling of ground at Kalini Hills, hereby appoints and nominates the said sub-contractor Mohamed Roshan & Co. to do and carry on the said contract on the terms and conditions hereinafter mentioned:
 - “1a. To complete the said works within the period of two months from the date hereof.
 - “2a. That the contractor, before the commencement of the said work shall advance to the said Mohamed Roshan & Co., the amount of Shs. 10,000/-.
- “2. That the contractor hereby agrees to pay to the sub-contractor at the rate of Shs. 15/- per hundred cubic foot.
- “3. That the said contractor agrees and hereby guarantees to pay to the sub-contractor the balance of the contract money by four instalments, that is to say at the completion of one quarters of the agreed excavation and filling etc.
- “4. That in the event of the said contractor failing to pay the first instalment the sub-contractor will be at liberty to stop further work and will be entitled to sue the contractor for the balance due to which the said contractor shall have no defence.

“Dated at Nairobi this 1st day of June, 1956.”

There were two original copies of this agreement, one held by the appellant and one held by the respondent. At some stage the appellant’s copy was amended by the substitution of the figure 17 for the figure 15 in cl. 2, and the alteration was signed by the respondent. Evidence was led by both sides without objection as to the circumstances in which the alteration was made. In his address to the Supreme Court, however, Mr. Cockar for the appellant contended that such evidence was inadmissible. The learned judge in his judgment ruled that the evidence was admissible. He rejected the appellant’s version that the amendment was made before the commencement of the work and accepted the respondent’s version that the amendment was only made when the second stage of the work, i.e. the lorry parking area, was about to be started and that it applied only to the second stage work.

Mr. Khanna argued that the learned judge was wrong in admitting or having regard to this evidence; that under s. 92 of the Indian Evidence Act such evidence was not admissible to contradict the figure of Shs. 17/- which appeared in the original agreement upon which the suit was brought; that the learned judge correctly directed himself in saying

“Such evidence would be admissible only if it was directed to prove the existence of an oral agreement subsequent to the written contract, modifying the latter”,

but that he was wrong in proceeding

“to study the evidence in order to determine whether there was in fact a subsequent oral agreement”;

that it was not contested that there were two tasks allotted at different times, but that the written contract on the face of it related to the first task undertaken in June and evidence was not admissible to show it related to the second task in August only.

By s. 91 of the Evidence Act, when the terms of a contract have been reduced to the form of a document no evidence shall be given in proof of the terms of such contract except the document itself except in cases in which secondary evidence is admissible. Section 92, so far as is relevant, provides:

“92. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from, its terms:

“Proviso (2). The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document.

“Proviso (4). The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

“Proviso (6). Any fact may be proved which shows in what manner the language of a document is related to existing facts.”

It is well established that where it is clear on the face of a contract that the written document does not contain the whole of the agreement between the parties, the terms not embodied in the writing may be proved by oral evidence (Monir, Law of Evidence (3rd Edn.) p. 672). The contract in the instant case refers generally to “the excavation and filling of ground at Kalini Hills” but contains no details of the work envisaged. Evidence was therefore properly admissible to establish the extent of the work. Such evidence established that the work to which the original contract referred was the excavation of the “crusher parking area”. The second task, in respect of the “lorry parking area” was allotted in or about the beginning of August, 1956, as the result of a new oral agreement between the parties.

It is also established that the date of a document is not a term of the contract and that oral evidence to prove the date on which the contract was written is admissible (Monir, Law of Evidence (3rd Edn.), p. 645, and Phipson on Evidence (9th Edn.), p. 610, and the cases there cited). Similarly, I think evidence is admissible to prove the date of any alteration to a document (Sarkar on Evidence (9th Edn.), p. 893; *Om Parkash v. Abdul Rahim* (1) (1929), A.I.R. Lah. 511). In the instant case the learned judge has not in terms found the date upon which the alteration was made, but it is clear from

the judgment that he accepted the evidence to the effect that the alteration was made at the commencement of the second stage of the work, i.e. about the beginning of August. The position therefore is that by a subsequent oral agreement the agreement of June 1 is extended to apply to a new task and at the same time as the oral agreement an alteration is made in the rate of payment recorded in the written agreement of June 1. In this situation I think evidence under proviso (6) to s. 92 of the Evidence Act is admissible to show how the language of the altered instrument is related to the existing facts. I would therefore hold that the learned judge was not wrong in admitting evidence to show that the parties intended the alteration in the instrument to apply to the second task only. In the view I take the other points raised by Mr. Khanna do not arise. I see no reason to interfere with the learned judge's conclusions of fact on the evidence and I would accordingly hold that the appeal fails in so far as the first item appealed against, the "crusher parking area", is concerned.

My conclusion as to the rate payable in respect of the crusher parking area also determines the appeal in respect of the third item appealed against, i.e. the amount allowed in respect of item 6 under the heading "Paragraph 8 of Defence", that is to say the excavation of the crusher pit. It was conceded by Mr. Khanna that the appeal on this item depended on his submission as to the admissibility of evidence in regard to the disputed rates, and, as I have rejected that submission, it follows that I think the appeal on this item must fail also.

As regards the second item appealed against, item 4 under the heading "Paragraph 8 of Defence", which is "Hire of shovel tractor, Invoice No. 2840", I think the appeal must succeed. The invoice in question is exhibit 6, and contains four items totalling Shs. 1,870/-. The learned judge dealt with the matter as follows in his judgment:

"Item (4)

"This is in respect of invoice 2840 (exhibit 6) for Shs. 1,870/-. The plaintiff has explained only the first two entries, namely:

"28/11 – 6 hours – Shs. 360/-, and

"29/11 – 8½ " – Shs. 510/-.

"He says that this was in respect of the removal of the earth excavated by the firm at the crusher pit, and the spreading of it, at the instance of the defendant. Mosca confirms that this earth after being dumped by his labourers 200 to 500 feet from the pit, was then removed by machine. It is in evidence that the defendant then had no machine of his own. The defendant then in his evidence denies any hire of the tractor and states that the removal and spreading of earth was all part of the plaintiff's contract for excavation. This, however, so far as it relates to earth excavated by the firm, is not the case. Any earth removed by the plaintiff which had not been excavated by him, was additional to and outside his contracts with the defendant. In view of Mosca's evidence the probability is that the plaintiff did remove this earth and that he did it as extra work at the request of the defendant; for Mosca has said that he had no dealings with the plaintiff other than through the defendant and/or as the defendant's employee. I will therefore accept plaintiff's evidence as to these two items and allow them."

As argued by Mr. Khanna, the learned judge has accepted the appellant's version but has only allowed two of the items because the "plaintiff has explained only the first two entries". With respect this is not correct. It is true that in cross-examination (at p. 20 of the record) he said:

“(Exhibit 6 – Invoice 2840 – Shs. 1870/-). Items 1 and 2 – removal of earth excavated by company at crusher site. This was done by tractor shovel. Done on defendant’s order, company representative present.”

But in examination-in-chief (at p. 19 of the record) he had said:

“Invoice 2840 – 15.12.56 – 1870/-, charge in respect of time employed on tractor shovel last occasion.”

He had in fact therefore given evidence explaining all four entries though not giving details. In cross-examination he was questioned as to only two of the entries, and he gave the details in respect of these. Mr. Salter argued that there was little evidence regarding the remaining two items in invoice 2840 and that while there was no definite finding by the learned judge on the point, the inference must be that the judge had applied his mind to the whole invoice and had found against the appellant in respect of two items. I think, however, that the learned judge must have overlooked the passage in examination-in-chief which I have set out above, and also the respondent’s evidence on the subject. It was no fault of the appellant that he was questioned as to two only of the four items in cross-examination. The respondent’s evidence in regard to exhibit 6 was as follows:

“(Exhibit 6) 6½ hours shovel tractor 360/- etc.–deny any hire. Use of tractor in spreading earth entirely plaintiff’s matter under contract. He did the work.”

There is therefore an admission by the respondent that the work was actually done, the defence being that the work done was part of the original contract. Since that defence was rejected, I think it must follow that all four items should be allowed. This will mean that the amount due to the appellant is increased by Shs. 1,000/-.

As regards interest on the amount recovered by the appellant, this was claimed in the plaint and I do not think it is contested that it should be allowed.

In the result therefore I would allow the appeal to the extent of setting aside paras. 1 and 2 of the decree dated March 6, 1958, and in lieu thereof I would order:

1. That the defendant/respondent do pay to the plaintiff/appellant a sum of Shs. 4,517/51 with interest thereon at 6 per cent. per annum from the date of institution of the suit.
2. That the defendant/respondent do pay to the plaintiff/appellant his costs of the suit as though the amount claimed had been the sum of Shs. 4,517/51 to be taxed and certified by the taxing master of the Supreme Court.

As regards costs in this court, the appellant has succeeded only on one comparatively minor item of his claim. I would allow him one-fifth of the costs of the appeal to be taxed, and would certify that the case was a proper one for two counsel.

Gould JA: I agree with the judgment of and the orders proposed by the learned Vice-President and would like only to add a few words of my own upon the subject of the alteration of the written contract. The facts are altogether unusual, but this court was not asked to review the findings of fact of the learned judge in the court below on this point, and the result of those findings as I see them is that the parties made two successive contracts and endeavoured (however misguidedly) to make the same document serve for both. While I do not dissent from the approach made to the matter by the learned Vice-President in relying upon proviso (6) to s. 92 of the Indian

Evidence Act I do not see anything in the section itself which would prevent the defendant in the court below from bringing evidence to show that the document relied upon by the plaintiff evidenced a new contract and was spent as far as the first contract was concerned. That evidence would not contradict, vary, add to or subtract from the terms of the new contract. As far as the old contract is concerned the evidence would merely show that the document relied upon by the plaintiff was not the document signed by the parties to evidence that contract; its identity as such had been terminated by its use, in an altered form, to evidence a later contract and I think that secondary evidence of its contents in its original form would be admissible in the same way as it would have been had the document been destroyed. It is therefore my view that the learned judge in the court below, having arrived at the conclusions he had upon the evidence admitted, was correct in giving it effect.

Windham JA: I also agree. With regard to the admission of evidence to explain the alteration superimposed upon the original contract, I concur with the view expressed by my brother Gould, J.A., that there were in reality two contracts, the second being in a sense a palimpsest upon the first; and that, even apart from proviso (6) to s. 92 of the Indian Evidence Act, oral evidence was admissible to explain that the figure Shs. 17/- per hundred cubic foot applied only to the contract later superimposed.

Appeal partially allowed on one comparatively minor item of claim.

For the appellant:

DN Khanna and SR Cockar

Cockar & Cockar, Nairobi

For the respondent:

CW Salter QC and DV Kapila

DV Kapila, Nairobi

Narandas Jina v Mohamed Amin
[1959] 1 EA 728 (HCT)

Division:	HM High Court of Tanganyika at Mwanza
Date of judgment:	16 September 1959
Case Number:	9/1959
Before:	Simmons J
Sourced by:	LawAfrica

[1] *Rent restriction – Premises comprising shop and dwelling accommodation – No express provision in lease as to nature of letting – Whether “contemplated user” or “actual user” is primary factor in determining whether premises subject to rent restriction – Rent Restriction Ordinance (Cap. 301), s. 2 (2) (T).*

Editor's Summary

A tenant had applied to the Rent Restriction Board to fix a standard rent and for an order that the landlord carry out repairs. The Board on a view of the premises found as a fact that the larger portion was "in bona fide use as the dwelling-house of the tenant and his family", that is to say used "mainly as a dwelling-house" within s. 2 (2) of the Ordinance. The Board however took into consideration "actual user" before considering what the premises were constructed for and held that the premises were subject to the Rent Restriction Ordinance. The landlord appealed mainly on the ground that the Board misdirected itself in law in failing to appreciate the significance in law of "contemplated user" in deciding whether premises are subject to the Rent Restriction Ordinance or not.

Held –

- (i) in the absence of express provision in the lease as to the purpose of the letting it is open to the court to look at the construction of building; if the building is constructed for use as a dwelling-house the reasonable inference would be that it was so let; if constructed as a shop the reasonable inference would be that it was so let; but if the position were neutral it would be proper to look at the actual user.

Wolfe v. Hogan, [1949] 1 All E.R. 570 applied.

- (ii) there was no express provision as to the purpose of the letting in the lease and the Board was wrong in considering "actual user" before considering the construction of the premises in deciding whether the premises were subject to the Rent Restriction Ordinance or not.

Case remitted to the Rent Restriction Board to make a finding as to the purpose for which the premises were constructed.

Cases referred to in judgment

(1) *Zainee binti Mtekwa v. Bhagat*, Tanganyika High Court DSM Miscellaneous Civil Appeal No. 3 of 1959 (unreported).

(2) *Wolfe v. Hogan*, [1949] 1 All E.R. 570.

Judgment

Simmons J: This is an appeal from a determination by the Rent Restriction Board for Mwanza dated May 8, 1959, finding that the premises the subject-matter of the application were a dwelling-house within the meaning of the Rent Restriction Ordinance (Cap. 301). The application was by the tenant for the fixing of a standard rent and for an order that the landlord carry out repairs.

There were two grounds of appeal, the first of which was as follows:

The Board misdirected itself in law in that the Board failed to appreciate the significance in law of “contemplated user” in deciding whether or not premises are subject to the Rent Restriction Ordinance or not.

The Board in their ruling had cited s. 2 (2) of the Ordinance:

For the purpose of this Ordinance, premises shall be deemed to be used as a dwelling-house when such premises, although used by the tenant partly for business, trade or professional purposes or for the public service, are used by him mainly as a dwelling-house; and conversely premises shall be deemed to be used for business, trade or professional purposes or for the public service when such premises, although used by the tenant partly as a dwelling-house, are used by him mainly for business, trade or professional purposes or for the public service.

They went on to say:

“We note that the test is user, not the nature of the letting.”

I agree that this appears to be a misdirection in that it seems to overlook the definitions of “business premises” and “dwelling-house” in s. 2 (1):

“‘business premises’ means a building or part of a building let for business, trade or professional purposes or for the public service where such letting does not include land other than the site and curtilage of such building or part of a building and comprised in the letting.”

“‘dwelling-house’ includes any house or part of a house or room let as a separate dwelling (whether or not such house, part of a house or room is occupied by one or more tenants and whether or not the terms of the letting include the use of other accommodation in common with the landlord or other persons or the landlord and other persons) where such letting does not include any land other than the site of the dwelling-house and garden or other premises within the curtilage of the dwelling-house.”

It does not follow, however, that this erroneous dismissal of the nature of the letting, as not providing a test, vitiates the determination of the Board. It has to be ascertained how far the Board were influenced by the misdirection. In *Zainee binti Mtekwa v. Bhagat* (1), Tanganyika High Court DSM Miscellaneous Civil Appeal, No. 3 of 1959 (unreported). I had to consider this point and did not find it necessary to look much further than the dictum of Denning, L.J., in *Wolfe v. Hogan* (2), [1949] 1 All E.R. 570, at p. 575:

“In determining whether a house or part of a house is ‘let as a dwelling’ within the meaning of the Rent Acts, it is necessary to look at the purpose of the letting. If the lease contains an express provision as to the purpose of the letting, it is not necessary to look further, but, if there is no express provision, it is open to the court to look at the circumstances of the letting. If the house is constructed for use as a dwelling-house, it is reasonable to infer that the purpose was to let it as a dwelling, but if, on the other hand, it is constructed for use as a lock-up shop, the reasonable inference is that it was let for business purposes. If the position were neutral, it would be proper to look at the actual user.”

In the present appeal I have no hesitation in holding that the lease on a true construction contains no express provision as to the purpose of the letting. The word “shop” appears in the parcels but that is all; there is no dispute that part of the premises was a shop, but that does not mean that the main contemplated user was necessarily as business premises. There are no terms as to user. It was therefore open to the Board to “look at the circumstances of the letting”, this in the first place being the construction of the premises. This is supported by the proposition from *Woodfall* cited to the Board, but

the Board felt that the proposition could not be applied in Tanganyika because it was based on the definition of dwelling-house as one “let as a separate dwelling”, apparently overlooking the fact that that definition appears in s. 2 (1) of our own Ordinance and considering s. 2 (2) as though it stood alone. I apprehend that s. 2 (2) exists to make it clear that user—where it has to be considered—need not be exclusive user, whether as business premises or as a dwelling-house, but is sufficient if it is merely predominant user. However, the Board went on to say “we cannot think that the object of the letting can be entirely ignored”. I agree, even though this is somewhat of an understatement.

Unfortunately the Board did not find, at least in so many words, that the premises were “constructed for use as a dwelling-house”. They went on to consider the “actual user” before considering the construction of the premises, which is a reversal of the procedure indicated by Denning, L.J., and Woodfall. If the premises are constructed for use as a dwelling-house, or alternatively as business-premises, that is an end of the matter; but if the construction is neutral it would be necessary to look at the actual user. This the Board did, on a view of the premises finding as a fact that the larger portion was “in bona fide use as the dwelling-house of the tenant and his family”, that is to say used “mainly as a dwelling-house”: s. 2 (2). This brings me to the second ground of appeal:

“The Board failed to take into account or appreciate the significance of the evidence of the landlord i.e. the appellant that part of the premises were used for residential purposes despite his objection thereto.”

I see no reason to suppose that the Board did not take into account the evidence of the landlord that he objected to the premises being used as a dwelling. Incidentally, this was denied by the tenant and a finding of the Board on matters of fact is final. As to its “significance” I am unable to see it myself. If it was an attempt to give evidence of the terms of the contract of letting it is inadmissible under s. 91 of the Evidence Act. If it was merely an after-thought by the landlord it is irrelevant; the question is whether the premises were “let as” a dwelling, not whether there was a subsequent objection. In any case the question hardly arises because the Board found as a fact that it was “not true that (the tenant) went in with his family against the will of the landlord”, so that even if the landlord conceived an objection later he cannot have done so at the time of the letting or at the beginning of the actual user as a dwelling-house, which are the material times. The second ground of appeal fails.

To revert to the first ground of appeal I think I must send the case back to the Board to find whether the premises are constructed (a) as a dwelling-house, or (b) as business premises or (c) in a neutral form. If (a) or (c), the Board’s present determination is correct; if (b) it must be reversed. Strictly, the appeal must come back to this court for a final order, but to save further costs it might be possible for the parties to settle in the light of the further finding of the Board. That, however, is entirely for the parties to decide.

Case remitted to Rent Restriction Board to make a finding as to the purpose for which the premises were constructed.

For the appellant:

JS Mann

Patel and Mann, Mwanza

For the respondent:

BK Gossain and VN Upadhyaya

VN Upadhyaya, Mwanza

Rosetta Cooper v Gerald Nevill and another
[1959] 1 EA 731 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 5 August 1959
Case Number: 2/1959
Before: Sir Kenneth O'Connor P, Forbes V-P and Windham JA
Sourced by: LawAfrica

(In the matter of an Intended Appeal to Her Majesty in Council.)

[1] Practice – Stay of execution pending appeal to Privy Council – Taxed costs – When a stay will be ordered – Eastern African Court of Appeal Order-in-Council, 1950, s. 14 (b) – Eastern African (Appeal to Privy Council) Order-in-Council, 1951, s. 7.

Editor's Summary

The applicant obtained conditional leave to appeal to the Privy Council and then applied for the suspension pending appeal of further execution in respect of taxed costs ordered to be paid by the applicant. The application was heard by a single judge who ordered, *inter alia*, that no further execution should issue pending an undertaking being given by the advocates issuing execution to refund the costs if the appeal to the Privy Council succeeded. The applicant then referred the matter to the full court.

Held –

- (i) the court possessed a discretion in the matter out of its inherent jurisdiction and this discretion should be exercised in accordance with general principles, the principles being those applicable in appeals to the House of Lords.
- (ii) on those principles a stay will not be granted save in very exceptional circumstances, and *Mandavia v. The Commissioner of Income Tax*, [1957] E.A. 1 (C.A.), did not lay down any general rule restricting the discretion of the court upon any particular application.

Reference dismissed.

Cases referred to in judgment

- (1) *Mandavia v. Commissioner of Income Tax*, [1957] E.A. 1 (C.A.).
- (2) *Attorney-General v. Emerson and Others* (1889), 24 Q.B.D. 56.
- (3) *Griffiths and Another v. Benn* (1911), 27 T.L.R. 346.

Judgment

Forbes V-P: read the following judgment of the court: The applicant in this matter obtained conditional leave to appeal to Her Majesty in Council from the judgment and order of this court in Civil Appeal No. 38 of 1958. She then applied

“for the suspension of further execution pending the hearing of this Intended Appeal to Her Majesty in Council”.

This application was heard by a single judge of this court in chambers, who made the following order:

“Order. This matter should have been dealt with on settling the conditions for appeal. As I see the position, I must deal with the application as I would have dealt with it if made at that time. The normal practice is for all costs ordered to be paid on an undertaking from advocates to refund if the appeal to Privy Council is successful. No special reason

has been advanced showing that the normal practice should not be followed. I order that no further execution shall issue or be proceeded with until an undertaking to refund is given by the issuing advocates covering the costs to be executed for and also those already paid.

“Costs of this application to be paid by the applicant.”

The applicant then referred the matter to the full court under s. 14 (b) of the Eastern African Court of Appeal Order in Council, 1950. We dismissed the reference with costs, and now give reasons.

The applicant had originally been awarded damages and costs in her suit against the respondents. On appeal to this court the first respondent to this application was successful, his appeal being allowed in full and the applicant (and her husband, who was, at that time, a party to the proceedings) being ordered to pay the taxed costs of the first respondent in this court and the court below. The second respondent was partially successful in the appeal, in that it obtained a reduction in the general damages awarded. We understood that this meant that in due course there would be a set-off between the applicant and the second respondent, and that for the present the second respondent was not concerned with the application. As between the applicant and the first respondent the subject matter of this application was the amount of the taxed costs of the first respondent in the Supreme Court. It appeared from affidavits filed on behalf of the applicant that the decretal amount, which had been paid to the applicant by the first respondent after the trial in the Supreme Court was, in pursuance of an order of the Supreme Court, being repaid to the first respondent by monthly instalments. The costs of the appeal to this court due to the first respondent had been taxed at Shs. 8,605/15 and this amount had been paid after the first respondent had levied execution. The taxed costs of the first respondent in the Supreme Court amounted to Shs. 12,547/-, and it was in respect of this amount that the application was brought. Mr. Hewett for the first respondent informed the court that he was in a position to give, and did give, an undertaking to repay the costs already executed for, and the costs in the trial court, if they were executed for, in the event of the applicant's appeal to Her Majesty in Council succeeding. He further informed the court that his instructions at present were not to execute for the costs in the trial court, but that he could give no undertaking that those instructions would not be altered.

The application was expressed to be under s. 7 of the Eastern African (Appeal to Privy Council) Order-in-Council, 1951 (hereinafter referred to as the Privy Council Appeals Order-in-Council) which, as amended, reads as follows:

“7. Where the judgment appealed from requires the appellant to pay money or do any act, the court shall have power, when granting leave to appeal, either to direct that the said judgment shall be carried into execution or that the execution thereof shall be suspended pending the appeal, as to the court shall seem just, and in case the court shall direct the said judgment to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security, to the satisfaction of the court, for the due performance of such order as His Majesty in Council shall think fit to make thereon:

“Provided that the court shall have power, in special cases, either to reduce the security to such an amount as to the court may appear just or to dispense with the security.”

Mr. Kean for the applicant argued that the section applied and made submissions as to the applicant's financial position in support of the application.

In *Mandavia v. Commissioner of Income Tax* (1), [1957] E.A. 1 (C.A.), this court held that a direction to pay costs was not in itself sufficient to bring the order appealed from within the definition of a “judgment which requires the

appellant to pay money or do any act” in s. 7 of the Privy Council Appeals Order-in-Council. In the course of the judgment the then learned President said:

“But, in any case, we think that a direction to pay costs is not of itself sufficient to bring the order appealed from within the definition of a judgment which ‘requires the appellant to pay money or do any act’. We think that this phrase is intended to apply to what may be termed the substantive order or orders of the court, i.e. the order or orders embodying the determination on the issue or issues raised in the appeal to the court. On any other view, the opening words of s. 7 would appear to be meaningless and otiose, since almost every judgment of the court contains an order for the payment of costs by the unsuccessful party, even if it be only a declaratory judgment or one dismissing a claim.”

We would respectfully agree, and we think the same reasoning applies to a direction to pay the costs of the trial court. In the instant case the application related solely to the direction as to costs and not to the substantive order of the court. In the circumstances, we did not think s. 7 of the Privy Council Appeals Order-in-Council applied, and were of the opinion that we possessed a discretion in the matter arising out of our inherent jurisdiction, and that this discretion should be exercised in accordance with general principles. We think the principles to be applied are those applicable in appeals to the House of Lords as set out in the Annual Practice 1959 at p. 1697, and the cases there cited. It is clear that on those principles a stay will not be granted save in very exceptional circumstances, and in our view no such exceptional circumstances had been shown in the instant case.

In the order from which this reference was brought the learned Justice of Appeal said:

“The normal practice is for all costs ordered to be paid on an undertaking from advocates to refund if the appeal to the Privy Council is successful”,

and he ordered that no further execution should issue or be proceeded with until an undertaking to refund had been given. The first respondent did not challenge this order, and we certainly do not wish to suggest that the learned Justice of Appeal was not entitled to make it in the exercise of his discretion. He may have been influenced by a passage in the judgment in *Mandavia’s* case (1) which reads as follows:

“It is contrary to the usual practice, on an application of this nature, to stay any direction for the payment of costs, provided the solicitor who is to receive the costs gives an undertaking to refund them if called upon to do so.”

No doubt such an undertaking is usually given: v. Annual Practice (*supra*); but we do not wish the two passages cited to be taken as laying down a general rule restricting the discretion of the court upon any particular application. It is clear that no such general rule exists in the case of appeals to the House of Lords: Annual Practice (*supra*); *Attorney-General v. Emerson and Others* (2) (1889), 24 Q.B.D. 56; *Griffiths and Another v. Benn* (3) (1911), 27 T.L.R. 346; and we do not think that any such general rule should be held applicable to appeals from this court to Her Majesty in Council. We think that in each case an application to stay execution must be decided upon its own particular facts.

Reference dismissed.

For the applicant:

M Kean

Sirley & Kean, Nairobi

For the first respondent:

PJS Hewett

Daly & Figgis, Nairobi

For the second respondent:

RDC Wilcock

Archer & Wilcock, Nairobi

Gullamhussein Sunderji Virji v Punja Lila and another
[1959] 1 EA 734 (HCT)

Division:	HM High Court for Tanganyika
Date of judgment:	3 September 1959
Case Number:	9/1959
Before:	Biron Ag J
Sourced by:	LawAfrica

[1] Rent restriction – Jurisdiction – Application by tenant to determine standard rent and for refund of excess rent – Application heard partly by board and partly by chairman alone – Decision of chairman alone – Whether chairman of board sitting alone entitled to decide application – Rent Restriction Ordinance, s. 2 (2) and 6 (2) (T.) – Rent Restriction (Authorisation) Order, 1951 (T.).

Editor's Summary

From the beginning of his tenancy the appellant had used certain premises both for living accommodation for himself and his family and also for a shop. The initial rent was Shs. 42/50 per month but in 1952 the standard rent was fixed at Shs. 70/25 per month. In 1957 when business premises were decontrolled the appellant after being asked to vacate agreed instead to pay Shs. 200/- per month rent. The appellant paid this increased rent until March, 1957, when he applied to the Rent Restriction Board for determination of the standard rent and for an order for refund of any rent in excess of the standard rent paid by him. Although the hearing of the application started before a properly constituted quorum of the board pursuant to s. 6.(2) of the Rent Restriction Ordinance, the chairman alone inspected the premises and gave his decision. The chairman taking the view that, under s. 2 (2) of the Rent Restriction Ordinance, the test for determining whether premises are residential or business premises is dominant user, held that the premises were business premises and accordingly dismissed the application. On appeal it was submitted that the chairman sitting alone had no jurisdiction to decide the application and that he erred in holding that the main user of the premises was that of a shop. It was submitted for the respondents that the chairman was empowered to sit alone under the provisions of the Rent Restriction (Authorisation) Order, 1951.

Held –

- (i) a Rent Restriction Board is the creation of statute and neither the board nor its chairman has any inherent powers but only those powers expressly conferred on them by the statute.
- (ii) the chairman of the Dar-es-Salaam Rent Restriction Board sitting alone has no power to order a

refund of excess rent paid and had no power to hear and determine this application.

- (iii) in determining whether premises have been let either as residential or as business premises the construction of the premises, the nature and purpose of the letting and the dominant user are all relevant factors.
- (iv) the onus is on the person asserting that premises are exempt from rent control to prove that they are so.

Appeal allowed. Application remitted to Rent Restriction Board for determination by a properly constituted board.

[See also *Narandas Jina v. Mohamed Amin*, [1959] E.A. 728 (T.)]

Cases referred to in judgment

- (1) *Gangabai Harji v. Bhoja Keshav*, [1959] E.A. 304 (C.A.).
- (2) *Epsom Grand Stand Association, Ltd. v. Clarke*, [1919] W.N. 170.
- (3) *Feyereisel v. Turnidge*, [1952] 2 Q.B. 29.
- (4) *Waller & Son, Ltd. v. Thomas*, [1921] 1 K.B. 541.
- (5) *Whiteley v. Wilson*, [1953] 1 Q.B. 77; [1952] 2 All E.R. 940.
- (6) *Wolfe v. Hogan*, [1949] 2 K.B. 194; [1949] 1 All E.R. 570.
- (7) *Harnam Singh v. Jamal Pirbhai*, [1951] A.C. 688.

Judgment

Biron Ag J: This is an appeal from the Order of the Dar-es-Salaam Rent Restriction Board dismissing an application brought by the appellant. The application was for:

- “(a) Declaration that the application premises are residential premises and subject to the provisions of the Rent Restriction Board. (Ordinance is obviously intended).
- (b) Determination of the standard rent of the application premises.
- (c) Order against the respondents (jointly or separately) to refund to the applicant excess over the standard rent paid by him for the two years preceding the date hereof.
- (d) Costs of this application.”

The facts as given in evidence and not apparently in dispute, are that the appellant had occupied the suit premises since 1940 and that since the commencement of the tenancy he has used the premises both as living accommodation for himself and his family and for business purposes in running a shop, apparently a provision shop. On the commencement of the tenancy the rent was Shs. 42/50 per month. In 1952, on the coming into force of the Rent Restriction Ordinance, Cap. 301 Revised Laws, the rent was increased to, and determined at Shs. 70/25 as the standard rent. In 1957 when business premises were decontrolled the appellant was apparently asked to vacate the premises. He preferred to stay on and after being asked for rent at Shs. 300/- per month, the parties eventually agreed to a rent of Shs. 200/-, which the appellant paid until December of last year. On March 23 of this year he brought this present application.

After hearing the evidence and inspecting the premises, the learned chairman of the board found the premises to be business premises and dismissed the application with costs to the respondent.

The first ground of appeal as set out in the memorandum of appeal is:

“The learned chairman had no jurisdiction to determine the application when sitting alone.”

Learned counsel are not in agreement as to the procedure followed in the board, but I propose to adopt the record of the proceeding though it is by no means free from ambiguity. The record commences:

“13.4.59

F. Addison, *Chairman*.

Shah for applicant.

1st resp. absent, served.

2nd resp. unserved.

Ex parte proof against the 1st resp. adjourned until 20.4.59. Reservice on payment of fees against the 2nd resp.

(Sgd.) F. Addison

13.4.59.

13.4.59

Shah for applicant.

Mhaisker for the resps. 1 and 2.

Application adjourned for hearing until 18.5.59.

Chairman visits premises.

(Sgd.) F. Addison.

18.5.59

F. Addison, *Chairman*.

Miss C. Penny *Members*

S. Nizamuddin Esq.

Rahim for applicant.

Sayani for respondent.”

Then follows the recorded evidence of the applicant and of one of the respondents, Ali Nathoo Meghji. The evidence was followed by addresses by Mr. Sayani and Mr. Rahim. The case was then adjourned until May 20, 1959. On that date the record continues:

“Board informs parties that evidence is required that premises were in existence on prescribed date, notwithstanding allegations to this effect in the application itself. Case further adjourned until 30.5.59, 9 a.m.”

On and from that date the record continues:

“30.5.59

Board adjourns until 1.6.59 for evidence as to existence of premises on 3.9.39.

Rahim informs board owner on safari at present.”

On May 30, 1959, the learned chairman delivered the judgment, which incidentally bears the date of May 18, 1959.

It would thus appear that although the hearing started before a properly constituted quorum of the board in accordance with s. 6 (2) of the Ordinance, part of the proceedings was conducted by the learned chairman alone and apparently he inspected the premises alone, and it is agreed by both learned counsel that the decision was that of the learned chairman alone.

Mr. Sayani for the respondent, submitted that the chairman was empowered to sit alone by the Rent Restriction (Authorisation) Order 1951, which reads:

- “1. This Order may be cited as the Rent Restriction (Authorisation) Order, 1951.
2. The chairman of the Dar-es-Salaam Rent Restriction Board is hereby empowered to exercise alone all the powers and functions of the board in so far as the said powers and functions relate—
 - (a) to the determination or assessment of the standard rent—
 - (i) of premises which were let on the third day of September, 1939; and
 - (ii) of premises which were in existence on the said date and were or are subsequently let; and
 - (b) to the determination as to whether or not any premises mentioned in para. (a) hereof are premises to which the Rent Restriction Ordinance applies.”

Mr. Lockhart-Smith for the appellant, submitted that apart from the fact that the application as brought could not be heard and determined by a chairman sitting alone, these proceedings having been started before a properly constituted board as defined in s. 6 (2) of the Ordinance (“Three members shall constitute a quorum at any meeting of a board”) could not be continued and completed by the chairman alone without some decision of the board; “they (the members of the board) could not be allowed simply to fade away.” He further submitted that a chairman sitting alone could not hear and determine item (c) of the application, which was for an order for the refund to the applicant of the rent paid by him in excess of the standard rent for the last

two years and Mr. Lockhart-Smith further submitted that the question whether a chairman sitting alone could award costs was open to argument.

A Rent Restriction Board is the creation of statute. Neither a board nor its chairman has any inherent powers but only those powers expressly conferred on them. In the absence of any such authority, I fully agree with Mr. Lockhart-Smith that a chairman sitting alone cannot order the refund of rent paid over and above the standard rent. By s. 9 (4) of the Ordinance,

“A board shall have power to award the costs of any proceeding before it and to direct that costs shall be taxed upon any prescribed scale or to award a specific sum as costs”.

I have already referred to the definition of a board in the Ordinance. In the absence of any express authority empowering a chairman sitting alone to award costs, I am inclined to agree with Mr. Lockhart-Smith that such question is at least open to argument.

Whether or not the Order can be construed as empowering the chairman of the Dar-es-Salaam Rent Restriction Board sitting alone to determine whether premises are business premises or a dwelling house, it was certainly never intended by this Order to give such powers, nor was it ever envisaged or contemplated that the Order would be so construed. At the time the Order was made both dwelling houses and business premises were subject to the provisions of the Ordinance. The Ordinance authorised *inter alia* an increase of fifty per cent. of the rent of premises which were in existence on September 3, 1939. Such increase, however, although more or less automatic, required an order of the board. There was therefore a very large number of applications for such increase on the coming into force of the Ordinance. The then chairman of the Dar-es-Salaam Board, which incidentally was the first board constituted under the Ordinance, was empowered to deal with such applications when sitting alone. In dealing with such applications it was also necessary to decide whether premises were subject to the Ordinance in accordance with the provisions of s. 1, which sets out the types of premises to which the Ordinance shall or shall not apply, such question hardly ever being contentious or presenting any great difficulty. It is, I think, pertinent to add that I have personal, though not judicial, knowledge of this, as I was the chairman at the time and the Order was made at my suggestion. Not only could it not have been contemplated that the Ordinance would be construed as empowering the chairman when sitting alone to determine whether premises are business premises or a dwelling house, but to my mind it is highly undesirable that a chairman sitting alone should decide such an important, vexatious, and in many if not most cases, very difficult question.

In *Gangabai Harji v. Bhoja Keshav* (1), [1957] E.A. 304 (C.A.), where the issue was the same as in this case, whether the suit premises were business premises or a dwelling house, the court held as stated in the headnote:

“The legislature intended that all questions which could be determined by a Rent Restriction Board should be referred to such board and deliberately ousted the jurisdiction of the courts on such questions.”

I said (at p. 306):

“The legislature has seen fit to create and set up a special domestic tribunal to deal with particular cases and disputes between landlords and tenants, and by the composition of such tribunal has ensured that it should be competent and qualified to deal with such questions. Therefore, even if I were to hold that this court has jurisdiction to entertain this present suit, I would still consider a Rent Restriction Board to be the more suitable forum for this particular issue, which to my mind is peculiarly within the province of such a board. Accordingly, even if I felt I had jurisdiction to

deal with this case I would still consider it incumbent on me to transfer it to the local Rent Restriction Board.”

It is pertinent to add that the judgment in that case was given after consultation with the other judges of the High Court. It does seem somewhat incongruous for the High Court to transfer such cases to the Rent Restriction Board for them to be dealt with by the chairman alone, who incidentally could not deal with them alone in his capacity as magistrate of the District Court.

As the Order has long outlived the object for which it was made, and is now being used as an authority for what, to my mind, is an undesirable practice and which if persisted in could, I think, render the continued existence of the Dar-es-Salaam Rent Restriction Board questionable, the appropriate authority may, I suggest with respect, consider its cancellation. The question also immediately poses itself why should the Dar-es-Salaam Rent Restriction Board, or rather its chairman, be thus singled out from all other boards in the territory?

The second and third grounds of appeal as set out in the memorandum of appeal, which I propose taking together, are:

- “2. The learned chairman should have followed earlier decisions of the Rent Restriction Board, in respect of almost identical user of almost identical premises, that such almost identical premises were dwelling-houses.
- “3. The learned chairman, having found that the area covered by the residential area exceeded that of the business portion, and having disagreed with the (second) respondent’s evidence on this point, erred in holding that the main user of the suit premises was that of a shop.”

The opening passage of the judgment reads:

“This case raises a single issue of fact, namely whether the premises are business premises or not. If they are business premises then it follows they come within the ambit of the R.R.O. Cap. 301 of the Laws. Under s. 2 (2) of the Ordinance the test is one of dominant user. See *Harnam Singh v. Jamal Pirbhai*, [1951] A.C. 688. The English authorities have laid down various tests in determining this issue, many of which are at variance, but I think this board is required to do no more than examine the facts and then ask itself what is the dominant user.”

With respect I consider that a fundamental misdirection. Neither the section referred to, nor the case cited is any authority for such proposition. The section, or rather sub-section, reads:

“For the purposes of this Ordinance, premises shall be deemed to be used as a dwelling house when such premises, although used by the tenant partly for business, trade or professional purposes or for the public service, are used by him mainly as a dwelling house; and premises shall be deemed to be used for business, trade or professional purposes or for the public service when such premises, although used by the tenant partly as a dwelling house, are used by him mainly for business, trade or professional purposes or for the public service.”

Had the Ordinance intended the construction put on it by the learned chairman, the section would have read:

“For the purposes of this Ordinance, premises shall be deemed a dwelling house when such premises although used by the tenant partly for business, trade or professional purposes or for the public service, are used by him mainly as a dwelling house.”

The section however reads:

“For the purposes of this Ordinance premises shall be deemed *to be used as* a dwelling house when such premises, etc.”

According to the learned chairman's construction these four words underlined are not only merely surplusage but distort the meaning intended. The character of premises cannot be determined by the de facto user. As said by Bankes, L.J., in *Epsom Grand Stand Association v. Clarke* (2), [1919] W.N. 170 at p. 171:

"If an agreement were to let premises as a barn, the tenant, even though he lived there, could not be heard to say they were let as a dwelling house."

If the meaning put on it by the learned chairman were given to the sub-section, it would conflict with sub-s. (1) of the very same section, which defines "business premises" and "dwelling house" as follows:

" 'business premises' means a building or part of a building let for business, trade or professional purposes or for the public service where such letting does not include land other than the site and curtilage of such building or part of a building comprised in the letting.

" 'dwelling house' includes any house or part of a house or room let as a separate dwelling (whether or not such house, part of a house or room is occupied by one or more tenants and whether or not the terms of the letting include the use of other accommodation in common with the landlord or other persons or the landlord and other persons) where such letting does not include any land other than the site of the dwelling house and garden or other premises within the curtilage of the dwelling house."

The character of premises, as to whether they are business premises or a dwelling house, is obviously determined by the nature of the letting and the purpose of the letting. Sub-section (2) deals with the matter of user, which is relevant, as for example in s. 19 (1) (i) of the Ordinance, which gives one of the grounds on which an order for possession can be based as

"the tenant of a dwelling house uses the premises mainly for business, trade or professional purposes without the consent of the landlord."

Where the purpose of the letting is not known and it is necessary to determine the character of the premises as to whether they are business premises or a dwelling house, it is certainly relevant to take into consideration the user of the premises. Likewise, where premises are let both as a dwelling house and for business purposes or the position, as it is sometimes termed, is neutral, and it is necessary to classify the premises as either a dwelling house or business premises, the use to which the premises are put is a relevant factor, but by no means the only or the main factor. Cases of this nature are by no means isolated, nor are such premises by any means few in number. There is a very large number of such premises, which are popularly termed "mixed" premises. Some such premises are sometimes referred to as "dwelling-house-cum-shop" or "shop with living accommodation". It may perhaps be submitted that from the very nomenclature of these last two descriptions may be derived their main and ancillary characters. Thus, in the case of the former, the dwelling house would be the main characteristic and in the latter, the shop.

I would certainly agree with Mr. Lockhart-Smith that uniformity is most desirable in the determination of such cases where it is necessary to decide into which category premises fall, which, I gather, is not the position at present. It may well be argued, and I must confess that personally I subscribe to such view, that from a realistic standpoint these mixed premises really represent a class of their own, and it would be equitable to make special provision for such class, possibly by an Order-in-Council. They are, strictly speaking, neither wholly a dwelling house nor are they wholly business premises, and it should not really be necessary to classify them into one or the other of these two rigid

categories. The present position where they must be so rigidly classified cannot be regarded, I think, as satisfactory, as it is extremely difficult if not almost impossible, to decide into which category certain premises fall. Boards and courts after hearing a great deal of evidence, much legal argument and after earnest consideration do, as they have to, make such determination, but without any disrespect to their decisions it could be said that an equally just and equitable result could be arrived at just as well by a toss of a coin. To take this instant case as an example, the appellant and his family have lived in these premises for nineteen years and three of his four children have been born on these premises. Can it then be said that the premises are not his home and so constitute a dwelling house? On the other hand, the appellant has been trading from the shop also contained in these premises for nineteen years, and such business is his only means of livelihood, and he appears to have prospered in this business, to which factor, incidentally, great and to my mind undue emphasis has been given by the learned chairman. It can thus be equally well maintained that these premises are therefore business premises.

The learned chairman applied the test of “dominant user” and in his judgment stated:

“The applicant said that if he were obliged to abandon either the shop or the living quarters he would elect to retain the residential portion only. I do not accept this evidence. He was hesitant and unconvincing in this part of his evidence.”

However, as the law at present stands, a board or court has no option but to place such premises into one or other of these two categories. In deciding such question I fail to see why the English principle, as stated by Denning, L.J., in *Feyereisel v. Turnidge* (3), [1952] 2 Q.B. 29, at p. 37:

“The guiding light from the darkness of the Rent Acts is to remember that they confer personal security on a tenant in respect of his home.”

should not apply. The English cases are by no means uniform and consistent. I make no pretence of having exhaustively examined them all, but from my view of the English authorities I agree, with respect, with Mr. Megarry and Mr. Blundell, that in England the test is not that of dominant user. Mr. Megarry, in his treatise *The Rent Acts*, 7th Edn. at p. 81, states:

“Under the doctrine of *Vickery v. Martin* this principle applies even if the letting is mainly for business and only to a minor degree for residence, as in the case of a hotel, or taking in boarders or paying guests, or use as a lodging house or as a nursing home. However, it seems that this is subject to the de minimis principles, e.g. in the case of a large warehouse with a small room for a caretaker, whose occupation may in any event lack the necessary residential quality. The test is thus not one of ‘dominant user’, though the court must consider whether the business user is such as to prevent the premises falling within the definition of a dwelling house.”

Mr. Blundell, in his treatise *Rent Restrictions Guide*, 4th Edn. at p. 44, states:

“In applying the statutory provision (that the application of the Acts to any house or part of a house is not to be excluded by reason only that part of the premises is used as a shop or office or for business, trade or professional purposes) there is no test of dominant purpose or user and the Acts will apply even where the business user of the part is substantial. Where the lease comprises one structure and the lease specified no one purpose, it is a question of fact whether the building is in a broad sense a dwelling-house which is partly or even substantially used for business purposes, or business premises partly used residentially; if the former, then the building is controlled;

if the latter, then the building is not controlled even by the provisions relating to houses let with land or premises.”

In the *Epsom* case (2) already referred to, Bankes, L.J., said:

“The Act contains no definition of a dwelling-house. The only conditions are that the premises must be a house or part of a house and let as a separate dwelling. If they fulfil these conditions and others relating to value, then they are to be deemed to be a dwelling-house to which the Act applies.”

It is not without interest to quote the comments of McCardie, J., who had his own personal views, in *Waller and Son Ltd. v. Thomas* (4), [1921] 1 K.B. 541, at p. 554, on this doctrine of Bankes, L.J.:

“That is a definite decision of the Court of Appeal, but I confess to feeling that juristic criticism may be properly applied to it: I feel with the deepest respect that the true test is to ascertain the dominant purpose and principal user of the premises. One might well have thought that the dominant purpose and object of a public-house was to carry on the business of a licensed victualler and that the provision of accommodation for the occupants was a mere adjunct of the business. One might have said that premises do not cease to be “business premises” because dwelling accommodation necessary for the purpose of the business is attached. However, the Court of Appeal have taken a different view and we must loyally follow it. In my opinion Mr. Wootten is right in saying that the Act of 1920 recognises the *Epsom* decision and treats it as an integral part of the scheme of the Act.”

In the more recent case of *Whiteley v. Wilson* (5), [1953] 1 Q.B. 77, a decision based on the 1939 Act, Romer, L.J., at p. 84, said:

“I agree, and I certainly find myself in agreement with the judge that no question of dominant purpose really arises in the present case. I think that the question in such cases as this, where the subject-matter of the tenancy is one building used partly as a dwelling-house and partly as a shop, and no purpose is specified in the tenancy agreement, is whether the building should in a broad sense be regarded on the one hand as a dwelling-house which is partly or even substantially used as a shop, or on the other hand as a shop which is used in part for residential purposes. If the former, then the building is within the Rent Restriction Acts, by reason of the first part of s. 3(3) of the Act of 1939, and will not be taken out of it because of the general provision at the end of the sub-section. If on the other hand the common sense of the matter is that the building is a shop, then it is outside the first part of the sub-section and will not be brought within the Act by virtue of the second part.”

It is also not unrewarding to quote from the judgment of Denning, L.J., in *Wolfe v. Hogan* (6), [1949] 2 K.B. 194, at p.204:

“In determining whether a house or part of a house is ‘let as a dwelling’ within the meaning of the Rent Restriction Acts, it is necessary to look at the purpose of the letting. If the lease contains an express provision as to the purpose of the letting, it is not necessary to look further. But if there is no express provision, it is open to the court to look at the circumstances of the letting. If the house is constructed for use as a dwelling-house, it is reasonable to infer the purpose was to let it as a dwelling. But if, on the other hand, it is constructed for the purpose of being used as a lock-up shop, the reasonable inference is that it was let for business purposes. If the position were neutral, then it would be proper to look at the actual user.

It is not a question of implied terms. It is a question of the purpose for which the premises were let.”

In *Harnam Singh v. Jamal Pirbhai* (7), [1951] A.C. 688, a Kenya case, which went to the Privy Council, the case cited by the learned chairman as authority for the proposition that the test is the dominant user, Lord Radcliffe, delivering the judgment of the Judicial Committee, said at p. 703:

“It becomes necessary to decide, therefore, whether the premises are a dwelling-house or business premises. It seems reasonably clear that they are a dwelling-house. Since the statutory scheme requires a choice between the two categories of property it is unavoidable that some test such as that of dominant feature or user should be applied. The lease itself is of no assistance, because it sanctioned user for either purpose or both. But, structurally, the premises are residential; and such business user of them as has taken place was ancillary to the main user as living accommodation.”

That case is not unequivocal, but it would appear that the main test applied was the structure of the premises.

Whatever the true test is, or whatever test is applied, I think the onus is on the party asserting that the premises are business premises to establish that they are such. The Ordinance applies to both business premises and dwelling-houses. By the Rent Restriction (Exemption) Order, 1955, business premises were exempted from the provisions of the Ordinance. The Order reads:

- “1. This Order may be cited as the Rent Restriction (Exemption) Order, 1955.
2. (1) The following premises are hereby exempted from all the provisions of the Rent Restriction Ordinance:
 - (a) all business premises in the Territory the erection or substantial reconstruction of which was or is completed on or after the first day of January, 1955; and
 - (b) all business premises in the Territory.
- (2) Sub-paras. (1) (a) and (1) (b) of para. 2 shall come into operation on the first day of March, 1955, and the first day of January, 1957, respectively.”

It is therefore, I think, on the party asserting that premises by virtue of being business premises are exempted from the Ordinance by virtue of the Order, to prove that they are in fact business premises. The corollary to that is self-evident.

To revert to this instant case, Mr. Sayani for the respondent landlords, in arguing this appeal submitted that there were several factors to be taken into consideration in deciding whether premises are a dwelling house or business premises, and he gave four such factors, which I quote in the order given by him:

1. Construction of the premises.
2. Situation of the premises.
3. Purpose for which they are let.
4. The dominant user.

With regard to the first, the learned chairman in his judgment stated:

“There are two rooms behind the shop and a yard at the back. There are washing and cooking facilities of a cramped condition which are not unfamiliar to those often found in Asian dwelling-houses. His family reside in the quarters behind the shop and I am satisfied upon my inspection of the premises that the area covered by the residential area exceeds, though not greatly, that of the business portion.”

I have also viewed the premises and from my view, while I would not be prepared to say that the veranda which is used as the shop was not originally constructed or intended to be used as a shop, I am convicted that the premises were primarily constructed as a dwelling-house, and if the veranda was intended to be used as a shop such user was ancillary to the main user of the premises.

With regard to the second factor, the neighbourhood to my mind is residential and not commercial. As for the third factor, which incidentally I would put first, if that were known, that would effectively dispose of the whole case. I do not feel called upon to decide the fourth factor, the dominant user, nor in fact whether the premises are a dwelling-house or business premises, in view of my finding on the first ground of appeal.

I have found that the learned chairman sitting alone had no jurisdiction to hear and determine this application. The appeal is accordingly allowed; the proceedings are declared a nullity and the Order is set aside. The application is to be heard and determined by a properly constituted board in accordance with the Ordinance. The appellant is to have his costs both in the proceedings before the board and in this court.

Appeal allowed. Application remitted to Rent Restriction Board for determination by a properly constituted Board.

For the appellant:

WJ Lockhart-Smith

WJ Lockhart-Smith, Dar-es-Salaam

For the respondents:

NR Sayani

Sayani & Co, Dar-es-Salaam

R v Nurali A Ghulamhussein
[1959] 1 EA 743 (HCT)

Division:	HM High Court For Tanganyika at Dar-Es-Salaam
Date of judgment:	11 March 1958
Case Number:	30/1958
Before:	Williams Ag J
Sourced by:	LawAfrica

[1] Criminal law – Sentence – Other admitted offences not charged – Request by accused that court should take into account other offences not charged – No statutory provision enabling – Whether High Court entitled to follow English practice – Tanganyika Order-in-Council, 1920, art. 17 para. (2) (T.) – Criminal Procedure Code, s. 3 (3) and s. 290 (T.).

Editor's Summary

The accused pleaded guilty to fifteen counts of stealing by a servant. Before sentence he asked for 352 other like offences not charged to be taken into consideration. Counsel for the prosecution submitted that the court was entitled, following the practice adopted in England, to take these other offences into consideration.

Held – in view of art. 17 para. (2) of the Tanganyika Order-in-Council, 1920 and s. 3(3) of the Criminal Procedure Code the High Court is entitled when passing sentence to take into account at the request of the accused other offences not charged.

Cases referred to in judgment

(1) *R. v. Rashidi s/o Makapenda*, Tanganyika High Court Criminal Revision, No. 502 of 1954 (unreported).

(2) *Joseph Andanda and Joseph Kironde v. R.* (1949), 6 U.L.R. 198.

Judgment

Williams Ag J: Accused has pleaded guilty to fifteen counts of stealing by servant contrary to s. 265 and s. 270 of the Penal Code

and he has asked for 352 other offences contra the same sections with which he is not charged to be taken into consideration when he is sentenced.

In the Criminal Procedure Code there is no express provision enabling the High Court or subordinate courts to take other offences into consideration when passing sentence and it has not been the practice for this to be done. However it is submitted by the Crown that there is nothing to prevent the practice being adopted.

The practice has been followed by the English courts for many years having been adopted well before the present Tanganyika courts were established. It is described in Archbold's Criminal Pleading Evidence and Practice (33rd Edn.) at p. 220 as based on convention and having no statutory foundation.

The only relevant Tanganyika authority which has been referred to is *R. v. Rashidi s/o Makapenda*, (1) Tanganyika High Court Criminal Revision, No. 502 of 1954 (unreported) in which it was held that a subordinate court had no power to impose a separate sentence for an offence not included in the charge which is not a direct decision on the practice. However in *Joseph Andanda and Joseph Kironde v. R.* (2) (1949), 6 U.L.R. 1948 it was held that the Uganda Criminal Procedure Code did not permit the practice to be adopted and this is a persuasive authority in view of the equivalent statute law in operation there.

The relevant parts of the judgment in the Uganda case are as follows. Section 203 (2) of the Tanganyika Criminal Procedure Code corresponding with, and being in the same terms as the section of the Uganda Criminal Procedure Code referred to:

"I first turn to the only section in the Criminal Procedure Code which has any bearing on the problem, that is s. 207 (2). Under that section the magistrate may before passing sentence receive such evidence as he thinks fit to inform himself of the sentence proper to be passed . . . the answer seems to be, and I give it with diffidence, I admit, that the legislature in this Protectorate have bound the courts by a code intended to be comprehensive and specially adopted to the circumstances existing in the Protectorate. No hint is given in that code that a man may receive punishment in respect of an offence of which he has not been convicted in due course of law, far from it . . . the courts in England are more free to settle their practice than we are. I do not think the courts here may decide to do that which is not permitted by the Criminal Procedure Code on their own view of what is desirable and convenient . . . doubtless an amendment of the code will be made, but until such amendment is made my opinion is that the practice of taking outstanding offences into consideration should not be followed."

With regard to this decision it is first noted that a sentence which the court states takes other offences into consideration is still in law only passed for the offence with which the court is actually dealing (see Archbold's Criminal Pleading Evidence and Practice (33rd Edn.) same reference).

Secondly the decision was in fact a decision on the powers of subordinate courts only. With regard to the High Court it is appropriate to refer to art. 17 para. (2) of the Tanganyika Order-in-Council, 1920, by which this High Court was established and which is in the same terms as the corresponding art. 15 para. (2) of the Uganda Order-in-Council the relevant part of the paragraph is as follows:

"Subject to the other provisions of this Order such civil and criminal jurisdiction shall, so far as circumstances admit, be exercised in conformity with the Civil Procedure, Criminal Procedure and Penal Codes of India and other Indian Acts and other laws which are in force in the territory

at the date of the commencement of this Order or may hereafter be applied or enacted, and subject thereto and so far as the same shall not extend or apply shall be exercised in conformity with the substance of common law, the doctrines of equity and statutes of general application in force in England at the date of this Order and with the power vested in and according to the procedure and practice observed by and before Courts of Justice and Justices of Peace in England according to their respective jurisdiction at that date.”

Section 3 (3) of both the Criminal Procedure Codes further provides:

“Notwithstanding anything in this code contained, the High Court may, subject to the provisions of any law for the time being in force, in exercising its criminal jurisdiction in respect of any matter or thing to which the procedure prescribed by this code is inapplicable, exercise such jurisdiction according to the course of procedure and practice observed by and before Her Majesty’s Court of Justice in England at the date of the coming into operation of this code.”

In my view the words “inapplicable” in these sections can only be interpreted by direct reference to the paragraphs of the Orders-in-Council and consistently with all the wording used there.

Up to the time of the Uganda decision s. 290 in both codes provided with regard to the High Court that:

“the court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the sentence proper to be passed.”

The section in the Uganda code was subsequently amended to provide *inter alia* for the adopting of the practice in question but I consider that the practice is a matter to which the sections unamended, as the section in the Tanganyika code still is, can be said not to extend as it is left open what evidence is receivable, and that this High Court can therefore have recourse to the practice under the Tanganyika Order-in-Council. The desirability of an amendment nevertheless being introduced setting out how the practice should be applied here is another matter (the equivalent section of the Kenya Criminal Procedure Code is unamended and it is not known whether the practice is followed there).

It would appear to have been the view of the learned judge in the Uganda case that his conclusion applied to the High Court as well as to subordinate courts, although, as already stated, a finding as to this was not necessary to the decision, and I must therefore with respect differ from him to that extent. Subordinate courts on the other hand are not established by Order-in-Council but constituted by the local legislature under powers given in the relevant Order which does not apply to them otherwise. I therefore agree with the actual decision in the case, that is that if a Criminal Procedure Code is found in its application by subordinate courts not to be fully comprehensive, there is no direct recourse to English law or practice by them and the only remedy is by way of amending legislation.

In the present case I therefore take into consideration when sentencing accused the other offences which he has requested should be dealt with in this way.

For the Crown:

JG Samuels (Crown Counsel, Tanganyika)

The Attorney-General, Tanganyika

For the accused:

NR Sayani

Sayani & Co, Dar-es-Salaam

Chhatrisha & Company Ltd v Puranchand & Sons
[1959] 1 EA 746 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 16 July 1959
Case Number: 97/1958
Before: Forbes V-P, Gould and Windham JJA
Sourced by: LawAfrica
Appeal from: H.M. Supreme Court of Kenya–Farrell, J

[1] Bailment – Storage of goods – Exemption clause – Goods stored in bailees’ premises – Bailor’s representative given unrestricted access to goods stored – Loss of goods not explained by bailees – Indian Contract Act, 1872, s. 151 and s. 152.

Editor’s Summary

The appellant company had arranged to store in the respondents’ godown a quantity of metal sheets. The appellant company’s representative signed a letter containing the conditions upon which the sheets were to be stored one of which exempted the respondents from liability for loss of the sheets. The respondents were not warehousemen in the ordinary course of business. The appellant company’s representative had unrestricted access to the godown and was able to take away such consignments as he wished without signing a receipt in favour of the respondents. Subsequently it was found that there was a shortage of sheets on the basis of quantities delivered and despatched only part of which was accounted for by removals of sheets by the respondents with the knowledge and consent of the appellant company’s representative. The appellant company sued for the value of the lost sheets alleging that the respondents were bailees and that they had not accounted for the shortage. The trial judge held that there was no contract of bailment between the parties and that the appellant company merely had a licence to store the sheets in respondents’ godown at their own risk. On appeal.

Held –

- (i) the letter drawn by the respondents and signed by the appellant company’s representative containing the terms upon which the sheets were to be stored imported a bailment.
- (ii) the respondents as bailees had failed to produce goods bailed to them and since they had not explained what had happened to the sheets they had failed to bring themselves within the protection of the exemption clause.
- (iii) the standard of care required of bailees under s. 151 and s. 152 of the Indian Contract Act may vary slightly from that required in some classes of bailment under English law but there was nothing in that fact to indicate that English decisions upon the construction and effect of exemption clauses in contracts of bailment should not be given weight by this court.

Appeal allowed.

Cases referred to in judgment

- (1) *Ashby v. Tolhurst*, [1937] 2 All E.R. 837.
- (2) *Tinsley v. Dudley*, [1951] 1 All E.R. 252.
- (3) *Andrews v. Home Flats Ltd.*, [1945] 2 All E.R. 698.
- (4) *Edwards v. West Herts Group Hospital*, [1957] 1 All E.R. 541.
- (5) *Halbauer v. Brighton Corporation*, [1954] 2 All E.R. 707.
- (6) *North Central Wagon and Finance Co. Ltd. v. Graham*, [1950] 1 All E.R. 780.
- (7) *Alexander v. Railway Executive*, [1951] 2 All E.R. 442.
- (8) *Woolmer v. Delmer Price Ltd.*, [1955] 1 All E.R. 377.
- (9) *J. Spurling Ltd. v. Bradshaw*, [1956] 2 All E.R. 121.
- (10) *Anamalai Timber Trust Ltd. v. Trippunithura Devaswom* (1954), A.I.R. T.C. 305.

July 16. The following judgments were read:

Judgment

Gould JA: This is an appeal from a judgment and decree of the Supreme Court of Kenya at Nairobi dismissing a claim by the appellant company against the respondents for the value of a number of galvanised corrugated iron sheets of which the appellant company alleged the respondents were bailees and for which the respondents had not accounted. The learned judge in the court below having, in his judgment, considered the facts at length, came to the conclusion that there was no contract of bailment between the parties but merely a licence given to the appellant company to store the sheets in the respondents' godown at their own risk.

The opening portion of the judgment under appeal gives the background to the relationship between the parties:

"In October, 1956, the plaintiff company, whose principal place of business is in Mombasa, purchased from Gailey and Roberts Ltd. in Nairobi, about 100 tons of galvanised corrugated iron sheets (hereinafter referred to as 'g.c.i. sheets'). The sheets went in lengths of 6 ft., 7 ft. and 8 ft., and done up in bundles, 24 sheets to a bundle of 6 ft. length, 21 to a bundle of 7 ft. length and 19 to a bundle of 8 ft. length. Pending resale of the sheets the plaintiff company desired to find some place of storage in Nairobi, and through their agent, Jiwandass Tanna (to whom I shall refer simply as 'Tanna') they made arrangements with the defendants for the storage of the sheets in their godown. The sheets were delivered to the defendant's godown by Gailey and Roberts Ltd., the first consignment being delivered on October 31, 1956, and on the same date as a letter was drawn up by the defendants in the following terms:

'Chhatrishia & Co. Ltd.

P.O. Box
Nairobi.

Messrs. Puranchand & Sons,
P.O. Box 3391,
Nairobi.

31.10.56.

Dear Sirs,

We shall be grateful if you may kindly allow us to store in your godown in the open approx. 100 tons galvanised corrugated sheets which may be loose or in bundles.

We understand that the above sheets as may be stored are entirely on our risk and consequences. You are not responsible in any manner whatsoever for any loss by theft, pilferage, fire and/or any other manner whatsoever.

We shall take away these corrugated sheets before the end of November, 1956, after which date we shall pay you a monthly rent of Shs. 200/-if goods are not cleared entirely.

Thanking you,

Yours faithfully,'

"This letter was put before Tanna and signed by him on behalf of the plaintiff company on November 2, 1956. It was agreed by both parties that this letter embodied the terms of the contract between them.

"Deliveries by Gailey and Roberts Ltd. into the defendants' godown were made over a period from October 31, 1956, to November 12, 1956."

With one exception (with which I will deal later) there was no challenge to any of the facts found by the learned judge and it will be convenient to summarise them as follows:

- (a) The delivery notes from Gailey and Roberts Ltd. were signed sometimes by Devdatt, an employee of the respondents, who was generally in charge of the godown, and sometimes by Bhatt as representative of Tanna. When Devdatt signed he did so "for Chhatrishia & Co." Tanna was present at the godown from time to time but not on every occasion when deliveries were made.
- (b) Sales were made by the appellant company, and Tanna on telephone directions from Mombasa generally supervised the loading at the respondent's godown, being granted access for that purpose. Devdatt occasionally supervised this work but the responsibility for the despatch of the goods was wholly Tanna's.
- (c) No record was made by the respondents in their stock book or in any separate record of the coming and going of the sheets.
- (d) Tanna sometimes was given a spare set of the godown keys and remained in the godown on many occasions when Devdatt was not present.
- (e) Tanna had unrestricted access to the godown for the purpose of dealing with the sheets and did deal with them without let or hindrance from the respondents.
- (f) In January, 1957, it was found that there was a shortage in the appellant company's stock of sheets on the basis of quantities delivered and quantities despatched on the instructions of the appellant company.
- (g) Part of the shortage was accounted for by the fact that the respondents had themselves removed quantities of the appellant company's sheets from time to time. They did so with Tanna's knowledge and consent and issued a number of credit notes in favour of the appellant company. Even so a substantial shortage remained.
- (h) The deliveries to the godown and the quantities despatched were established and the shortage proved. No explanation of it was forthcoming from either side.
- (i) The respondents did not act as warehousemen in the ordinary course of their business and used the godown primarily for the purposes of their own business.

Before proceeding further I will deal with a submission by counsel for the respondents (which is the exception referred to above) that the court should review the finding of the existence of the shortage. In his submission the possibility of error had not been removed. The evidence relied upon to prove the quantities despatched was that provided by the duplicate invoices prepared by the appellant company at Mombasa. These were prepared from the duplicate consignment notes sent by Tanna, which were not produced, though the invoice book was. It was possible that an invoice had been wrongly entered in another book and overlooked; it was also possible that a duplicate consignment note had been lost or, though sent, had not been received at Mombasa. Tanna himself had kept no records. With regard to this it is only necessary to say that the same submission was made in the court below and was not accepted by the learned judge, who had all the evidence before him, though he regarded the chain of evidence on this aspect of the matter as not as complete as that relating to the arrival of the goods in the godown. It has not been found, or I think suggested, that Chhatrishia, managing director of the appellant company at Mombasa, who gave the evidence concerning the invoices, was guilty of any

fraudulent conduct. The consignments were not very numerous and it appears unlikely, particularly as the orders for the goods were apparently received in Mombasa, that error of the nature suggested might have crept in. The learned judge had to arrive at his finding as a matter of the balance of probabilities as he fully appreciated; I see no reason to interfere with his estimate of them.

Upon these facts, and in circumstances of obscurity which owed much to the deplorable lack of business method displayed by both sides, the learned judge was faced with the difficult task of ascertaining the legal rights and obligations of the parties. He found first that the letter of October 31, 1956, "refers to" an agreement for storage at a monthly rental and that *prima facie* such an arrangement constitutes a bailment for reward. This must however be read in the light of the following passages of the judgment in which the learned judge concluded that he was entitled to look at the surrounding circumstances and conduct of the parties to remove ambiguity in the document. The first ambiguity arose from the use of the words "allow us to store" and that this phrase creates an ambiguity I would agree. It might mean "allow us to place in your custody as our storekeepers" or "allow us to use your premises as a place to store our goods". A second matter mentioned in the judgment was the presence of what I might call an exemption clause—in the second paragraph of the letter. I do not consider that this clause of itself is ambiguous (in the sense relied upon) but that does not of course prevent its use as part of the document in question as a guide to the construction of the document as a whole, if any such guidance is derivable from its terms. It was in fact plain that the learned judge did consider it in this light.

The factors in the surrounding circumstances and conduct of the parties to which the learned judge had regard (and as in my view the document is ambiguous in one respect I think he was justified in doing so) are included in the facts enumerated above. He considered the fact that the respondents did not ordinarily act as warehousemen as one which rendered it less likely that they would undertake custody of and responsibility for the sheets. I think that the weight to be attached to this, though little in itself, is somewhat augmented by the added fact that no charge was to be made for the first month of the arrangement. Next the learned judge took into consideration the fact that no record was kept of arrival and despatch of the sheets as tending to show that the respondents did not regard themselves as bailees of them. Such lack of method might also of course arise from reliance placed on the second paragraph of the letter of October 31, 1956. The judgment goes on to refer to Tanna's having the use at times of spare keys to the godown and dealing with the sheets without let or hindrance from the respondents. This he considered to be (as it is) in marked contrast with the normal practice of warehouses and tended to show absence of custody or possession in the respondents.

As to the law upon this subject, in argument before this court, counsel for both parties referred to the case of *Ashby v. Tolhurst* (1), [1937] 2 All E.R. 837, in which it was held that the plaintiff, who left his car in the defendants' car park on payment of a fee of Shs. 1/-, did so as a licensee and not as a bailor, and therefore the defendants were not liable when the car was taken by some unauthorised person. The car park was an open piece of land in charge of an attendant who, upon receipt of Shs. 1/-, handed the plaintiff a ticket containing the following words:

"The proprietors do not take any responsibility for the safe custody of any cars or articles there, nor for any damage to the cars or articles however caused, nor for any injuries to any persons, all cars being left in all respects entirely at their owners' risk. Owners are requested to show ticket when required."

A passage from the judgment of Romer, L.J., at p. 844 and p. 845 will serve to illustrate the basis upon which the judgments as a whole proceeded:

“This much, at any rate, emerges from those two passage quite clearly: in order that there shall be a bailment there must be a delivery by the bailor, that is to say, he must part with his possession of the chattel in question. In the present case there is no evidence whatever of any delivery in fact of the motor-car to the attendant on behalf of the defendants. All I can see is that the plaintiff left his car on the car park, paying the sum of Shs. 1/- for the privilege of doing so. It is true that, if the car had been left there for any particular purpose that required that the defendant should have possession of the car, a delivery would rightly be inferred, and, if the car had been left at the car park for the purposes of being sold or by way of pledge or for the purposes of being driven away to some other place or indeed for the purposes of safe custody, delivery of the car, although not actually made, would readily be inferred. It is perfectly plain in this case that the car was not delivered to the defendants for safe custody. You cannot infer a contract by A. to perform a certain act out of circumstances in which A. has made it perfectly plain that he declines to be under any contractual liability to perform that act. The defendants made it as clear as writing can make it in the ticket which was delivered to the plaintiff that they would not take any responsibility for the safe custody of any car. One cannot infer, therefore, in those circumstances that the car was left in the car park for the purpose of being in the custody of the defendants. It is perfectly plain that the car was not left there for any other purpose. That being so, it is impossible, it seems to me, to find that the car was delivered to the defendants or that there was any contract of bailment.”

Sir Wilfred Greene, M.R., in his judgment rejected an argument that the presence of what I might call “the exemption clause” on the ticket indicated that existence of a bailment as there would be no need to exclude the liabilities mentioned therein unless the relationship between the parties was one which, *prima facie*, would import them. On the same matter Scott, L.J., said at p. 846:

“In my view there was no contract between the parties except the mere permission to leave the car there for payment of Shs. 1/-, but I sympathise with the judge’s view that the ticket imported a contract of bailment, because the language in which the defendants protected themselves from liability is language which in itself was much more appropriate to the assumption that the relationship of bailor and bailee existed than to that of licensor and licensee . . . On analysis I agree with both my colleagues that that view is erroneous. I think, if you look at the whole of the provisions on the ticket, you realise in the result, after careful scrutiny, that they leave no obligation of a contractual kind at all upon the owner of the car park, and that the form of expression is merely due to a layman’s choice of language and the absence of what you may call a natural lawyer’s way of expressing that warning. In the result on the proper interpretation of these conditions I entirely agree that the dominating words are ‘All cars are left in all respects entirely at their owners’ risk.’ Those words, I think, are unambiguous and in themselves exclude the idea of any contract of bailment. The words at the beginning of the sentence, namely, ‘The proprietors do not take any responsibility for the safe custody of any cars,’ read in the light of those concluding words, I think ought not to be read as importing any indication of a contract of bailment.”

Two points emerge from these judgments. The first is that an actual or constructive transfer of immediate possession of the chattel must be shown in

order to constitute a bailment. The second is that words negating the liability of a person whom it is sought to show is a bailee, may, in a suitable context, be taken as tending to show that delivery did not take place. Needless to say, the second of these two propositions must be regarded with caution as exemption clauses in cases of undeniable bailment are only too frequent.

The court was referred also to *Tinsley v. Dudley* (2), [1951] 1 All E.R. 252, *Andrews v. Home Flats Ltd.* (3), [1945] 2 All E.R. 698 and *Edwards v. West Herts Group Hospital* (4), [1957] 1 All E.R. 541, but none of these cases carries the matter any further than does *Ashby v. Tolhurst* (1). It may, however, be of some assistance to examine the case of *Halbauer v. Brighton Corporation* (5), [1954] 2 All E.R. 707 which was not referred to in argument. In that case the plaintiff claimed damages for the loss of a caravan which had been parked on a camping ground provided by the defendant corporation. There were printed camp regulations which showed that the camp was open day and night from March to October (for parking on numbered sites); caravans could also be parked on a tarmac area at a reduced charge during the winter months but were not then available for residential purposes. Entry to the camp was open and unrestricted during the summer months but during the winter it was closed and locked. Regulation 8 was as follows:

“Liability. The corporation will accept no liability for injury to any person using the camping ground or for damage to or loss of the property of any such person.”

Regulation 15 and reg. 16 described what was granted, as a licence. The difficulty of such cases as these is exemplified by the different opinions of the learned lords justices who comprised the Court of Appeal, though all were agreed that the appeal should be dismissed. Singleton, L.J., said that the winter arrangement

“was that the corporation should store the caravan for the plaintiff; in other words there was a bailment.”

Without saying whether he considered the summer arrangement to be a licence he considered that reg. 8 protected the corporation during both periods. Denning L.J., held that there was a licence during the summer months and that reg. 8 was only declaratory of the legal position. During the winter months he agreed that the corporation were bailees, that reg. 8 applied only to the summer months and that it was not in any case sufficiently clear to exempt the corporation from their common law liabilities. Morris, L.J., considered that there was a licence during the summer months; he inclined to the view that there was no bailment during the winter months but thought that reg. 8 operated to exclude liability if there were a bailment. In considering the question whether there was a bailment he said at p. 713:

“Furthermore, the existence of reg. 8 may be a pointer leading to the view that there was no bailment.”

Fortunately, at least for the sake of unanimity, the loss of the vehicle occurred shortly after the commencement of the summer months.

While Morris, L.J., drew a little from the presence of reg. 8 in holding, with some hesitation, that the relationship between the parties during the winter was that of licensor and licensee both the other lords justices unhesitatingly held that there was a bailment at that time. In so doing each was influenced by the word “store” or its equivalent, and the contrast between the open park by day and night in the summer and the locked gate in the winter. Singleton, L.J., said at p. 710:

“Of course, there is a considerable difference between summer, when the caravan occupier is using the caravan, and thus in possession of it, and

when entry to the camping site is open and unrestricted, and winter, when the place is closed and the gate locked. I agree with McNair, J., that the winter arrangement was that the corporation should store the caravan for the plaintiff; in other words, there was a bailment.”

Denning, L.J., said at p. 711:

“During the summer months, the corporation gave to each camper a licence to use a caravan site for Shs. 25/- a week, which carried with it the right to use the facilities of the camp. The corporation did not let the site to him on a tenancy. They only licensed him to use it. They did not take possession of his caravan so as to become bailees of it. The camper remained in possession of it himself, and it was for him to take care for its safety . . .

“During the winter months the position was different. The camp was closed. The road gates were kept locked, and the caravans of customers were parked on the hard tarmac. The corporation described them as being ‘stored’ and made a ‘storage charge’ of 12s. 6d. a week. None of the camp facilities was available. During these months, I think the corporation were bailees of the caravans and responsible for their safe custody.”

Neither was deterred from adopting this point of view by the existence of reg. 8.

In the case now under consideration the main indication which appears to favour the learned judge’s view that the arrangement was a licence is the fact that Tanna was able to take away such consignments as he wished without signing a receipt for them in favour of the respondents and apparently without their being recorded in any way. This is indeed a departure from normal procedure and might indicate that the parties considered there was no duty of care upon the respondents; on the other hand the attitude of the respondents might have arisen from reliance upon the second paragraph of the letter of October 31, 1956, and, as the case of *Andrews v. Home Flats* (3) indicates, the giving of a receipt is not an indispensable factor of bailment. There is something but not a great deal, in my opinion, in the point that the respondents are not professional warehousemen and I do not myself draw anything from the second paragraph of the letter above mentioned, which is at least equally consistent with bailment as with licence. These reasons are valid in some measure, but it is a far cry from the parking of a vehicle upon open ground to the storing of corrugated iron sheets in a godown. I think the more basic inferences to be drawn from the nature of the transactions are very different. The man in the street would readily agree that he parked his car in a car park for his own convenience and at his own risk. He would be more likely to say that he put his goods in a locked warehouse for his own convenience but for their safe custody. Tanna certainly had free access to the goods in the sense that he was given the key of the godown whenever he wanted access. The goods, however, were in a locked godown to which members of the public had no access, and, during the periods when Tanna was not actually dealing with the goods, they were, in fact in the exclusive physical possession of the respondents. Tanna himself had to obtain the key from the respondents each time he wished to get access to the goods. Tanna’s visits were occasional and there must have been long periods by day and by night when the goods were within the respondents’ locked godown and dependent for their safety upon the absence of negligence of the respondents’ servants in seeing that all was secure. The fact that when the corrugated iron sheets were delivered, the delivery notes were signed on behalf of the appellant company is explainable by the fact that that is the signature that Gailey and Roberts Ltd. would require.

As I see the matter there are inferences from the surrounding circumstances which point towards licence and others which point towards bailment. I think

the latter preponderate but even if they merely cancel each other out it would be the court's duty to construe the letter of October 31, 1956, as it stands; on that basis, and having regard to the emphasis placed upon the word "store" in *Halbauer v. Brighton Corporation* (5), I consider that the *prima facie* impression of the learned judge in the court below was correct and that the document imported a bailment.

It follows that the corrugated iron sheets were delivered into the custody of the respondents and, on the facts, they have failed to account for a number of them. Apart from any protection afforded by para. 2 of the letter above-mentioned they are liable to the appellant company for their value. The learned judge considered the question upon the hypothesis that the relationship between the parties might be held to be that of bailor and bailee and found that, in the circumstances, the respondents could not avail themselves of any protection which the letter might be thought to afford. He found that the respondents were guilty of a fundamental breach of contract in having taken a quantity of the sheets and disposed of them to their own customers. On evidence of a conflicting nature he found that the goods were taken with the knowledge and approval of Tanna but that Tanna had no authority, express or apparent, to sell any goods. The learned judge relied upon *North Central Wagon and Finance Co. Ltd. v. Graham* (6), [1950] 1 All E.R. 780 at 781 and *Alexander v. Railway Executive* (7), [1951] 2 All E.R. 442, and his view of the law was not attacked before us by counsel for the respondents except to the extent of a suggestion that these English authorities might not be appropriate having regard to s. 152 of the Indian Contract Act. Section 151 and s. 152 of that Act, however, merely indicate the standard of care required of bailees, which is the care which

"a man of ordinary prudence would, under similar circumstances take of his own goods of the same bulk, quality and value as the goods bailed."

Though this standard may vary slightly from that required in some classes of bailment under English law I see nothing in that fact to indicate that English decisions upon the construction and effect of exemption clauses in contracts of bailment should not be given weight by this court.

Counsel's main argument was that, contrary to the learned judge's finding, Tanna had been held out by the appellant company, as having the requisite authority. In the first place he had been left completely in control of the sheets. Secondly counsel relied upon a letter written on January 5, 1957, by Chhatrishia, the managing director of the appellant company, to the respondents, the relevant paragraphs of which are as follows:

"When the undersigned was in Nairobi last November, he was informed by Mr. Jivandass that you have taken up some 15 to 20 bundles of G.C.I. sheets which you are storing on our behalf. Please give us details of the quantities taken up by you so that we may debit the amount to you.

"We would ask you to ensure that whenever you require G.C.I. sheets you contact us before taking delivery from our lots without due approval from us. Your failure to contact us keeps us completely out of the picture in regard to our stocks and sizes of the sheets which remain with you. You will appreciate that we do not want to be left over with odd sizes, which are difficult to sell, and we would again ask you to obtain our approval before you sell any quantities from our holdings."

As to the first argument I see nothing in the position of an employee who has authority to put goods into a godown and remove them, which would imply that he has also authority to sell them on behalf of his company. The letter of January 5, 1957, indicates knowledge on the part of Chhatrishia in

November that a small portion of the goods had been taken but his knowledge was not communicated to the respondents at that stage and therefore had no influence upon their actions. Apart from that the letter merely indicates a willingness to adopt the transactions as sales of the quantities taken and implicitly denies any authority in Tanna to sell. I agree with the learned judge in the court below, who examined the evidence on this matter in detail, when he said:

“If the defendants, having entered into a contract of storage had wished to avail themselves of the plaintiff company’s goods, it seems to me that in common prudence they should have applied to the plaintiff company and not relied on any presumed authority of Tanna to sell the goods.”

In my view these submissions on behalf of the respondents fail, but even if they did not, the case appears to me to fall within a principle relied upon in *Woolmer v. Delmer Price Ltd.* (8), [1955] 1 All E.R. 377 and referred to by Denning, L.J., in *J. Spurling, Ltd. v. Bradshaw* (9), [1956] 2 All E.R. 121 at 125. At p. 379 of the judgment in the former case it is stated:

“On the facts of this case, however, where a fur coat has been handed over for the purpose of storage or, accepting the defendants’ case, handed over for the purpose of sale, the defendants do not escape liability unless they establish either that the loss did occur in some way not involving their negligence, or alternatively, that the loss did occur by their negligence. If, however, they fail to adduce satisfactory evidence of how the loss occurred, as is the case, and if the loss may have occurred in a way which would not be covered by the ‘customer’s risk’ clause, then the clause does not protect them.”

In *J. Spurling Ltd. v. Bradshaw* (9) at p. 125, Denning, L.J., says:

“Another thing to remember about these exempting clauses is that in the ordinary way the burden is on the bailee to bring himself within the exception. A bailor, by pleading and presenting his case properly, can always put the burden of proof on the bailee. In the case of non-delivery, for instance, all he need plead is the contract and a failure to deliver on demand. That puts on the bailee the burden of proving either loss without his fault (which would be a complete answer at common law) or, if the loss was due to his fault, that it was a fault from which he is excluded by the exempting clause: see *Cunard S.S. Co. v. Buerger*, (1927) A.C. 1; and *Woolmer Delmer Price Ltd.*”

The same position obtains under the Indian Contract Act and the case of *Anamalai Timber Trust Ltd. v. Trippunithura Devaswom* (10) (1954), A.I.R. T.C. 305 is quoted among the authorities in the notes to s. 161 of the Act in Pollock & Mulla (8th Edn.). At p. 311 of the report is the passage from which the headnote is taken:

“The bailee must return the goods without demand, on the due date. Failure to return, renders him liable for the loss or damage to goods from the date of default. The law presumes negligence to be the cause and casts upon the bailee the burden to show that loss is due to causes consistent with due care on his part. That was the decision in—*Kush Kanta v. Chandra Kanta*’ A.I.R. 1924 Cal. 1056 (R.).”

In the present case the respondents as bailees have failed to produce goods bailed to them and no explanation as to what has happened to them has been forthcoming. There are undoubtedly possible explanations for their loss which would not be covered by the exemption clause contained in the letter of October 31, 1956, and the respondents have therefore failed to bring themselves within

its protection. I have had some doubt as to the propriety of relying on this aspect of the law as the circumstance that Tanna was allowed free access to the goods might be thought sufficient to vary the normal burden of proof. I think however that this is not the case for the respondents kept stock records of their own goods and could without difficulty have done so in respect of the goods bailed.

In my view, for these reasons the learned judge was correct in holding that, upon a basis of bailment, the respondents were liable for the value of the sheets which are unaccounted for; it is unnecessary to consider a further submission by counsel for the appellant company based on detinue.

I would allow the appeal, set aside the judgment and decree in the court below and substitute a decree that the defendants pay to the plaintiff company Shs. 16,314/20 as damages with interest thereon at court rates from the date of the institution of the suit and the plaintiff company's taxed costs of the action. The appellant company should have the costs of the appeal. The respondents are however entitled to a set off of Shs. 400/- which, the court was informed from the bar, was overlooked by both counsel and judge in the court below, and which counsel agreed should be allowed.

Forbes V-P: I agree and have nothing to add. An order will be made in the terms proposed by the learned justice of appeal.

Windham JA: I also agree.

Appeal allowed.

For the appellants:

EP Nowrojee

EP Nowrojee, Nairobi

For the respondents:

AE Hunter

Daly & Figgis, Nairobi

Souza Figueiredo & Co Ltd v George Panagopaulos and others [1959] 1 EA 756 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	11 August 1959
Case Number:	37/1959
Before:	Sir Kenneth O'Connor P, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda–Sheridan, J

[1] *Landlord and tenant – Agreement to lease – Assignment of leasehold interest by original landlord to*

new landlords – Intimation of change of landlords to lessee – Assignment not registered – Effect of non-registration – Registration of Titles Ordinance (Cap. 123) s. 51 (U.).

[2] Distress – Illegal distress – Non-payment of rent – Distress levied on goods subject to bill of sale – Distress levied by court broker on instructions from persons not entitled to distrain – Damages – Court broker's liability – Whether court broker a "public officer" acting in pursuance of a "public duty or authority" – Suits By or Against the Government Ordinance (Cap.7) s. 4 (U.) – Civil Procedure Ordinance (Cap. 6) s. 2 (g)(U.) – Distress for Rent (Bailiffs) Ordinance (Cap. 16) s. 3 (U.) – Public Authorities Protection Act, 1893, s. 1 – Law of Distress Amendment Act, 1888, s. 7.

Editor's Summary

In 1953, the third respondent agreed to purchase from K. Ltd. a leasehold plot in Kampala. The price was paid and the assignment was duly executed but not registered, as required by s. 51 of the Registration of Titles Ordinance, until December, 1957. In March 1955, the third respondent by an agreement in writing agreed to lease a restaurant which had meanwhile been erected on the plot. The agreement recorded that the third respondent had not yet been registered as proprietor of the plot. In November 1955, the third respondent informed the lessee by letter that the third respondent had assigned his interest in the plot to the first and second respondents. The lessee did not reply to this letter, paid no rent and took no step which might constitute recognition that the first and second respondents had thenceforth become landlords or had replaced the third respondent as contracting parties under the agreement to lease. In November 1956, the lessee executed a bill of sale whereby she assigned to the appellant company her furniture and other chattels situated in the restaurant by way of security for a debt due by her to that company. Three weeks later, on instructions from the third respondent given on behalf of the first and second respondents the fourth respondent, a court broker, levied distress for arrears of rent on goods and chattels of the lessee situated in the restaurant and subsequently had the seized goods sold by auction despite a protest by the appellant company's managing director who attended the sale. On December 20, 1957, the assignment to the third respondent, which had been executed in 1953, was registered and eight days later the names of the first and second respondents were substituted in the register for that of the third respondents, as holders of the said leasehold interest. The appellant company's action against all the respondents for damages for illegal distress was dismissed by the trial judge who found that there was a relationship of contractual tenancy between the first and second respondents and the lessee by virtue of the agreement to lease coupled with the letter. He also held that under the equitable doctrine of *Walsh v. Lonsdale* (1882), 21 Ch.D. 9 the agreement to lease gave the first and the second respondents a reversion carrying with it the right to distrain, and that this reversion existed although neither the third respondent's interest

in the property nor any interest conferred by him on the first and second respondents by way of assignment or otherwise had been registered when the distress was levied. On appeal

Held –

- (i) no privity of contract or of estate had been established between the first and second respondents on the one hand and the lessee on the other; that being so they were not the lessee's landlords.
- (ii) since the first and second respondents were not the lessee's landlords they were not entitled to distrain upon the premises occupied by the lessee and therefore the levying of distress was unlawful.
- (iii) although the third respondent might have had the right to distrain on the lessee's goods on his own behalf, it was never contended that he acted for himself; on the contrary it was admitted that he was acting for the first and second respondents and therefore the third respondent was also liable for damages for wrongful distress.
- (iv) although the fourth respondent was a court broker, and as such probably a "public officer", not every distress levied by him must from that fact be necessarily held to have been levied in pursuance of a public duty or authority; the distress which he had levied on the appellant company's goods was not under any judicial process and accordingly the fourth respondent was not protected by s. 4 of the Suits By or Against the Government Ordinance.
- (v) all the respondents were jointly and severally liable to the appellant company in the sum claimed.

Appeal allowed.

Cases referred to in judgment

- (1) *Tadman v. Henman*, [1893] 2 Q.B. 168.
- (2) *Walsh v. Lonsdale* (1882), 21 Ch. D. 9.
- (3) *Towerson v. Jackson*, [1891] 2 Q.B. 484.
- (4) *Brown v. Storey*, 133 E.R. 270.
- (5) *Davis v. James* (1884), 26 Ch. D. 778.
- (6) *Schalit v. Joseph Nadler Ltd.*, [1933] 2 K.B. 79.
- (7) *Manchester Brewery Co. v. Coombs* (1901), 2 Ch. 608.
- (8) *Hollins v. Fowler* (1875), L.R. 7 H.L. 757.
- (9) *Winter v. Bancks* (1901), 84 L.T. 504.
- (10) *Bennett v. Bayes*, 157 E.R. 1233.
- (11) *R. v. Whitaker*, [1914] 3 K.B. 1283.
- (12) *National Telephone Co. Ltd. v. Kingston-upon-Hull* (1903), 89 L.T. 291.
- (13) *Bradford Corporation v. Myers*, [1916] 1 A.C. 242.
- (14) *In re Caidan, Ex parte Official Receiver v. Regis Property Co.*, [1942] Ch. 90; [1941] 3 All E.R.

491.

(15) *Draper v. Thompson*, 172 E.R. 618.

August 11. The following judgments were read by direction of the court:

Judgment

Windham JA: The plaintiff company appeals against the dismissal, by the High Court of Uganda, of its action against the four defendant-respondents for damages for illegal distress. In order to epitomize the contest between the appellant and the respondents it will be convenient to set out briefly the following undisputed facts in their chronological order.

- (a) In 1953 the Kawempe Cotton Co. Ltd., who were the registered lessees of a certain plot of land in Kampala under a ninety-nine year lease from the Crown, agreed in writing to transfer their interest in it to the third respondent.

The purchase price was paid and the transfer executed, but the transfer (as will hereafter appear) was not registered in the transferee's name until December, 1957.

- (b) On March 31, 1955, by written agreement, exhibit A3, the third respondent agreed to lease to a Mrs. d'Ellis a restaurant known as the Moulin Rouge, which had meanwhile been erected on the plot, for ten years at a monthly rent of Sh. 3,000/-, payable in advance. Mrs. d'Ellis duly moved into possession of the restaurant, on being credited by the third respondent with Sh. 6,000/- which she had paid as earnest money against two months rent. She proceeded to run the restaurant.
- (c) On November 10, 1955, the third respondent sent to Mrs. d'Ellis a letter, exhibit A4, whose terms I will set out later, informing her that he was transferring his interest in the premises to the first and second respondents and that her lease would accordingly now be from them.
- (d) On November 28, 1956, Mrs. d'Ellis executed in favour of the appellant company, who are grocers and provision merchants, a bill of sale, whereby she assigned to the company her furniture and other chattels situated in the restaurant, by way of security for a debt of Sh. 26, 273/- which she had incurred to the company for goods sold and delivered, and in respect of which the company had obtained judgment against her.
- (e) On December 20, 1956, Mrs. d'Ellis having defaulted on all rent under the agreement lease, exhibit A3, save for the initial deposit of Sh. 6,000/-, the fourth respondent, a court broker, upon the instructions of the third respondent given on behalf of the first and second respondents, and also upon the written instructions of the advocate of the first and second respondents, exhibit A6, levied distress upon all her goods and chattels situated in the restaurant that were subject to the appellant's bill of sale.
- (f) On January 17, 1957, the fourth respondent, on behalf of the first and second respondents, caused the seized goods to be sold by auction. They realized Sh. 42,000/-. The appellant's managing director attended the sale and protested at its being held.
- (g) On December 20, 1957, the third respondent's leasehold interest in the suit premises, which (as we have seen) the Kawempe Cotton Co. Ltd. had transferred to him in 1953, was registered in his name as required by the Registration of Titles Ordinance (Cap. 123). It is conceded that the interest was one which required for its efficacy in law to be registered under that Ordinance.
- (h) On December 28, 1957, the names of the first and second respondents were substituted upon the register under that Ordinance for that of the third respondent, as the holders of the said leasehold interest. The first and second respondents were at all material times living in Greece.

The contest between the parties in the court below, as also before us on appeal, was whether the distress levied on behalf of the first and second respondents upon Mrs. d'Ellis' chattels in the restaurant was lawful. It was argued at one stage, both here and below, that even if those respondents had the right to distrain upon any chattels in the restaurant that might still be in Mrs. d'Ellis' ownership, their right would not extend to chattels of third persons, namely those which she had assigned to the appellant company by the bill of sale of November 28, 1956. But that contention could only prevail if Mrs. d'Ellis were the tenant of the first and second respondents by way of estoppel, in which case the decision in *Tadman v. Henman* (1), [1893] 2 Q.B. 168, would appear to be authority for it. Not only, however, does learned counsel for the respondents state that he does not, and never did, either plead or rely on any tenancy

by way of estoppel, but the learned trial judge based his decision on no such relationship and therefore rightly ruled *Tadman's* case (1) to be irrelevant. If, therefore, the distress was lawful at all, it was lawful in respect of the chattels assigned under the bill of sale.

What the learned judge did base his decision upon was his finding, the correctness of which we shall consider presently, that a relationship of contractual tenancy under an agreement to lease, founded on the documents exhibits A3 and A4, existed between Mrs. d'Ellis and the first and second respondents. From this he went on to hold that, applying as between them and her the equitable doctrine of *Walsh v. Lonsdale* (2)(1882), 21 Ch. D. 9, the agreement to lease gave the first and second respondents a reversion carrying with it the right to distrain, and that this reversion existed although neither the third respondent's interest in the property, nor any interest in it conferred by him on the first and second respondents by way of assignment or otherwise, had yet been registered when the distress was levied. The learned judge reached this decision after duly considering the provisions of s. 51 of the Registration of Titles Ordinance, the relevant portion of which reads as follows:

"51. No instrument until registered in manner herein provided shall be effectual to pass any estate or interest in any land under the operation of this Ordinance or to render such land liable to any mortgage; but upon such registration the estate or interest comprised in the instrument shall pass or (as the case may be) the land shall become liable in manner and subject to the covenants and conditions set forth and specified in the instrument or by this Ordinance declared to be implied in instruments of a like nature; . . ."

Much argument, both in this court and below, was devoted to the question whether the doctrine of *Walsh v. Lonsdale* (2), regarding the effect in equity of a written agreement to lease upon which the parties have acted, can have any application in the light of the specific requirement of s. 51 that no instrument until registered shall be effectual to pass any estate or interest in land which is under the operation of the Ordinance.

For the purpose of this appeal, however, it will only become necessary to pronounce on the general applicability of the doctrine of *Walsh v. Lonsdale* (2), if we are able to hold that, on the material before him, the learned trial judge was right in deciding that there was privity of contract between the first and second respondents on the one hand and Mrs. d'Ellis on the other. For without such privity that doctrine, even if applicable in Uganda at all, could not come into operation as between those parties so as to create any equitable lease carrying with it the reversion upon which the right to distrain for rent is dependent; nor, without privity of contract or estate, could any rent have accrued due from Mrs. d'Ellis to the first and second respondents so as to entitle them to exercise any such right of distress.

That the distress was levied on behalf of the first and second respondents, and that it was they who claimed to be Mrs. d'Ellis' landlords and as such to be entitled to distrain, emerged clearly on the pleadings. In para. 6 of the plaint, it was alleged that:

"the third defendant on behalf of the first and second defendants authorised and instructed the fourth defendant to levy a distress on the goods of the said Lena d'Ellis".

And para. 7 alleged that:

"the fourth defendant purporting to act pursuant to the authority stated in the preceding paragraph hereof . . . wrongfully seized . . . the said chattels and things specified in the said bill of sale."

Paragraph 6 of the plaint was admitted in the statements of defence of all the respondents, as was also the actual levying of the distress. Paragraph 7 of the statement of defence of the first three respondents averred that

“the said Lena d’Ellis was the tenant of the first and second defendants at all material times”,

and nowhere in that statement of defence was there mention of any contractual or tenancy relationship between Mrs. d’Ellis and the third defendant. In short, the plaint alleged illegal distress by the first and second respondents, acting through the other two, while the statements of defence admitted the distress by the first two respondents but claimed that it was lawful by reason of a tenancy relationship between them and Mrs. d’Ellis. Whether such relationship existed at the time of the distraint was not only in issue on the pleadings, but counsel for the appellants protested its non-existence in correspondence with the respondents’ advocate before the suit was filed, and argued the point both in the court below and before us.

The written agreement to lease between the third respondent and Mrs. d’Ellis, signed by both of them, dated March 31, 1955, and produced as exhibit A3, was in the following terms:

“Landlord: John N. Penessis of Kampala.

Tenant: Lena d’Ellis, P.O. Box 6377, Nairobi.

Period of lease: Ten years.

Rent agreed: Shs. 3,000/- per month payable three monthly in advance.

Rates and taxes: To be paid by tenant.

Costs of preparation of lease to be paid fifty per cent. by landlord and fifty per cent. by tenant.

“Tenant to pay Shs. 6,000/- as earnest money which will be credited to tenant against three months rent amounting to Shs. 9,000/- as soon as tenant gets possession of the restaurant.

“Tenant will have right to sub-let or assign the lease to any respectable tenant on getting approval and consent from the landlord.

“All the furniture and fixtures required for the restaurant to be provided by the tenant and she will be at liberty to sell the same and business to anyone on receipt of written consent and approval from the landlord.

“It is clearly understood that Mr. J. N. Penessis has not yet been registered as proprietor of the land of Plot No. 13 Portal Avenue upon which the restaurant is situate and as soon as he has been registered as proprietor the lease will be drawn by Mr. P. J. Wilkinson but meanwhile the tenant will be put in possession of the restaurant as soon as occupation permit has been issued.”

The written notice dated November 10, 1955, sent to Mrs. d’Ellis on behalf of Mr. P.J. Wilkinson who then was and still is the advocate of the first three respondents, and produced as exhibit A4, is relied on by the respondents as establishing, when read with exhibit A3, a tenancy or at least an agreement for a tenancy between the first and second respondents and Mrs. d’Ellis. It is in the following terms:

“Dear Madam,

Reference agreement to lease dated March 31, 1955, the part of the premises in Plot 13 Portal Avenue as restaurant, I am instructed to register the transfer of the said plot in favour of George Panagopoulos as to sixty per cent. and of Mrs. Nitcha Pantelakis as to forty per cent. You are therefore to take note that your lease will be with the said George

Panagopaulos and Mrs. Nitcha Pantelakis and the lease will be drawn accordingly. The agreement to lease dated March 31, 1955, be amended to read accordingly.

“I hope you will now find the matter in order.

Yours faithfully,
for P. J. WILKINSON.”

(Signature illegible)

This notice, exhibit A4, was the only intimation given to Mrs. d’ Ellis, before the date of the distraint (December 20, 1956), of any proposal that the first and second respondents should become her landlords in place of the third respondent. She did not reply to it, but continued to remain in occupation of the restaurant. After receiving it she paid no rent to the first or second respondents, nor indeed to the third respondent either, for as we have seen, she had defaulted on all rent save that originally credited to her by the third respondent on her first entering into possession of the restaurant. Nor did she do any other act such as might constitute a recognition that the first and second respondents had now become her landlords or had replaced the third respondent as the contracting parties under the agreement A3. And, on the first and second respondents’ side, there was no evidence to show that they had ever adopted the agreement A3 and agreed to step into the shoes of the third respondent under it. There was only the letter A4 itself, the writer of which was not called to testify to the truth of its contents in so far as they suggested that this was the case.

In these circumstances I consider that the learned trial judge erred in holding, as he did hold after apparently giving the point scant attention in his judgment, that privity of contract or of estate had been established between the first and second respondents on the one hand and Mrs. d’Ellis on the other. With regard to privity of contract, it is to be noted that in the agreement, exhibit A3, both parties derived benefits and undertook obligations, and there could be no assignment of the benefits and obligations under it by one party without the express or implied consent of the other. The Indian Contract Act, 1872, as adopted in Uganda (Cap.207), contains no provisions regarding the assignment of contracts, except for s. 62 which deals with novation; and there was no novation in the present case. The relevant English common law may therefore be resorted to. And under the English law it is clear that the mere fact of Mrs. d’Ellis remaining on as a tenant after receiving the notice A4 was insufficient to constitute such an implied consent, even assuming that the first and second respondent’s adoption of the agreement had been proved. In *Towerson v. Jackson* (3), [1891] 2 Q.B. 484, it was held, (overruling an earlier decision to the contrary in *Brown v. Storey* (4), 133 E.R. 270) that the mere fact of a tenant remaining in possession of the leased premises after receiving notice from his landlord, a mortgagor, that he should thereafter pay rent to a third person, the landlord’s mortgagee, was insufficient to show an agreement by the tenant to become tenant of the mortgagee. Bowen, L.J., at p. 486–7, said:

“That the mere continuing in possession of the tenant after receipt of such a notice is not conclusive of the creation of a new tenancy is too plain for argument. Is it true that the service of notice without anything more is a circumstance from which a jury should conclude that a new agreement has been completed between the mortgagee and the mortgagor’s tenant? In *Brown v. Storey*, there, were two propositions: one, that the relation of landlord and tenant can only be created by contract assented to by both parties; and the other, that when nothing was done by the tenant after receipt of the notice but to continue in possession, he must be taken to have

assented to remain in possession upon the old terms. The first is correct; the second seems to me to be wrong. Mere service of notice on the tenants would be no evidence of consent. Consent can only be gathered from the conduct of the person who receives the notice. It cannot be expected that the tenant on the receipt of the notice should go out of possession, and there is nothing in the mere fact of his continuing in possession which indicates that by so doing he intended to convey a complete acquiescence in the terms offered by the other side."

And Kay, L.J., at p. 487–8, said:

"I also agree. The plaintiff did no act whatever which was evidence of an agreement to become tenant to the mortgage, except that he continued in possession . . . It seems to me that the balance of authority is strongly in favour of the view that there must be more than a mere notice from the mortgagee without any assent shown by the tenant, and that such assent is not established by the mere fact of the tenant remaining in possession."

It is true that both *Towerson v. Jackson* (3) and *Brown v. Storey* (4), were cases in which the owner had mortgaged the property and subsequently let it to a tenant, and that the letting in each case was therefore void against the mortgagee and an attornment was necessary before a tenancy between him and the tenant could be created. But in the present case an attornment was equally necessary before a right of distress could be claimed by the first and second defendants. Their title was in fact never shown or proved. So far as can be gathered from the pleadings they would have to rely for their title at the time of the distress upon some agreement with the third defendant that he would transfer the property to them, or possibly upon a basis that the third defendant had at all times been a trustee for them. But no such agreement or trust was pleaded or proved. Such pleading and proof was necessary for their defence to succeed. In *Davis v. James* (5) (1884), 26 Ch. D. 778, the plaintiff's statement of claim was struck out, in an action upon covenants, because he had failed to show in his pleading how and by what steps the reversion had become vested in him. In any event (and even assuming for the purpose of the argument that the doctrine of *Walsh v. Lonsdale* (2), is applicable) the first and second respondents, as beneficiaries of a trust, would have no right to distrain: *Schalit v. Joseph Nadler, Ltd.* (6), [1933] 2 K.B. 79; 12 Halsbury's Laws Of England (3rd Edn.) p. 97. Nor would it have availed them had they proved an agreement to purchase the property from the third respondent. It is stated in 12 Halsbury's Laws of England (3rd Edn.) p. 119 on the authority of *Manchester Brewery Co. v. Coombs* (7) (1901), 2 Ch. 608 that:

"In as much, however, as the right of distress is a legal right and depends on the possession of a legal reversion, it is not taken away by a mere agreement by a person to sell or assign his reversionary interest in the premises; . . ."

I would therefore hold that no privity of contract or of estate was established between the first and second respondents on the one hand and Mrs. d'Ellis on the other. That being so, they were not her landlords, and were accordingly not entitled to distrain upon the premises occupied by her when, in December, 1956, the distraint was levied on their behalf. On this ground I would allow the appeal against them.

It remains to decide which of the four respondents are liable to the appellants in damages for the unlawful distress. The liability of the first and second respondents is clear, and in the event of the distress being found to be unlawful it is not disputed.

The liability of the third respondent also seems to me to be clear on the pleadings. Although he might have had the right to distrain on Mrs. d'Ellis'

goods on his own behalf (a question which it is not necessary to decide) it was never contended that he acted on his own behalf in the matter. In the joint statement of defence of the first three respondents it is admitted that

“the third defendant on behalf of the first and second defendants authorised and instructed the fourth defendant”

to levy the distress. This is an admission that the third respondent had authority from the first and second respondents to instruct the fourth respondent to distrain; in short that in so instructing the court broker he was acting as their authorised agent. Secondly, the managing director of the appellant company gave uncontradicted evidence in the following terms:

“I had taken an inventory of the goods. Subsequently Mr. Khan, the fourth defendant, seized the goods by distress for non-payment of rent. The goods were sold by him. I was present. I objected generally to fourth defendant. J. N. Penessis, third defendant was present. He heard the objection.”

In the light of the above admission and evidence I think the liability of the third respondent is established, on the principle regarding the liability of agents laid down in *Hollins v. Fowler* (8) (1875), L.R. 7 H.L. 757, and followed in *Winter v. Bancks* (9) (1901), 84 L.T. 504. In the latter case, as in the present, the defendant, though unaware that the true title to the goods lay in the plaintiff, was aware that the plaintiff was claiming it. The principle is expressed in Clerk and Lindsell on Torts, (11th Edn.) at p. 438, in the following words:

“When a person, though only as agent, takes part in a transaction which purports to effect a transfer of property in a chattel, and it turns out that his principal had no title, his ignorance of that fact does not protect him, for he has clearly intended an act which is inconsistent with the right of the true owner.”

The case of *Bennett v. Bayes* (10), 157 E.R. 1233, is also in point, with regard to the liability of the third respondent, and the facts are not dissimilar. In that case the first two defendants, who were the agents of the plaintiff’s landlord, were held liable in tort for having ordered the third defendant, a broker, to levy a distress on the plaintiff’s chattels which turned out to be illegal, on the ground that, having so ordered the distress, they were

“as much the persons who have done the act as if their own hands had done it.”

With regard to the liability of the fourth respondent, who admittedly levied distress upon the appellant company’s goods and sold them knowing that the appellant company was objecting, the main contention advanced in his defence is that he was a “court broker”, as was conceded in the plaint, and that as such he was a “public officer” and was entitled to exemption from liability by reason of the appellants’ admitted failure to give prior notice to him before joining him as a defendant, as required by s. 4 of the Suits By or Against the Government Ordinance (Cap. 7). Section 4 provides as follows:

“4. No suit shall be instituted against the Government, or against a public officer in respect of any act done in pursuance, or execution, or intended execution of any Ordinance or other law, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Ordinance, duty or authority, until the expiration of two months next after notice in writing has been, in the case of the Government, delivered to or left at the office of the Chief Secretary, and, in case of a public officer, delivered to him or left at his office, stating the cause of

action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.”

The necessity of the appellant complying with s. 4 depends upon whether the fourth respondent can be held to be a “public officer” acting in pursuance of a “public duty or authority” for the purpose of that section. The expression “public officer” is not defined in the Ordinance. The only definition of the phrase appears in s. 2 of the Civil Procedure Ordinance (Cap. 6), and the definitions in that section are not expressed to be of general application, but to apply only “in this Ordinance”. That definition is therefore strictly irrelevant. But it may be noted that in para. (g) of the definition a “public officer” is defined to include

“every officer in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty.”

The fourth respondent, as a court broker, was no doubt “remunerated by fees or commission” for every judicial process carried out by him; and he was the holder of a certificate issued by a first class magistrate under s. 3 of the Distress for Rent (Bailiffs) Ordinance (Cap. 116) entitling him to “act as bailiff to levy any distress for rent”. But such a certificate would entitle him to levy distress for rent quite outside any judicial process; and in the present case the distress which he levied was between private persons and not by way of judicial process.

The only helpful definition of a “public officer” which I have been able to discover, other than non-applicable statutory definitions, is contained in the judgment of the Court of Criminal Appeal in *R. v. Whitaker* (11), [1914] 3 K.B. 1283, where at p. 1286 he is defined as

“an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public”.

A court broker, while executing judicial processes, would in my view undoubtedly fall within that definition. Should the fourth respondent, then, be held to fall from time to time inside and outside the definition according as the process which he is executing at the time is judicial or extra-judicial? With some hesitation I think not. If it were necessary to decide the point, I would hold that a court broker, even when carrying out private distress, is still “discharging a duty in which the public are interested”, in so much as it tends to lessen the chance of a breach of the peace (a matter which is manifestly in the public interest) that such distraint should be carried out by a person not only vested with authority by a magistrate but whose principal function is known to be of a public nature, namely the discharge of judicial processes. I incline to the view (without, however, deciding the point) that a court broker is a “public officer” even when levying distress at the instance of a private person. But that is not the end of the matter. Section 4 of the Suits By or Against the Government Ordinance protects public officers from being sued without receiving the prescribed prior notice, only if the act in respect of which they are being sued was done

“in pursuance, or execution, or intended execution of any Ordinance or other law, or of any public duty or authority . . .”

Can the distress in the present case be said to have been levied in execution of any “public duty or authority”? It was carried out at the behest of private persons, and the fourth respondent was under no legal compulsion to carry it out. Section 4 appears to be modelled to some extent on s. 1 of the Public

Authorities Protection Act, 1893, and the same provision that the act must have been done “in pursuance . . . of any . . . public duty or authority” appears in both sections. In interpreting these words it was observed, in *National Telephone Co. Ltd. v. Kingston-upon-Hull* (12) (1903), 89 L.T. 291, where the defendants were undoubtedly a “public authority”, that this

“certainly does not mean that every action done by a corporation is to be treated as an act done in pursuance of a public duty or authority.”

And in *Bradford Corporation v. Myers* (13), [1916] 1 A.C. 242, where the same section was being considered, the position was stated lucidly in the judgment of Lord Buckmaster, L.C., at pp. 247–8 in the following words:

“In other words, it is not because the act out of which an action arises is within their power that a public authority enjoy the benefit of the statute. It is because the act is one which is either an act in the direct execution of a statute, or in the discharge of a public duty, or the exercise of a public authority. I regard these latter words as meaning a duty owed to all the public alike or an authority exercised impartially with regard to all the public. It assumes that there are duties and authorities which are not public, and that in the exercise or discharge of such duties or authorities this protection does not apply. This distinction is well illustrated by the present case. It may be conceded that the local authority were bound properly to dispose of their residual products; but there was no obligation upon them to dispose by sale, though this was the most obvious and ordinary way. Still less was there any duty to dispose of them to the respondent. No member of the public could have complained if the respondent had not been supplied; nor had any member of the public the right to require the local authority to contract with him.”

Applying these general principles to the present case, I am of the opinion that, although the fourth respondent was a court broker, and as such probably a “public officer”, not every distress levied by him must from that fact be necessarily held to have been levied in pursuance of a public duty or authority; and in particular the distress which he levied on the appellants’ goods, not under any judicial process but upon the instructions of the first and second respondents, given through the third respondent, all of them private individuals, cannot in my view be held to have been so levied. I would accordingly hold that, in respect of that act, the fourth respondent is not protected by s. 4 of the Suits By or Against the Government Ordinance.

It is perhaps worth noting that in England a bailiff, as such, derives no protection under the common law, nor under the Public Authorities Protection Act, 1893, for any private distress unlawfully levied by him, although under s. 7 of the Law of Distress Amendment Act, 1888, he is required to hold a certificate from a county court judge or registrar to entitle him to act as bailiff, just as the fourth respondent in the present case is required to hold a certificate from a magistrate under the Distress for Rent (Bailiffs) Ordinance (Cap. 116) to entitle him to act as broker. Under the English common law a bailiff is not an officer of the court so as to relieve a landlord from liability for his (the bailiff’s) irregular acts, but remains the agent of the landlord: see *In re Caidan, Ex parte Official Receiver v. Regis Property Co.* (14) [1942] Ch. 90, at p. 96, in a passage approving the statement of the legal position in Halsbury’s Laws of England, now set out in the 3rd Edn. thereof, Vol. 12, at p. 129.

That being so, the fourth respondent must be held liable in damages, equally with the other three respondents, for the unlawful distress. It may or may not be that he has a right of indemnity against his co-respondents: *Draper v. Thompson* (15), 172 E.R. 618; but that is not relevant to this appeal.

The amount claimed as damages, namely the Sh. 26,273/- secured by the appellants' bill of sale, was proved by their managing director in evidence and, on the footing of the distress being unlawful, it is not disputed by learned counsel for the first three respondents. He does, however, contest the prayer that interest on that sum should be at the rate of 9 per cent. per annum as from the date of the distress, that being the rate of interest stipulated in the bill of sale, and he asks that it should be only at court rates. Since, however, interest at nine per cent. is what the appellant lost, and since the distrained goods that were subject to the bill of sale realized Sh. 42,000/-, an amount which would have amply covered the nine per cent. interest stipulated for, I can see no reason for disallowing the claim for interest at that rate. I would accordingly allow the appeal against all four respondents, with costs here and below, and would hold them jointly and severally liable to the appellant company in the amount of Sh. 26,273/-, with interest thereon as claimed.

Sir Kenneth O'Connor P: I agree. There will be an order in the terms proposed by the learned Justice of Appeal.

Gould JA: I also agree.

Appeal allowed.

For the appellants:

DN Khanna and SA Pinto

SA Pinto, Kampala

For the respondents:

PJ Wilkinson and RE Hunt

PJ Wilkinson, Kampala

Re the Estate Ahmed Bin Abed Bin Salim Bin Said Shareem
[1959] 1 EA 766 (HCT)

Division:	HM High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	10 September 1959
Case Number:	12/1937
Before:	Biron Ag J
Sourced by:	LawAfrica

[1] *Mohamedan law – Wakf – Bequest for charitable objects to be chosen by executors – Whether wakf valid or void for uncertainty.*

[2] *Administration of estates – Bequest for charitable objects to be chosen by executors – Death of executors before charitable objects chosen – Whether court has power to select charitable objects to give*

effect to bequest.

Editor's Summary

By his will the deceased, a Sunni Moslem of the Shafi sect who died in 1934, appointed his two sons to be his executors and bequeathed a plot of land at Dar-es-Salaam "upon trust as a wakf property for the benefit of my soul" the income from which should be used in such charitable purposes as his executors should decide. The executors, having died leaving this bequest unadministered, letters of administration de bonis non with the will annexed were in 1945 granted to the Administrator-General who sold the land and in 1948 deposited the proceeds in the savings bank pending settlement of a wakf scheme. When the Administrator-General decided to seek further directions from the court the testator's grandchildren sought to establish that the bequest was void for uncertainty, in which event the proceeds would devolve upon them, as heirs; or, alternatively, if the bequest were valid that it should be treated as a charitable bequest and the income should by direction of the court be applied for the relief of the testator's grandchildren who were now impoverished, on the ground that in Mohamedan law the highest form of charity is the relief of one's own impecunious relations.

Held –

- (i) the testator had shown more than a general charitable intention; he had specified the objects of the wakf and the bequest was not void for uncertainty but was a valid wakf for charitable purposes.
- (ii) where the testator has indicated a particular mode for the selection of the charitable objects and this mode has become impossible, the court is entitled to make the selection to give effect to the bequest.
- (iii) without fettering the choice of the trustees chosen to administer the fund, they might well consider that in view of the Mohamedan principle that preference should be given to relatives in making charitable gifts a portion of the moneys available for distribution should be applied for the relief of the impoverished descendants of the testator.

Order accordingly.

Cases referred to in judgment

- (1) *Mt. Abadi Begum and Others v. Mt. Bibi Kaniz Zainab and Others* (1927), A.I.R.P.C. 2.
- (2) *Mohamed Yusuf and Others v. Azimuddin* (1941), A.I.R.All. 235.
- (3) *Ruchordas Vandrawandas and Others v. Parvatibhai and Others* (1899), I.A. 71.
- (4) *Beli Ram and Brothers v. Mohammed Afzal and Others* (1948), A.I.R.P.C. 168.
- (5) *Gangabai v. Thavar* (1863), 1 Bom.H.C.R. 71.
- (6) *Shahab-Ud-Din v. Sohan Lal* (1907), Punjab Rec. No. 75.
- (7) *Advocate-General of Bombay v. Hormusji Noshirwanji Vakil and Others* (1905), 29 Bom. 375.
- (8) *W. B. Keatinge v. Mohamed bin Seif Salim and Others* (1930), 12 K.L.R. 74.
- (9) *Shaw v. Willis*, [1921] 1 Ch. 44.
- (10) *Abdul Fata Mohamed Ishak v. Russomoy Dhur Chowdhry and Others* (1894), 22 I.A. 76.

Judgment

Biron Ag J: This is an application brought by the Administrator-General under s. 87B of the Probate and Administration Act, 1881, as amended by the Repealing and Amending Act, 1919, for directions in regard to a bequest.

The history of this case as set out in the affidavit of the Administrator-General is as follows:

- “1. That Ahmed bin Abed bin Salim bin Said Shareem, the above-named deceased (hereinafter referred to as the deceased) an Arab, died at Shehr in Arabia on the 26th day of February 1934 having duly executed his last Will and Testament at Dar es Salaam bearing date 25th June 1927, whereby he appointed his two sons Mohamed bin Ahmed and Said bin Ahmed as executors.
- “2. That the said Mohamed bin Ahmed and Said bin Ahmed duly proved the said Will and Probate thereof was granted to them by this Honourable Court on the 21st day of June 1934, in its Probate and Administration Cause No. 12 of 1934.
- “3. That as both the executors were then dead and part of the deceased’s estate had been left

unadministered, this Honourable Court granted Letters of Administration *de bonis non* with the Will annexed of the property and

credits of the deceased to the Administrator-General on the 10th day of December, 1945.

- “4. That by paragraph six of the said Will the deceased, *inter alia*, devised and bequeathed to his executors ‘All that my right title and interest in the western half of the plot of land in Market Street, Dar es Salaam, on which my house No. 8 is built together with the western portion of the said house upon trust as a Wakf property for the benefit of my soul that is to say all the rents, etc., of the property to be used in charitable purposes as my said executors shall think fit.’
- “5. That the old building (No. 8 Market Street) Dar es Salaam referred to in the preceding paragraph standing at the death of the deceased was demolished and a new building was erected by the said Said bin Ahmed and he raised mortgages to obtain the amount required to erect such building.
- “6. That the Administrator-General in the course of the administration of the estate by him made an application on the 31st May 1947 to this Honourable Court for leave to sell the property and to appropriate the proceeds of sale thereof in the manner therein described.
- “7. That after an order was made by this Honourable Court on the 16th June 1947, the said property was sold for Shs. 82,000/-.
- “8. That as a result of the sale of the said property for Shs. 82,000/-, accounts were taken and a sum of Shs. 23,890/94 was allocated to meet the deceased’s devise and bequest mentioned in paragraph 4 of this affidavit.
- “9. That on 2nd October 1948, the Administrator-General made a second application to this Honourable Court asking for permission to deposit the said sum of Shs. 23,890/94 with the Post Office Saving Bank or in Fixed Deposits with the Standard Bank of South Africa Limited.
- “10. That an order was made by this Honourable Court on the 18th October 1948, directing the Administrator-General to invest the said sum of Shs. 23,890/94 in the Post Office Saving Bank pending settlement of a Wakf scheme.
- “11. That since the 27th October 1948, on which date the said sum of Shs. 23,890/94 was deposited in the said Post Office Saving Bank the balance with interest standing to the credit of the account had increased to Shs. 30,705/50 as at 31st March 1959.”

This application is concerned only with the particular bequest referred to above, as apart from this bequest all the testator’s property has been distributed.

Before applying to the court for directions the Administrator-General, by letter dated October 16, 1956, sought the advice of the Liwali of Dar-es-Salaam on the settling of a scheme for this wakf created by the testator. Such course is perfectly proper as stated by Tyabji in his Treatise on Muhammadan Law (3rd Edn.), p. 605:

“The Advocate-General as the guardian of charity has the power, which is liberally made use of, to take the assistance of the community in arriving at a decision and in preparing the scheme for laying before the court.”

The Liwali apparently misunderstood the Administrator-General’s request and referred the matter to a body of nine Sheikhs, who mistakenly refer to themselves as executors of the estate with regard to this bequest, in the opinion they have submitted and which is annexed to the application of the Administrator-General as Annexure A. In this opinion the signatories advise that the bequest be distributed amongst eight grandchildren of the testator whose names appear on the annexure. At the hearing of this application Mr. Harjit Singh appeared for these grandchildren.

As indicated in the extracts from the affidavit of the Administrator-General quoted above, this particular bequest has already been twice before the court and on both occasions it was treated as a valid wakf. On the first occasion, June 16, 1947, the record reads:

“Public trustee is to be appointed when a proper scheme is put forward. Public trustee to hold the money in the interim.”

On the second occasion, October 18, 1948, when the court made an order that the proceeds of the sale of the house should be invested, the record states: “Pending settlement of wakf scheme”. However, as at that time no objection had been raised to the bequest being held a wakf, nor had such bequest been disputed, the validity of the bequest as a wakf was never at issue or considered. In the circumstances, as conceded by all learned counsel, I am not precluded from now considering this issue and the court is free to decide whether or not the bequest is a valid wakf.

Mr. Harjit Singh submitted first of all that the bequest was void and therefore it should fall into residue and consequently to his clients as heirs of the deceased testator. Both Mr. Dastur, who appeared for the Administrator-General, and Mr. Spry, who appeared for the Attorney-General, submitted that the bequest was a valid one.

Mr. Harjit Singh would appear to base his contention on three grounds. He stated:

“I submit that this wakf is not a valid wakf and that for three reasons. First I will contend that there is no general or overriding charitable intention on the part of the testator as submitted by my learned friend. Second I am going to contend that this is not a valid wakf for the simple reason that it is a wakf created for an object which is not recognised as a valid object for a wakf under Mohamedan law. Thirdly and in the alternative I am going to submit that this wakf is void for uncertainty.”

Mr. Harjit Singh contended that

“the guiding words in this bequest are ‘upon trust as a wakf property for the benefit of my soul’,”

that the operative words are “for the benefit of my soul”, and “to be used for charitable purposes” is only a subsidiary consideration, and,

“I think that the testator intended primarily a religious trust, he must have intended a religious trust of a charitable nature which would benefit the soul of the testator”.

The opinion delivered by the nine Sheikhs already referred to, would appear to support Mr. Harjit Singh’s submission, though the document setting out such opinion is by no means unequivocal or free from ambiguity. Mr. Harjit Singh contended that the testator was really creating a wakf for himself and, again to quote from his argument:

“... except that the words ‘for my own soul’ clearly indicate that under the cloak of piety the testator is trying to legalise something for his own entitlement.”

I must confess myself somewhat at a loss to follow Mr. Harjit Singh’s contention, as according to him this wakf was created for the benefit of the testator himself and to quote an expression used in *Mt. Abadi Begum and Others v. Mt. Bibi Kaniz Zainab and Others* (1) (1927), A.I.R.P.C. 2.: “The wakif must not eat out of the wakf.”

The testator was a Shafii Sunni and obviously the law applicable to his community should be applied. I fail to see, however, how the words of the testator can possibly be considered in the manner submitted by Mr. Harjit Singh.

I fully agree with Mr. Spry and Mr. Dastur that the words “for the benefit of my soul” merely indicate the motive of the testator and not the object of the bequest. As stated by Omer Hilmi Efendi in A Treatise on the Laws of Evqaf (the Turkish equivalent of wakf) at p. 7, paragraph 52:

“The motive of dedication is the seeking to approach God and worship Him by the gift of property for philanthropic purposes.”

Also Fyzee, in his Outlines of Muhammadan Law (2nd Edn.) at p. 248, states:

“The real purpose of making a wakf is to acquire merit in the eyes of the Lord; all other purposes are subsidiary. Therefore every purpose considered by the Muhammadan law as ‘religious, pious or charitable’ would be considered valid. Ameer Ali explains this clearly by saying that a pious act may be a smile in a neighbour’s face or help to the weary; but in Islamic law ‘it means an offering or gift made with the object of obtaining the approval of the Almighty or a reward in the next world’.”

According to Mohamedan principle the property dedicated as a wakf is vested in God and the usufruct is applied to the object of the wakf.

Mr. Harjit Singh further submitted that the bequest was void for uncertainty, this apparently on two grounds. The first ground, again apparently based on Mr. Harjit Singh’s construction of the testator’s words “for the benefit of my soul”, is that the uncertainty is due to the bequest being for religious and/or charitable purposes. There are numerous cases both under English and Indian law that a bequest in such terms is void for uncertainty. However, as I have already held that the words “for the benefit of my soul” indicate the pious motive or purpose of the testator and not the object of the wakf, I do not need to consider this proposition any further.

Mr. Harjit Singh further argued that the bequest was void for uncertainty because it did not specify any particular charity. Here again numerous authorities and cases have been cited in support of such contention.

Mr. Harjit Singh, in the course of his argument, submitted that this is a wakf very similar in terms to a “dharam”. Opinion is, I think, uniform, or almost uniform (such qualification is necessary in view of the diversity of opinion amongst Indian jurists) that a dharam is void for uncertainty. Dharam is defined in *Mohammed Yusuf and Others v. Azimuddin* (2) (1941), A.I.R. All. 235, at p. 240 as follows:

“... their lordships held that a trust for dharam which means law, virtue, legal or moral duty is equivalent to a trust for such purposes as are mentioned in (1805) 10 Ves. 522 and (1896) 2 Ch. 451, and was consequently void.”

In *Runchordas Vandrawandas and Others v. Parvatibhai and Others* (3) (1899), I.A. 71, at p. 81, dharam is defined as:

“In Wilson’s dictionary dharam is defined to be law, virtue, legal or moral duty . . .”

It is not without interest to quote Tyabji on this, who (at p. 602) states:

“That crucial step, viz. dedication for charity, is taken when a dedication by way of wakf (with its concomitant renunciation of private property) is postulated: the fact that an intention of charity has been given expression to, distinguishes a wakf from a bequest governed by Hindu law using the word dharam, which expression may have reference to charitable objects, but may also include other objects that do not fall within the definition of charity, and for which a perpetuity is not permitted.”

The language used by the testator cannot, I think, by any stretch be construed so vaguely, or to have such a wide meaning as that given to dharam.

Learned counsel in their arguments have cited numerous authorities and still more cases, mostly Indian, and the court is indebted to them for the pains they have taken and for the assistance which the court has derived from their efforts. It is with no disrespect to them that I do not quote all the authorities cited to me, and I ought to add that I have perused them all. But in most of the cases quoted the words used by the testator were much wider than in this instant case and therefore have no application here. As is not unusual in such cases, the Indian authorities are not consistent. As Mulla states in his *Principles of Mahomedan Law* (13th Edn.) at p. 166:

“Turning now to Mahomedan cases there appears to be a conflict of decisions.”

Mulla, however, would appear to support the view that a bequest should indicate the object of the wakf with reasonable certainty. He states at p. 166:

“Wakf void for uncertainty. The objects of a wakf must be indicated with reasonable certainty; if they are not, the wakf will be void for uncertainty.

“(Note: According to the English law the object of trust is void for uncertainty).”

And there follow quotations from cases. Mr. Spry submits that Mulla is mistaken both in his view of the English authorities and of the Indian authorities, and he has referred me to the case of *Mohammed Yusuf and Others v. Azimuddin* (2), cited above, a Privy Council case, where both the English and the Indian authorities were reviewed. Dar, J., delivering the judgment of the Judicial Committee, stated at p. 238:

“A trust in favour of the charity exclusively never fails for want of certainty and never fails by reason of indefiniteness or uncertainty of objects. Ever since the cases in (1792) 1 Ves. J. 464, (1802) 7 Ves. 36, (1807) 13 Ves. 416 and (1815) 1 Mer. 55 were decided by Lord Eldon, the law has been well settled in England that a trust for charity generally or a trust for charitable purposes to be determined by nominated trustees are perfectly good trusts.”

And again at p. 241:

“What then is the law on the subject which is applicable to this case? In our opinion a trust for charity simpliciter so long as it is confined to charity exclusively is a perfectly good trust and it is not necessary that the objects of trust or charity need be specified. This, in our opinion, is the English law and this is also the Indian law.”

Again at p. 242:

“In our opinion, if a Mahomedan settler creates a wakf in favour of the poor or a trust for religious, pious or charitable purposes of a permanent character recognised by Mussalman law without specifying the religious, pious or charitable objects or he makes a trust for religious, pious or charitable purposes of a permanent character recognised by Mussalman law either one or the other or all or in any combination such a trust would be perfectly valid and should not fail simply because the objects were not specified.”

Mr. Spry also referred to the case of *Beli Ram and Brothers v. Mohammed Afzal and Others* (4) (1948), A.I.R.P.C. 168, where Sir John Beaumont, delivering the judgment of the Judicial Committee stated at p. 174:

“In the view their lordships take of this deed of wakf there is a clear overriding charitable intention expressed in the preamble, and this absorbs any beneficial interests in the usufruct which are not expressly covered by the deed. The beneficial interests in the usufruct go to the three children of the wakif in the shares mentioned in cl. 8 and pass to their descendants from generation to generation according to Mohamedan law under which males take twice the share of females. On the extinction of any of the three lines, the share belonging to that line will be applicable in charity in accordance with the general charitable intent since there is nothing in the deed to justify the view that the share of a line becoming extinct accrues to the other lines. The same principle will cover any beneficial interest which may accrue between the extinction of the lines of the children of the wakif and the time when the provisions of cl. 15 come into operation. Their lordships therefore hold the wakf to be valid.”

In this instant case, however, the testator has shown more than a general charitable intention. He has gone further and specified the objects of the wakf as “any charitable purposes as my said executors shall think fit.” In such case even Mulla will, I think, consider the bequest valid, as at p. 168, note 2, he states:

“A bequest by a Khoja Mahomedan under a will in the English language of a fund ‘to be disposed of in charity as my executor shall think fit’ is not void for uncertainty.”

The authority for that is the case of *Gangabai v. Thavar* (5) (1863), 1 Bom. H.C.R. 71, the headnote to which reads:

“In the will of a Khoja Mahomedan written in the English language confirming a gift of a fund ‘to be disposed of in charity as my executors shall think fit’ is a valid charitable bequest, and it will be referred to the proper officer of the court to settle a scheme for the application of the fund to charitable objects, by analogy to Act 43 Eliz. Cap. 4.”

There is, however, one case referred to in Mulla which would appear to support Mr. Harjit Singh’s contention. That case is cited at p. 167, and Mulla’s quotation from it reads:

“In a Punjab case it was held that a wakf for such charitable objects as the trustees should think proper and for such purpose as that the settlor should obtain certain bliss therefrom, is void for uncertainty.”

The case cited is that of *Shahab-ud-din v. Sohan Lal* (6) (1907), Punjab Rec. No. 75. That case is not available and I have been unable to obtain a sight of it. It is not without interest, however, to refer to the other case cited by Mulla in the very same note, also apparently as authority for the proposition put forward. This is the case of *Advocate-General of Bombay v. Hormusji Noshirwanji Vakil and Others* (7) (1905), 29 Bom. 375. The headnote to that case reads:

“A deed of indenture contained, among other things, a provision which ran: ‘upon trust and for the use of the said trustees absolutely to be expended and used by them for such charitable purposes as they might think fit’. On a construction of this provision—

“Held, that having regard to the words that follow the phrase in the indenture in question, the word ‘absolutely’ cannot be taken as conferring an unfettered and unlimited interest on the persons designed as trustees; and that the words used created a valid trust for charitable purposes in the events which had happened.”

On consideration of all the authorities, not necessarily Indian, I have been able to study, I incline to the view of Mr. Dastur and Mr. Spry that this bequest is a valid wakf and not void for uncertainty. Such view is, I think, as I have already indicated, supported by Mulla. It is also supported by Tyabji who states at p. 604, quoting from Lewin on Trusts:

“It may be noticed, he says, that settlements to charitable purposes are an exception from the law of resulting trusts, for upon the construction of instruments of this kind where a person makes a valid gift and expresses a general intention of charity, but either particularizes no objects, or such as do not exhaust the proceeds, the court will take upon itself to execute the general intention by declaring the particular purposes to which the fund shall be applied.”

This is also the view of Fyzee who at p. 251 states:

“Despite the conflict of opinion on the subject, the latest tendency appears to be to agree with the views of Ameer Ali and Tyabji and to hold that (1) once it is clear there is a bona fide intention on the part of the *wakif* to create a *wakf*, and divest himself completely of the property, there is a good *wakf* which will not be allowed to fail. A valid *wakf* may thus be constituted: (i) where the objects are not specified at all, or (ii) where the objects fail as being impracticable, or (iii) where the objects are partly valid and partly not valid. In cases (i) and (ii) the *cy pres* doctrine may be applied; and in case (iii) the valid objects may be accepted by the court and the others rejected.”

Such view also has the support of Omer Hilmi. At para. 75, p. 14 he states:

“It is not required that the object for the benefit of which the dedication is made should be declared and fixed.”

And at para. 71:

“The dedication is valid, if the dedicator put as a condition that the Muteveli may spend the profits for the benefit of a subject which he considers has philanthropic object.”

Mr. Harjit Singh has further submitted that the Indian authorities will not apply to this case. His authority for that is Fitzgerald in his *An Abridgement of Muhammadan Law* who at p. 32 states:

“In cases between Arab or African Moslems it has been held both by the Zanzibar and the Kenya Supreme Courts that the decisions of the Indian courts and the Privy Council on appeal from India, though ‘of extreme interest for purposes of illustration and comparison’ are not binding. In such cases the Supreme Courts take the advice in Zanzibar of the Qadis and in Kenya of Chief Qadi, who bears the title Shaikh ul Islam; but they are not conclusively bound by that advice.”

I therefore feel fortified by the Kenya case of *W. B. Keatinge v. Mohamed bin Seif Salim and Others* (8) (1930), 12 K.L.R. 74, the relevant headnote to which reads:

“Also held that gifts for charitable purposes are valid, even though the exact object of the charity be not mentioned.”

It is not unrewarding to quote the following passage from the judgment of Thomas, J., at p. 78:

“Now according to the Shafii a gift for charitable purposes is valid so long as the word charity is used; the exact object of the charity need not be mentioned. It is open to the administrator of the charity divide the

income amongst the poor, and he may effect this by using the money for education or hospitals as well as money donations.”

I accordingly hold that the testator’s bequest is valid as a wakf for charitable purposes.

It now remains to consider the object to which this bequest shall be applied. The Administrator-General in his affidavit refers the court to two deserving charities. At para. 18 he states:

“That I am informed and verily believe that the following institutions amongst the Muslim Communities of Tanganyika are deserving of charitable assistance:

1. Ijumaa Mosque, Kitumbini Street, Dar-es-Salaam, with Arabs as trustees thereof.
2. Al-jumaat Islamiyaa School, New Street, Dar-es-Salaam.”

Mr. Spry suggested that the bequest be applied for the relief of the poor and he went on to say:

“But I would suggest that your lordship may feel that this is a case where the principles dear to the heart of the Muslim jurists might be respected. I would suggest that if your lordship advises this course it would be reasonable to restrict any application for the benefit of the poor, first to the Muslim community and secondly to the poor of Dar-es-Salaam as being restrictions which one could reasonably suppose would have been in the mind of the testator.”

Mr. Dastur was also of the same view, stating:

“All the authorities are in favour of the view that the primary object of a wakf is the relief of the poor. At p. 248 of Fyzee (Outlines of Muhammadan Law) which is an authority very often cited in cases in East Africa: “The ultimate object of a wakf, however, is the benefit of the poor’.”

Mr. Harjit Singh also supports the proposition. He goes further and urges that the objects of this charitable bequest should be the descendants of the testator, who are now destitute and deserving recipients of charity. He has produced a letter from the Tanganyika Arab Association confirming that these descendants, or rather the descendants named in the letter, are very poor and deserving objects of charity.

Mr. Dastur would appear to support the view that preference in some measure should be given to these destitute descendants of the testator, though the Administrator-General himself dissociates himself from such view. This view is most heartily supported by the nine Sheikhs already referred to. They state:

“It is better to give charity to a related person than to a person who is far from your relationship (Dhawil-Arhami).”

These nine consultants took the view that whichever way this case is decided, whether the bequest be valid or not, it should go to the impoverished descendants of the testator. It is perhaps, therefore, hardly surprising that these descendants do not dispute, or rather “object” to this opinion as certified by them on Annexure A:

“We hereby certify that we have accepted this judgment passed by the nine above-mentioned persons and we have no objection to this judgment.”

It is, I think, undisputed that the guiding principle in such cases is to give effect, if at all possible, to the wishes of the testator. From the language used by the testator I am satisfied that he intended the bequest to be applied to the relief of the poor.

The testator further intended that the executors, his sons, should determine the particular objects of his charity. However, they have died before making such determination. The choice of the charity is now thrown upon the court. As stated by Warrington, L.J., in *Shaw v. Willis* (9), [1921] 1 Ch. 44 at p. 52:

“If the court sees a general intention in favour of charity but a particular mode indicated for giving effect to that intention cannot be adopted that not affect the validity of the gift, but the court will in some form or other give effect to it. One of the most familiar instances is where the particular mode indicated by the testator is the selection of the particular charitable objects. It has over and over again been decided that the impossibility of the selection being made as directed by the testator will not prevent the court from giving effect to the charitable bequest by making the selection itself.”

In this particular case it may be said that the testator’s intention is further channelled through the discretion of his sons, the executors. Bearing in mind the Mohamedan attitude towards the relief of one’s kith and kin, the proposition that preference should be given to the impoverished descendants of the testator, who incidentally are also of the executors’ kin, is not without attraction. Fitzgerald in his treatise already referred to, states at p. 202:

“But among the objects of generosity a man’s own family have the first claim. Thrice over, in almost the same words, the Qoran approves the righteousness of him ‘who gives wealth for the love of God to kindred and orphans and the poor and the wayfarer and beggars and captives’—kindred ranking first; and a tradition in the same sense runs: ‘It is better to give alms to kindred than to beggars. The most excellent of sadaqa is that which a man bestows on his own family’.”

This is repeated almost verbatim by Fyzee. This precept of the Prophet Mohammed was quoted in the Privy Council case of *Abdul Fata Mahomed Ishak v. Russomoy Dhur Chowdhry and Others* (10) (1894), 22 I.A. 76. In that case, however, it was strongly animadverted on by Lord Hobhouse who delivered the judgment of the Judicial Committee, and, incidentally, disregarded in their judgment, as not being authoritative in law. Mr. Spry, who contends that the bequest should not be restricted to the destitute descendants of the testator but should be applied to the poor generally, has referred me to this case, stating:

“I mention this case because although their lordships cited this precept they did not accept it and they were a little scathing in commenting that they could not believe that Mohamedan law was to be found in accordance with absolute and, it seems to them, abstract precepts taken from the mouth of the Prophet.”

The executors, however, who may well have subscribed to the popular Mohamedan view and possibly not having had the advantage of reading their lordships’ opinion, in selecting the objects of the bequest, had they been alive to do so, may well have applied the bequest to the use of their destitute kin and in Mohamedan eyes would not have been guilty of a breach of trust. With regard to the decision itself in that particular case, to quote Fyzee at p. 258:

“This case created a storm in the country; it went against the fundamental notions of Mohamedan law; it was refuted with a wealth of learning by Ameer Ali in his well-known work on Mohamedan law; a number of Muslim divines, headed by the late Allama Shibli Numani, protested against it and wrote forceful pamphlets; and finally the legislature stepped in by passing the Mussalman Wakf Validating Act, 1913.”

There are two further passages to which I feel I ought to refer. In Minhaj et Talibin (A Manual of Muhammadan Law according to the School of Shafii) by Nawawi, at p. 280, it is stated:

“The Sonna prescribed also a supererogatory tax that may be given even to persons in easy circumstances and to infidels. It is given in secret, in the month of Ramadan, preferably to one’s near relatives and neighbours. But it is recommended to those who owe a debt, or have to maintain a family, not to pay a tax on their property by way of charity until they have first discharged these obligations. (It is even forbidden to spend in charity money required for the maintenance of those dependent on one, or for paying a debt that otherwise one can hope for no means of paying). It is commendable to be charitable out of one’s superfluity, provided that too great a burden is not thereby incurred.”

Fyzee at p. 259 states:

“If he bestows the usufruct in the first instance upon those whose maintenance is obligatory on him, or if he gives it to his descendants so long as they exist to prevent their falling into indigence, it is a pious act—more pious, according to the Prophet, than giving to the general body of the poor. He laid down that one’s family and descendants are fitting objects of charity, and that to bestow on them and to provide for their future subsistence is more pious and obtains greater ‘reward’ than to bestow on the indigent stranger. And this is insisted upon so strongly that when a *wakf* is made for the *indigent or poor* generally, the proceeds of the endowment is applied to relieve the wants of the endower’s children and descendants and kindred in the first place (see Baillie’s Dig., (2nd Edn.) p. 593).”

I have been unable to find Baillie’s Digest from which this passage is apparently taken, but it is a very strong argument in support of Mr. Harjit Singh’s submission that preference should be given to the impoverished grandchildren of the testator.

It is generally agreed that the money available from this bequest should be handed to the trustees of the Ijumaa Mosque in Kitumbini Street, Dar-es-Salaam, to administer. The fund as at March 31, this year stood at Shs. 30,705/50; the original principal sum when deposited in the Post Office Savings Bank was Shs. 23,890/94. I feel, however, that the whole sum should now be treated as capital. I would direct that this sum, together with all accrued interest thereon and after the deduction of costs, should be transmitted to the trustees of the Ijumaa Mosque above referred to, if they are prepared so to accept the money, for them to invest and to apply the income thereof to the relief of the poor at their discretion.

I feel that they, being of the same community as the testator and the executors, should be fully competent as to how to apply such money. Therefore I do not propose to fetter their discretion in any way. But I would expect, in view of all the authorities to which I have been referred as reflecting Mohamedan principles, that some preference should be shown to the destitute descendants of the testator. I feel that the trustees may well consider that up to a third at least of the moneys available for distribution should be applied for the relief of the descendants of the testator who are in need and are, and so long as they are, deserving objects of charity qua charity, and not as relatives of the testator. This, however, as I have already, I think, made clear, is not intended to fetter the discretion of the trustees.

With regard to costs, Mr. Spry for the Attorney-General has agreed with the Administrator-General that a fair figure for Mr. Dastur’s fee would be Shs. 1,000/-. Mr. Harjit Singh has also applied for a like sum as his costs. The Administrator-General, however, is of the view that Mr. Harjit Singh should

not be allowed costs unless he is successful in his claim. However, in view of the fact that his clients were led to believe by the nine Sheikhs acting in excess of zeal and of authority that they were entitled to this bequest, they can, I think, hardly be blamed for instructing counsel to pursue their claim. In all the circumstances I feel that Mr. Harjit Singh should be allowed some fee out of the estate and I consider a fair sum would be Shs. 600/- as he was not really concerned with all the aspects of the case.

Order accordingly.

For the Administrator-General:

PR Dastur

For the grandchildren-heirs of the testator:

Harjit Singh

For the Attorney-General:

JF Spry (Legal Draftsman, Tanganyika)

For the applicant:

The Administrator-General, Tanganyika

For the heirs of the testator:

Harjit Singh, Dar-es-Salaam

For the guardians of the trust:

The Attorney-General, Tanganyika

Adams v Adams
[1959] 1 EA 777 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	24 September 1959
Case Number:	14/1959
Before:	Forbes Ag P, Windham JA and Sir Owen Corrie Ag JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya—Edmonds, J

[1] *Practice – Court of Appeal – Record for appeal lodged without copy of decree appealed from – Application for leave to file supplementary record including decree made and granted – Whether appeal competent – Eastern African Court of Appeal Rules, 1954, r. 56, r. 62 (4) (e).*

Editor's Summary

The appellant filed the record of an appeal without including therein a copy of the preliminary decree with which the appeal was concerned. The preliminary decree had not then been extracted but this was done later and the appellant then applied for and obtained without objection leave to file a supplementary record including the decree. At the hearing of the appeal the respondent took a preliminary objection that since the decree had not been extracted when the appeal was filed, the appeal was incompetent.

Held –

- (i) the requirement in r. 56 of the Eastern African Court of Appeal Rules, 1954, that a decree or order shall be extracted applies to any appeal and not merely to appeals against a judgment.
- (ii) the appellant's application for leave to file a supplementary record was misconceived in form, but in substance what the appellant had sought and was granted leave to amend the record and in the exercise of its discretion the court would treat the application as such.
- (iii) if leave to amend the record had been granted, the breach of r. 56 as well as of r. 62 (4) (*e*) would thereby have been cured.

Preliminary objection overruled.

Case referred to in judgment

- (1) *Motel Schweitzer v. Cunningham and Another* (1955), 22 E.A.C.A. 252.

Judgment

Forbes Ag P: read the following judgment of the court: We are of opinion that the requirement to extract a decree contained in the latter part of r. 56 of the rules of this court relates to any appeal and not merely an appeal against a decree or order as distinct from an appeal against a judgment. We think this follows from the use of the words “shall in any event be extracted before an appeal is lodged” in r. 56, read with r. 62 (4) (e) which requires that a copy of the decree or order shall be attached to the memorandum in every appeal.

In the instant case leave was granted to file a “supplementary record” which included a copy of the preliminary decree. It is true that the preliminary decree was extracted after the appeal was lodged, but we are of opinion that if leave to amend the record by adding thereto a copy of the decree had been granted, this would have cured the breach of r. 56 as well as of r. 62 (4) (e). We think that this is the effect of the decision in *Motel Schweitzer v. Cunningham and Another* (1) (1955), 22 E.A.C.A. 252. In the instant case the appellant sought and obtained leave without objection from the respondent to file a “supplementary record” which included the preliminary decree. While we agree that the form of the application was misconceived, we think that in substance what was sought and granted was an amendment of the record and, in our discretion, we propose to treat it as such and allow the appeal to proceed. We accordingly dismiss the preliminary objection.

As regards costs, we think the justice of the case will be met if each party bears his own costs arising out of the preliminary objection in any event, and we so order.

Preliminary objection overruled.

For the appellant:

DN Khanna

DN & RN Khanna, Nairobi

For the respondent:

M Kean

Sirley & Kean, Nairobi

Farmers Bus Service and others v The Transport Licensing Appeal Tribunal [1959] 1 EA 779 (CAN)

Division:	Court of Appeal at Nairobi
Date of ruling:	21 August 1959
Case Number:	63/1959
Before:	Forbes Ag P, Windham JA and Templeton J
Sourced by:	LawAfrica

Appeal from: H.M. Supreme Court of Kenya–Rudd and MacDuff, JJ

[1] Practice – Application for prerogative order – Crown practice – Proceedings incorrectly intituled – How such proceedings should be intituled.

Editor’s Summary

The Supreme Court of Kenya dismissed an application by the appellants for an order of certiorari directed to the Transport Licensing Appeal Tribunal, but gave conditional leave to appeal. The appeal having been lodged, the appellants then moved the appellate court to vary the order of the Supreme Court so that leave to appeal might become unconditional. At the hearing of this application, which was refused, the court commented on the form of the proceedings and the headings of the application to the Supreme Court and of the appeal and

Held – prerogative orders are issued in the name of the Crown and applications for such orders must be correctly intituled.

Mohamed Ahmed v. R., [1957] E.A. 523 (C.A.), followed.

Order that the notice of appeal and other documents be amended as shown in the ruling.

Case referred to in judgment

(1) *Mohamed Ahmed v. R.*, [1957] E.A. 523 (C.A.).

Ruling

Forbes Ag P: read the following ruling of the court: This was an application by the appellants (hereinafter referred to as the applicants) in an appeal which is pending before this court. The appeal is against an order of the Supreme Court dismissing with costs an application for an order of certiorari directed to the Transport Licensing Appeal Tribunal relating to certain road service licences which had been granted to the applicants. The application to this court was for variation of the order of the Supreme Court granting leave to appeal so that leave might be unconditional, the order of the Transport Licensing Appeal Tribunal as confirmed by the Supreme Court stayed, and the licences in question remain in force as originally granted pending the hearing of the appeal. We refused the application with costs, but undertook to give a ruling on a matter of form.

The applicants number nineteen in all, and for the sake of brevity they will be referred to in the forms below as “(the applicants)” where in the actual form the names were or should be set out in full.

The record of the appeal which was before us (Mr. Kean for the applicants intimated that a supplementary record would be filed in due course) does not contain the original application to a judge of the Supreme Court for leave to apply for an order of certiorari in pursuance of r. 1 of O. LIII of the Civil

Procedure (Revised) Rules, 1948, but from the “Amended Statement” which appears in the record it would appear that the application was intituled:

“In the Matter of: The Transport Licensing Ordinance

and

In the Matter of: An application for an Order of Certiorari directed

to

The Transport Licensing Appeal Tribunal

1

(to) (the applicants)

19

Applicants”

Similarly, the present record does not contain a copy of the notice of motion for the order of certiorari, but, from the formal order embodying the decision of the Supreme Court on the motion, it would appear that the heading of the notice of motion was the same as that of the application for leave to apply which is set out above. From the judgment of the Supreme Court it would appear that the appeals before the Transport Licensing Appeal Tribunal to which the application relates are Nos. 11 to 16 inclusive, 30, 32-35 inclusive, 37, 39, 41-43 inclusive and 46-48 inclusive, all of 1958.

The appeal to this court is headed:

“1

(to) (the applicants)

19

..... Appellants

and

The Transport Licensing Appeal Tribunal

..... Respondents”

In our opinion the forms of heading used are incorrect. This court had occasion to comment on the forms to be used in applications for prerogative orders in *Mohamed Ahmed v. R.* (1), [1957] E.A. 523 (C.A.). In that case the then learned President of the court, after setting out the forms of heading employed in that case and accepting as correct the form of heading for the *ex parte* application to a judge for leave, continued (at p. 524):

“This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners’ offices and in some registries of the High Court. The appellant’s advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative writs, are issued in the name of the Crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intituled and served accordingly. The Crown cannot be both applicant and respondent in the same matter.

“When proceedings in the High Court by originating summons or originating motion are inter partes, it is not sufficient to intitule them as ‘In the matter of’, etc. This must be followed by the names of the applicants and respondents. If this had been done in this case, the error would have been obvious on the first draft.”

There is no material difference between the rules relating to prerogative orders in force in Uganda and those in force in Kenya. The ruling in *Mohamed Ahmed’s* (1) case therefore applies in Kenya, and, following that ruling, we are of opinion that the *ex parte* application for leave to apply for an order

should (on the assumption that the applicants could properly join in one application) have been intituled:

“In the matter of an application by (the applicants) for leave to apply for an Order of Certiorari
and

In the matter of Appeals Nos. 11 to 16 inclusive, 30, 32-35 inclusive, 37, 39, 41-43 inclusive and 46-48
inclusive, all of 1958, of the Transport Licensing Appeal Tribunal.”

We may say we entirely agree with the view expressed by the learned judges of the Supreme Court that the application concerned nineteen separate and distinct appeals, which should not have been joined in one application. As in *Mohamed Ahmed’s* (1) case, if the proper form had been used, the error would have been obvious.

Leave having been granted, the notice of motion should have been intituled:

“R.

v.

The Transport Licensing Appeal Tribunal

ex parte

(the applicants)”

So far as the appeal to this court is concerned, the persons really interested in resisting the appeal are the Overseas Touring Co. (E.A.) Ltd. and the Kenya Bus Services Ltd., who were the objectors before the Transport Licensing Appeal Tribunal. In the circumstances we think they should be added to the heading as interested parties. The appeal should therefore be intituled:

“R. Appellant

v.

The Transport Licensing Appeal Tribunal Respondent

and

The Overseas Touring Co. (E.A.) Ltd. Interested Parties

The Kenya Bus Services Ltd.

ex parte

(the applicants)”

The notice of appeal and other documents in the appeal should be amended accordingly.

Order that the notice of appeal and other documents be amended as shown in the ruling.

For the appellants:

M Kean

For the respondent:

F de F Stratton (Crown Counsel, Kenya)

The Attorney-General, Kenya

For interested parties:

PJS Hewett

Daly & Figgis, Nairobi

For the applicants:

Sirley & Kean, Nairobi

Re an Application by Ajit Singh **[1959] 1 EA 782 (SCK)**

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	25 November 1959
Case Number:	13/1959
Before:	Rudd J
Sourced by:	LawAfrica

[1] Criminal law – Autrefois acquit – Charge dismissed through complainant’s failure to attend court – Fresh summons issued at instigation of complainant – Plea of autrefois acquit to second summons – Charge dismissed – Whether case stated is complainant’s proper course to test validity of plea – Criminal Procedure Code (Cap. 27), s. 87 (a), s. 200, s. 204 (K.).

Editor’s Summary

S. filed a complaint in a magistrate’s court that three named persons had assaulted him. The magistrate framed a charge based on the complaint and summoned the three accused to appear and plead before him on April 28, 1959. Two of the accused duly appeared, but neither S. nor the third accused attended the court. The magistrate accordingly dismissed the charge against all the accused, under s. 200 of the Criminal Procedure Code. S. then filed a fresh complaint in the same terms and the accused were again summoned to answer a charge in the same terms. When the accused appeared, the magistrate after hearing argument held that pleas of autrefois acquit had been established and acquitted all the accused. S. then sought unsuccessfully to obtain a case stated or revision and, having failed, applied for leave to move for orders of certiorari and mandamus to quash the finding of autrefois acquit and directing the magistrate to hear the second complaint.

Held – the applicant’s proper course in the present case was by way of case stated which, however, required the consent of the attorney-general; that consent having been refused on reasonable grounds, it would have to be an exceptional case (which this was not) to justify the orders sought.

R. v. Jiwan Nathu and Amrik Singh (1944), 11 E.A.C.A. 62 considered.

Application dismissed.

Cases referred to in judgment

(1) *R. v. Jiwan Nathu and Amrik Singh* (1944), 11 E.A.C.A. 62.

(2) *Kanka v. R.*, Kenya Supreme Court Criminal Appeal No. 215 of 1955 (unreported).

(3) *R. v. Banks*, [1911] 2 K.B. 1095.

Judgment

Rudd J: This is an application for leave to bring a motion for an order or orders of certiorari and mandamus. The facts of the matter appear from the papers to be as follows:

The applicant instituted a private prosecution by way of complaint in the resident magistrate's court at Thika, in which he complained that three persons whom I shall refer to as the accused were guilty of an assault occasioning actual bodily harm, contrary to s. 246 of the Penal Code.

The resident magistrate framed a charge on the basis of the complaint and the accused were summoned to appear or plead to the charge on April 28, 1959.

The applicant did not appear on the said April 28th but two of the accused duly appeared on that day. The resident magistrate thereupon dismissed the charge in accordance with s. 200 of the Criminal Procedure Code. The resident magistrate did not, in the circumstances, consider that steps should be

taken against the third accused who did not appear and dismissed the charge against all three accused.

It is admitted that the resident magistrate was entitled under s. 200 of the Criminal Procedure Code to dismiss the charge as against the two accused who appeared in obedience to the summons and, although the third accused did not come within the purview of that section, it has been admitted that the dismissal of the charge as against him was also justified in the circumstances. The code is silent as to the orders to be made when an accused person does not appear in obedience to a summons and the prosecutor or complainant also fails to appear. I think that in such a case there is inherent power to dismiss the charge if the court thinks fit so to do. This does not appear to be challenged and no distinction appears to be sought to be made between the position of the two accused who appeared before the resident magistrate on April 28, 1959, and the third accused who did not so appear.

After the charge had been dismissed on April 28 the applicant filed a fresh complaint in the same terms as the one which had originally been made and the accused all appeared to answer a charge which was in the same terms as the charge which had been dismissed. The resident magistrate, after hearing argument on the matter, held that pleas of *autrefois acquit* had been established and acquitted all the accused on that basis.

The applicant then sought the consent of the attorney-general to have the acquittals or findings of *autrefois acquit* tested by way of a case stated but consent was refused on the ground that even if the decisions might have been legally incorrect there had been no satisfactory explanation or excuse for the non-appearance of the complainant on April 28.

The applicant next applied to the Supreme Court for revision but this application failed on the ground that the accused had been acquitted and consequently revision did not lie.

The applicant now seeks leave to move for orders quashing the acquittal of the accused at the second hearing and requiring the resident magistrate to hear and determine the second complaint and charge according to law.

Section 200 of the Criminal Procedure Code reads as follows:

“If in any case which a subordinate court has jurisdiction to hear and determine, the accused person appears in obedience to the summons served upon him, or is brought before the court under arrest, then if the complainant having had notice of the time and place appointed for the hearing of the charge, does not appear, the court shall dismiss the charge, unless for some reason it shall think it proper to adjourn the hearing of the case until some other date, upon such terms as it shall think fit, in which event it may, pending such adjourned hearing, either admit the accused to bail or remand him to prison or take such security for his appearance as the court shall think fit.”

It will be noticed that the section contains the words “dismiss the charge” without stating the effect of such dismissal. It does not, as does the corresponding section in Tanganyika, add words such as “and shall acquit the accused”, nor on the other hand does it state whether or not such a dismissal shall or might be a bar to the filing of a fresh complaint or the framing of a fresh charge alleging the same offence.

The effect of a dismissal under s. 200 of the Criminal Procedure Code was considered by the Court of Appeal in *R. v. Jiwan Nathu and Amrik Singh* (1) (1944), 11 E.A.C.A. 62, which Whitley, C.J., delivering judgment of the court said at p. 64:

“Even if the magistrate had purported to dismiss the charge under s. 200, we are of opinion that such dismissal would not have been a bar to

subsequent proceedings on the same facts in as much as if such had been the intention of the legislature, one would have expected to find words such as 'shall thereupon acquit' as in s. 202 or 'shall forthwith acquit', as in s. 208. It may be asked why s. 200 does not contain some clear provision as to subsequent proceedings on the same facts such as that in s. 87 (a). The answer is, we think, that s. 87 (a) contemplates a withdrawal from the prosecution at any stage before judgment and it was accordingly necessary to specify when there should be an acquittal and when a mere discharge, whereas s. 200 only applies to cases in which the complainant is absent and the prosecution is not commenced at all, in which case there would seem to be no just reason why subsequent proceedings should be barred."

In that appeal, however, it was held that the accused had prior to the trial at which they were convicted been discharged under s. 87 (a) consequent upon a withdrawal of the charge by the prosecutor and that the charges against them had not been dismissed under s. 200 of the Criminal Procedure Code. The extract from the judgment which I have quoted was therefore obiter and is of persuasive effect only and although I have very great respect for the opinions of the members of the court in that appeal, I am bound to say that I have very grave doubt as to the correctness in law of the dicta contained in that judgment as to the effect of a dismissal under s. 200 of the Criminal Procedure Code.

Where the complainant does not appear on the date set down for hearing and the accused does appear, s. 200 requires the subordinate court to do one of two things only, namely to dismiss the charge or to adjourn the proceedings. If an adjournment is ordered and the complainant still does not appear on the adjourned hearing then under s. 204 of the Code the court may "dismiss" the charge, but the effect of that dismissal is not defined and would seem in the circumstances to be no different from a dismissal under s. 200. If the dicta in *R. v. Jiwani Nathu and Amrik Singh* (1) be correct, it would follow that notwithstanding that a charge had been duly and properly dismissed under s. 200, a malicious complainant could repeatedly file complaints in the same terms as the original complaint and that the magistrate would be bound to frame a charge and issue a summons in respect of each complaint notwithstanding that the complainant never appeared on any of the days on which the accused was summoned to appear. I put this point to Mr. Gledhill who appeared before me for the applicant and he was forced to admit that would appear to be the legal position in such a case if his contention were correct that a dismissal under s. 200 was no bar to subsequent prosecution for an exactly similar charge on an exactly similar complaint in respect of the same facts. The only remedy, apart from civil action, would be orders for compensation and costs. I do not think that that can possibly be the correct legal position for, in my opinion, it would be a flagrant violation of the maxim *Nemo debet his vexari pro una et eadem causa*.

It may be pointed out that the extreme and rather unlikely possibility which I have just referred to could be avoided in the case of a mere discharge under s. 87 (a) pursuant to the withdrawal by the prosecutor before the close of the case for the prosecution for in such a case the court has power to refuse to consent to the withdrawal in which case if there were not adduced evidence sufficient to require conviction the accused would be entitled to an acquittal.

Notwithstanding the dicta in the judgment in *R. v. Jiwani Nathu and Amrik Singh* (1), I am respectfully inclined to the view that when a charge is dismissed that is the end of that charge or any resubmission of that charge unless the dismissal is in accordance with some provision of law which provides that the dismissal shall not have that effect or unless the court which orders the dismissal (a) had power to dismiss on terms that the dismissal shall not prevent a fresh charge of the same offence in relation to the same facts being subsequently

presented, which is not the case under s. 200 Criminal Procedure Code, and (b) orders the dismissal in such circumstances or under such conditions as to show that the dismissal was to be a dismissal without prejudice to such a possibility.

I adhere to this opinion notwithstanding that in *Kanka v. R.* (2), Kenya Supreme Court Criminal Appeal No. 215 of 1955 (unreported), O'Connor, C.J., as he then was, dismissed an appeal without stating reasons, where the appellant was convicted of arson and it turned out that there had previously been a dismissal of a similar charge on the same facts under s. 200. The fact of the previous dismissal was not referred to at the trial and the appellant had pleaded not guilty and had not, prior to the appeal, raised any question of res judicata or autrefois acquit. It appears to me that it might be possible to justify the result of that appeal in the circumstances without regard to the effect of a dismissal under s. 200. *R. v. Banks* (3), [1911] 2 K.B. 1095.

However, my view of the effect of a dismissal under s. 200 of the Criminal Procedure Code is not the reason wherefore I have decided to refuse leave to move in this case. It must be admitted that my view is at least open to doubt. If I may make a suggestion, I would say that I think that it would be desirable for the legislature to amend s. 200 in such a way as to provide that a court may if it thinks fit so to do in all the circumstances allow a fresh charge or complaint to be filed subsequently on the same facts notwithstanding the previous dismissal. The main reason for my decision is the fact that the remedies of mandamus and certiorari are discretionary.

In the present case I feel quite satisfied that the orders sought should not be made. The proper remedy is by case stated but that is subject to the consent of the attorney-general which has been refused on reasonable grounds. I think it would have to be an exceptional case to justify an order of mandamus for a retrial in such circumstances, and I do not consider this to be such a case.

This was a criminal case, Her Majesty the Queen is a technical party and her attorney-general has refused his consent to further proceedings. I think that the petitioner should be left in the circumstances to his civil remedy.

I dismiss the application.

Application dismissed.

For the applicant:

J Gledhill

J Gledhill, Nairobi

Fish and Provision Stores Ltd v R [1959] 1 EA 786 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	22 December 1959
Case Number:	892/1959
Before:	Sir Ronald Sinclair CJ and Rudd J

[1] Criminal law – Practice – Irregularity – Neither complaint nor charge sheet signed by magistrate – Summons signed by magistrate with copy of charges annexed thereto served on accused – Whether irregularity is fatal to conviction – Criminal Procedure Code (Cap. 27), s. 89 (3), s. 89(4) and s. 381 (K.).

Editor's Summary

The appellant company appealed against convictions on four counts of contravening the Weights and measures (Sale by Weight and Measure) Rules, 1959. The inspector of weights and measures had signed and submitted to a magistrate a complaint in the form of a police charge sheet. The magistrate did not himself sign the complaint and did not sign a separate charge sheet but a summons was issued under the signature of the magistrate requiring the appellants to appear and answer "a charge as per copy of charge sheet attached" which was a copy of the complaint. On appeal.

Held –

- (i) the complaint should have been signed by the magistrate as well as the complainant in accordance with s. 89 (3) of the Criminal Procedure Code, and as it was not a charge presented and signed by a police officer the magistrate should then have drawn up and signed a formal charge in accordance with s. 89 (4) of the Criminal Procedure Code.
- (ii) the copy of the charges attached to the summons was described in the summons as a copy of the charge and was sufficient compliance in the circumstances with the requirements of s. 89 (3) of the Criminal Procedure Code.
- (iii) the magistrate's omission to sign the complaint and to sign the copy of the charge did not in the circumstances constitute more than an irregularity curable under s. 381 of the Criminal Procedure Code but such an irregularity would be fatal if prejudice is thereby occasioned to an accused person.

Appeal dismissed.

Case referred to in judgment

- (1) *R. v. Tampukiza s/o Unyonga*, Kenya Supreme Court Criminal Case No. 76 of 1958 (unreported).

Judgment

Sir Ronald Sinclair CJ: read the following judgment of the court: The appellant company appeals from conviction and sentence on three counts of selling goods accompanied by a statement of weight which was false contrary to r. 8 of the Weights and Measures (Sale by Weight and Measure) Rules, 1959, and on a fourth count of having in possession for sale pre-packed goods of a kind specified in the Third Schedule of the aforesaid rules which did not bear a statement of the net weight of the goods contrary to r. 5 of the aforesaid rules.

The prosecution was instituted by an inspector of weights and measures who submitted to the

magistrate a complaint in the form of a police charge sheet signed by the inspector of weights and measures. This inspector was not a police officer and the charge sheet must be considered as being a complaint submitted to the court under s. 89 of the Criminal Procedure Code.

The complaint should have been signed by the magistrate as well as the complainant in accordance with s. 89 (3) of the Criminal Procedure Code and as it was not a charge presented and signed by a police officer the magistrate should then have drawn up or caused to be drawn up a formal charge which should have been signed by the magistrate in accordance with s. 89, sub-s. (4).

The magistrate did not himself sign the complaint and did not sign a separate charge. A summons was issued under the signature of the magistrate requiring the appellant to appear and answer “a charge as per copy of charge sheet attached” which was in fact a copy of the complaint.

The complaint merely stated the charge in the form of four counts as if it were a police charge sheet. The counts were expressed in terms appropriate to a formal charge. It clearly stated the particulars of the offences charged without any improper or embarrassing surplusage. The copy attached to the summons was described in the summons as a copy of the charge and in our opinion that was a sufficient compliance in the circumstances with the requirement of s. 89, sub-s (3) of the Criminal Procedure Code that the magistrate should draw up or cause to be drawn up a formal charge containing a statement of the offence or offences with which the appellant was charged. It is somewhat questionable, however, as to whether the signature of the magistrate on the summons alone constituted a signature of the formal charge which was attached to the summons in compliance with the further requirement of s. 89, sub-s. (4) of the Criminal Procedure Code that the charge when drawn up should be signed by the magistrate.

We think that it is possible to argue that in law there was sufficient compliance with this last requirement, but even if such an argument were found to be incorrect, we do not think that the omission by the magistrate to sign a formal charge which had been drawn up under his authority is a defect which necessarily vitiates the whole proceedings. Counsel for the appellant admitted that no prejudice had resulted to the appellant. There was no uncertainty as to the offences to which the appellant was required to plead. The appellant appeared before the lower court by advocate. No question was raised as regards the property of the charge and unequivocal pleas of guilty were entered.

In our opinion the magistrate’s omission to sign the complaint and to sign the copy of the charge could not in the circumstances constitute more than at most an irregularity curable under s. 381 of the Criminal Procedure Code. Such an irregularity would, of course, be fatal if any prejudice had been occasioned thereby to the appellant, but there can be no suggestion of that in this case.

We have considered the judgment of this court in *R. v. Tampukiza s/o Unyonga* (1), Kenya Supreme Court Criminal Revision Case No. 76 of 1958 (unreported), in which it was held, *inter alia*, that the omission of the magistrate to draw up and sign a formal charge pursuant to the complaint was necessarily fatal to the conviction, but it was also held in that case that the plea was not an unequivocal plea of guilty and as the accused had been convicted on his plea it was held that in any case that conviction could not be allowed to stand. The dicta as to the effect of the magistrate’s failure to draw up and sign a formal charge were therefore in a sense obiter.

However, we do not intend in this case to criticise the dicta in *Tampukizas’* case since the instant case is distinguishable in the following respects: in *Tampukiza’s* case the complaint was in narrative form and was not in the proper form of an appropriate charge. Further, in that case no formal charge appears to have been caused by the magistrate to have been drawn up, whereas in the instant case a copy of the charge sheet containing the charge in the form of four counts in proper form was issued under the signature of the magistrate on the summons.

The failure of the magistrate to sign the complaint in accordance with s. 89, sub-s. (3) of the Criminal Procedure Code is, in our opinion, clearly not a fatal defect when no prejudice is occasioned thereby. Certainly it could not vitiate the complaint and, in our opinion, it is merely an irregularity curable under s. 90, sub-s. (2) and s. 381 of the Criminal Procedure Code. It might possibly have vitiated the summons but, if it could have that effect, it was overcome when the appellant duly appeared by advocate and submitted to the jurisdiction of the court by pleading guilty to the charges without objection, the charges being within the jurisdiction of the court.

For these reasons we dismiss the appeal against conviction.

The appellant was fined in the sum of Shs. 500/- in respect of each of the first three counts. We see no reason to interfere with these sentences.

The appellant was fined the maximum of Shs. 1,000/- in respect of the fourth count which read as follows:

“Fourth Charge. Having in possession for sale pre-packed goods of a kind specified in the Third Schedule to the Weights and Measures (Sale by Weight and Measure) Rules, 1959, which did not bear a statement of the net weight of the goods contra r. 5 of the aforesaid Rules.

“Fourth Offence. That Fish and Provision Stores Ltd., at their shop in Donald Avenue, Nakuru, in the Rift Valley Province of the Colony and Protectorate of Kenya had in their possession for sale 10 packets of raisins, 5 packets of lentils, 6 packets of butter beans, 10 packets of sifted tea and 4 packets of coconut, none of which bore a statement of the net weight of the goods and did thereby commit an offence.”

We are informed that the appellant is in a large way of business and that of the considerable number of pre-packed articles in stock for sale by weight and unsold only the items specified in this count were not in order. It was submitted that the shortages were due to some extent to evaporation.

The rules in question were made in the current year and constituted a major change from the law previously in force which did not apply to human food. The appellant has had a shop in Nakuru for fifteen years and had never previously been convicted. In all the circumstances we do not consider that this offence required the imposition of the maximum fine prescribed for it. We, therefore, reduce the sentence on the fourth count to a fine of Shs. 500/-; in all other respects the appeal is dismissed.

Appeal dismissed.

For the appellant:

FRS De Souza

FRS De Souza, Nairobi

For the respondent:

GP Nazareth (Crown Counsel, Kenya)

The Attorney-General, Kenya

Sheikh Jama v Dubat Farah
[1959] 1 EA 789 (CAD)

Division:

Court of Appeal at Dar-Es-Salaam

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Date of judgment: 2 November 1959
Case Number: 45/1959
Before: Forbes Ag P, Gould Ag V-P and Windham JA
Sourced by: LawAfrica
Appeal from: H.M. High Court of Tanganyika–Biron, Ag. J

[1] Costs – Successful party deprived of costs – Inter-pleader proceedings for award of compensation arising from re-settlement scheme – Appeal against judgment dismissed – Order as to costs of trial court varied on appeal on ground that issues should have been framed – Whether variation justified – Indian Code of Civil Procedure, 1908, s. 35.

Editor's Summary

The appellant and the respondent had filed statements of claim in an inter-pleader suit seeking a decision as to the persons to whom compensation should be paid for work done in execution of a Government resettlement scheme. The proceedings in the magistrate's court were protracted. No issues were framed at the commencement of the hearing nor did the magistrate formulate issues in his judgment. The magistrate upheld the appellant's claim for compensation and also awarded him without any objection costs against the respondent. The respondent appealed to the High Court which confirmed the magistrate's decision as to compensation but set aside the magistrate's award of costs to the appellant and substituted "no order as to costs", and ordered that there should be no order as to the costs of the appeal to the High Court, on the ground that had issues been framed the respondent appreciating the true position might not have pursued his claim and the litigation might have been avoided or would not have been so protracted. On further appeal on the question of costs only.

Held – there was no ground for inferring that the magistrate acted unjudicially or on wrong principles in awarding costs to the successful party and accordingly it was not open to the High Court to disturb the magistrate's award of costs when the magistrate's award of compensation was not being varied.

Appeal allowed. Order of the High Court as to costs set aside and magistrate's order as to costs restored.

Case referred to in judgment

(1) *Huxley v. West London Extension Railway Company*, [1889] 14 A.C. 26.

Judgment

The following judgment was read by direction of the court: This was an appeal from that part of a judgment and decree of the High Court of Tanganyika, made in its appellate jurisdiction, which set aside an order of the resident magistrate, Moshi, awarding costs of the suit to the appellant, directed that there should be no order as to the costs in the lower court, and further directed that there should be no order as to costs of the appeal to the High Court. At the conclusion of the hearing we allowed the appeal, set aside the judgment and decree of the High Court in so far as costs were concerned, and ordered that the order

of the learned trial magistrate as to costs should be restored. We also ordered that the present appellant should have the costs of the appeal to the High Court and of the appeal to this court. We now give reasons for our decision.

The matter arose out of a Government resettlement scheme which involved the award of compensation for, *inter alia*, certain water furrows which had been constructed to serve lands formerly occupied by the persons who had been moved in the resettlement scheme. Conflicting claims having been made for the compensation payable, amounting to a sum of Shs. 6,300/-, the district commissioner, Moshi, filed an interpleader suit in the Moshi district court seeking a decision as to the persons to whom compensation should be paid. Statements of claim in the proceedings were filed by the present appellant and the present respondent only. In his statement of claim the present appellant conceded that other persons besides himself, notably one Abdillah Warsama and one Haji Duala, were entitled to a part of the compensation. Subject to these admissions he claimed that he was entitled to “any compensation payable”. The claim was based on construction of the furrows in question.

The respondent in his statement of claim claimed that the “Ishakia Community” as set out in exhibit A thereto, were the only persons entitled to share in the sum of Shs. 6,300/- being held by Government as compensation, and he prayed for the award of the whole of such compensation to him on behalf of this community. Exhibit A which was attached to his statement of claim set out a list of persons alleged to comprise the “Ishakia Association–Moshi”. The claim was based on maintenance and construction of the furrows, it being alleged that the Ishakia community and their dependants

“are the only persons responsible for the construction and maintenance or have any interest in the aforesaid furrows.”

The proceedings in the district court were a long-drawn out affair. The contest was between the two parties to this appeal, the original plaintiff (the district commissioner) having been discharged at the outset of the hearing from all liability to the parties, and the parties for the purpose of the hearing being declared to be “Sheikh Jama, Plaintiff, Dubat Farah, Defendant”.

The hearing commenced on June 13, 1956, and continued intermittently to November 8, 1957. No issues were framed at the commencement of the hearing nor did the learned magistrate formulate issues in his judgment. Apart from the statement filed by the district commissioner, Moshi, there was no evidence before the court as to the scheme of compensation which it was being asked to implement. The present appellant himself gave evidence and called witnesses to substantiate the allegations in his statement of claim. The present respondent also gave evidence and called one witness. In the course of his evidence he expressly abandoned any claim to have constructed the furrows and stated that his claim was based on maintenance alone, maintenance alleged to have been carried out by the people mentioned in exhibit A to his statement of claim. None of the persons mentioned was called to give evidence, nor was there anything to substantiate the respondents claim to be acting as representative of that community except his statement in evidence: “I am an elder of the Ishakia community and I have been so for 12 years”. It is not surprising that in the result there was confusion as to the nature of the scheme and the basis of compensation, which is reflected in the judgment of the learned resident magistrate. With great respect to the learned resident magistrate, the judgment is not a satisfactory document, and Mr. Reid, who appeared in this court for the appellant, did not suggest that it was more than “a commonsense settlement on the material available”. The learned magistrate by his judgment awarded Shs. 700/- compensation to the Abdillah Warsama mentioned in the present appellant’s statement of claim, and a further Shs. 700/- compensation to a Mrs. Asha Ahmed, who, we were informed, was the widow of the Haji Duala, mentioned in the present appellant’s statement of claim. The remainder of the compensation available, amounting to Shs. 4,900, was awarded by the learned magistrate to the present appellant, Sheikh Jama, who, he held, had

proved himself entitled solely to the compensation for three of the furrows in question. The learned magistrate further held that there was

“nothing whatever in the evidence to show that Dubat Farah as representing the Somali Community is entitled to any compensation”,

and he rejected the evidence of the respondent Dubat Farah as contradictory and unimpressive and unworthy of any weight.

It was to be inferred that he awarded compensation on the basis of construction of the furrows, and not on the basis of maintenance or of construction and maintenance.

The learned magistrate’s note of the proceedings after his judgment had been read is as follows:

“Mr. Reid. I ask for costs. It has been found that the claimant Dubat Farah had no grounds whatsoever. This suit is entirely due to his unfounded claim. I ask for taxed costs.

“Mr. Cassidy. I have nothing to say.

“Court. I think I must grant Mr. Reid’s application and I award him the costs of the suit as taxed.”

The present respondent appealed against the learned resident magistrate’s decision, and the matter came before the High Court in April, 1959. The learned judge of the High Court held on appeal that the learned resident magistrate’s decision as to compensation was to be supported, and there has been no appeal against this part of his judgment. As to costs, however, he said, after rightly criticising the omission of the resident magistrate to frame issues:

“Had issues been framed, however, the parties would have known at the outset what the court considered entitled a party to compensation.

“Although in his statement of claim the appellant is apparently setting up that he and the persons whom he represents and for whom he is claiming, were responsible for the construction of one of the furrows, the Sanya River Furrow, in his evidence he expressly disclaims having constructed the furrows and expressly bases his claims on maintenance alone. And learned counsel for the respondent concedes that the persons for whom the appellant is claiming or some of them, may have assisted in maintaining the furrows.

“It is quite possible then, that had it been made clear at the outset that maintenance only would not be considered by the court as entitlement to compensation the appellant would not have pursued his claims and this litigation may have been avoided. At least it would not have been so long drawn out and protracted at such cost to the parties.

“In the circumstances I do not consider it fair and equitable that the respondent’s cost should be borne by the appellant on top of his own, and I find myself unable to support the lower court’s award of costs to the respondent. The order of the lower court awarding costs to the respondent, is accordingly set aside and the following order is substituted. ‘No order as to costs’. In all other respects the appeal is dismissed. Likewise in respect of this appeal I make no order as to costs.”

It is this part of his decision which was challenged before us.

Costs of, and incident to all suits are in the discretion of the court, but where the court decides that any costs shall not follow the event the court must state its reasons in writing (Indian Code of Civil Procedure, s. 35). The ordinary rule in inter-pleader proceedings is the same as in other suits, that is, that the

unsuccessful party pays the costs of the successful party, though the matter is one for the discretion of the court. (Halsbury's Laws of England (3rd Edn.), Vol. 22, p. 489). Where a trial court has exercised its discretion, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. (*Huxley v. West London Extension Railway Co.* (1) (1889), 14 A.C. 26). In the instant case the learned magistrate did not, it is true, give reasons for his award of costs to the successful party. There is, however, no reason to assume that he therefore acted unjudicially or upon wrong principles. He was under no legal obligation to give reasons as would have been the case if he had deprived the successful party of his costs; and Mr. Cassidy, learned counsel for the respondent at the trial, did not put forward any grounds for departing from the usual rule that costs follow the event. We could see no ground for inferring that the learned magistrate did not act judicially in awarding costs to the successful party. Accordingly, we thought that it was not open to the learned judge of the High Court to disturb the learned magistrate's award of costs when he had not varied the learned magistrate's award of compensation. Further, it did not seem to us that the reason given by the learned judge for the making of the order as to costs was a valid one. On the pleadings put in by the present respondent, the issue clearly arose as to whether compensation should be awarded on the basis of construction only of a furrow, or on the basis of construction and maintenance of the furrow. So far as can be judged from the statement filed by the original plaintiff, compensation might be payable in respect of either construction, or maintenance, or both. Had the learned magistrate framed issues as he ought to have done, the basis of compensation would, no doubt, have been one of the issues, but the hearing would not, so far as we can see, have been shortened to any appreciable extent as a result. The learned magistrate could hardly decide the point without hearing evidence and argument. The whole proceedings were rendered necessary because of the claim put forward by the present respondent, which claim was, in the event, rejected in its entirety. We could see no justification for depriving the successful party of his costs.

We accordingly were of opinion that the learned judge was wrong to vary the decision of the learned magistrate regarding the award of costs, and we directed that the order of the learned magistrate must be restored. The result of this was that the present respondent's appeal to the High Court was dismissed in its entirety. In these circumstances we were of opinion that the present appellant was entitled to his costs of the appeal to the High Court and that the learned judge's order as to those costs must be varied accordingly.

Appeal allowed. Order of the High Court as to costs set aside and magistrate's order as to costs restored.

For the appellant:

A Reid

A Reid, Moshi

For the respondent:

Harjit Singh

Harjit Singh, Dar-es-Salaam

Sardar Mohamed v Charan Singh Nand Singh and another
[1959] 1 EA 793 (SCK)

Division: HM Supreme Court of Kenya at Nairobi
Date of judgement: 18 December 1959
Case Number: 51/1959
Before: Farrell J
Sourced by: LawAfrica

[1] *Practice – Review – Application for summary judgment – No attendance of defendants – Judgment entered – Judgment set aside by magistrate exercising powers of review under O. 44 – Civil Procedure Ordinance (Cap. 5), s. 80 and s. 81 (1) (K.) – Civil Procedure (Revised) Rules, 1948, O. IX r. 10 and r. 24, O. XXXV, O. XLIV r. 1 (K.) – Indian Code of Civil Procedure, 1908, s. 114, O. 47, r. 1.*

Editor’s Summary

The appellant filed a notice of motion for summary judgment under O. XXXV of the Civil Procedure (Revised) Rules, 1948. When the motion came on for hearing the respondents were absent and their advocate informed the court that he had no instructions and withdrew from the case. The magistrate thereupon entered judgment for the appellant. By notice of motion which was not instituted under any order or rule the respondents applied to the court for setting aside the judgment. The magistrate purporting to exercise his powers of review under O. XLIV set aside the judgment. On appeal it was argued on behalf of the appellant that the application to set aside judgment might fall within O. IX, r. 10 or r. 24 but it was submitted for the respondents that the application had always been for review under O. XLIV.

Held –

- (i) section 80 of the Civil Procedure Ordinance confers an unfettered right to apply for review in the circumstances specified and an unfettered discretion in the court to make such order as it thinks fit.
- (ii) when a rule made by the rules committee pursuant to s. 81 (1) of the Civil Procedure Ordinance is capable of two constructions, one consistent with the Ordinance and the other inconsistent, the court should lean to the construction which is consistent on the principle “ut res magis valeat quam pereat”. *Chajju Ram v. Nekki and Others* (1922), 49 I.A. 144 distinguished.

Appeal dismissed.

Cases referred to in judgment

- (1) *Chajju Ram v. Nekki and Others* (1922), 49 I.A. 144.
- (2) *Spira v. Spira*, [1939] 3 All E.R. 924.

Judgment

Farrell J: This is an appeal by the original plaintiff from an order of the learned magistrate setting aside a judgment entered against the respondents, the original defendants, on an application for summary

judgment under O. XXXV.

The plaint was filed on May 29, 1959, and both defendants entered appearance on July 23, 1959, by their advocate Mr. R. R. Shah.

On July 27, the plaintiff filed a notice of motion for summary judgment under O. XXXV for hearing on August 7 at 9 a.m., and this was duly served on the defendants' advocate, Mr. Shah. Mr. Shah was not able immediately to make contact with his clients, and on August 4, wrote the following letter:

“A

4th August, 1959.

Messrs. Charan Singh Mohinder Singh & Co.,
Nairobi.

Dear Sirs,

Re: R.M.C.C. No. 4389 of 1959.

S.A. Sardar & Co. v. Yourselves.

I have been trying to contact you since July 28 but so far without any success.

The plaintiff firm has applied for summary judgment. The application will be heard on August 7, 1959, at 9.00 a.m.

Unless I have full instructions by 12.00 noon on August 6 I regret I shall be obliged to withdraw from the case.

Please treat this matter as extremely urgent.

Yours faithfully, (Sgd.) R. R. Shah.”

This letter was received on August 5, by the first defendant, who states in an affidavit, that he had been “Entrusted by the second defendant in the defence of the suit”. He further states that he was informed by Mr. Shah that there was insufficient time for him to file a counter affidavit before the hearing fixed for August 7, and he proposed accordingly to give viva voce evidence in opposition to the notice for summary judgment. Unfortunately, while he was on the way to the court, his car broke down, and he arrived some 20 minutes late. When the motion came on for hearing, Mr. Shah who was present informed the magistrate that he had no instructions. The magistrate thereupon entered judgment for the plaintiff.

On August 11, the defendants gave notice of change of advocates, and on the same date their present advocates filed a notice of motion to set aside the judgment entered on August 7. This notice was supported by an affidavit explaining the reasons for the defendants’ non-appearance on August 7, and setting out detailed grounds of defence.

At this stage no decree had been extracted but the decree was duly passed on August 14. The plaintiff filed a counter affidavit on August 20, and the notice was heard before the same magistrate on August 24. After hearing argument the learned magistrate, on August 20, purporting to exercise his powers of review under O. XLIV, set aside the judgment. The plaintiff now appeals from that order.

The notice of motion to set aside the judgment was not instituted under any order or rule, and both before the magistrate and in this court, the plaintiff’s advocate argued the case partly upon the footing that the application might fall within the provisions of O. IX, r. 10 or r. 24 of O. IX. The defendants’ advocate has, however, made it clear that the application is and always was for review under O. XLIV and has disclaimed any intention to rely on either of the rules under O. IX.

Order XLIV, r. 1 is in identical terms with the Indian O. XLVII, r. 1, except for an additional sub-paragraph in the Indian rule which is of no importance. A number of decisions on the Indian rule were cited on both sides, the most important of which is the decision of the Privy Council in *Chajju Ram v. Nekki and Others* (1) (1922), 49 I.A. 144, the headnote of which, as far as material, reads:

“Order XLVII, r. 1 of the Code of Civil Procedure, 1908, must be read as in itself definitive of the limits within which review of a decree or order is now permitted, and the words ‘any other sufficient reason’ mean a reason sufficient on grounds at least analogous to those specified in the rule . . .

Reference to decisions as to the jurisdiction in review under earlier and different enactments is misleading and the conflicting decisions establish no settled rule of practice.”

It is not difficult to point to earlier decisions in which a more liberal construction has been given to the words in question, and even in subsequent cases the principle laid down by the Privy Council does not always appear to have been observed. But so far as the Indian legislation is concerned, the principle of construction laid down by the Privy Council must in any case prevail.

The learned magistrate in his ruling purported to follow this construction and held that the grounds disclosed in the present case were analogous to the first ground specified, namely, the discovery of new and important matter or evidence. Before considering whether he was right in so holding, it is necessary to examine the relevant provisions of law in force in the Colony.

As I have clearly pointed out, there are no material differences between the Indian O. XLVII, r. 1 and our own O. XLIV, r. 1, and *prima facie*, the decision of the Privy Council as to the construction of the relevant words of the Indian rule must apply to the construction of identical words in the Kenya rule. There is, however, one vital difference between the Indian legislation and our own. Section 114 of the Indian Code of Civil Procedure which confers the power of review and corresponds to s. 80 of our own Civil Procedure Ordinance, opens with the words “Subject as aforesaid” which can only refer to the opening words of the preceding section in the same part, “Subject to such conditions and limitations as may be prescribed”. “Prescribed” is defined in s. 2 as meaning prescribed by rules, and it is the presence of these words which justifies the Privy Council in holding that the O. XLVII, r. 1 is ‘definitive of the limits within which review of a decree or order is permitted’. Section 80 of the Civil Procedure Ordinance, however, contains no such introductory words. The section reads as follows:

“Review 80. Any person considering himself aggrieved:

- (a) by a decree or order from which an appeal is allowed by this Ordinance, but from which no appeal has been preferred: or
 - (b) by a decree or order from which no appeal is allowed by this Ordinance,
- may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

In terms this section confers an unfettered right to apply for review in the circumstances specified and an unfettered discretion in the court to make such order as it thinks fit. The omission of any qualifying words at the beginning of the section appears to have been deliberate, since the section is obviously based on s. 114 of the Indian Code, which is qualified, and similar qualifying words appear in a number of other sections of the Ordinance—e.g. s. 22, s. 38, s. 52 and s. 78.

Under s. 81 (1) of the Ordinance, the rules committee has power to make rules “not inconsistent with the provisions of this Ordinance”. If a rule is inconsistent it is to that extent *ultra vires*; and if the Ordinance confers an unfettered power, a rule which limits the exercise of the power is *prima facie* inconsistent with the Ordinance and *ultra vires*. If, however, a rule is capable of two constructions one consistent with the provisions of the Ordinance, and one inconsistent, the court should lean to the construction which is consistent on the principle “*Ut res magis valeat quam pereat*”. If the words “Or for any other sufficient reason” can be given a liberal construction, there is nothing in O. XLIV, r. 1 (1) in any way inconsistent with s. 80 of the Ordinance. The paragraph is perhaps unnecessary, but serves to make it clear that at least the

two grounds specified are such as would entitle an aggrieved party to apply for review. The question is whether in view of the Privy Council's decision in *Chajju Ram v. Nekki and Others* (1) it is open to the court to give them such a liberal interpretation. In my opinion the decision of the Privy Council in that case, although the words to be construed are identical, is not in pari materia owing to the essential difference between the wording of s. 114 of the Indian Code and s. 80 of the Kenya Ordinance. It is by no means certain that the Privy Council would have given the words a similar construction in the context of the Kenya legislation, and that being so the decision is not binding on this court.

The learned magistrate in his ruling found that due to no fault of the applicant he was prevented from attending court when the decree was passed, and that this was sufficient cause for setting aside the decree. While I would not necessarily have reached the same conclusion, since in my view there was no valid reason why an affidavit should not have been filed in time, nevertheless, there is no reason to suppose that the applicant would not have been permitted to give his evidence viva voce and I am not prepared to dissent from the learned magistrate's finding, nor do I consider that I am called upon to review it in the interests of justice. The learned magistrate also held that the reason was analogous to the first of the grounds specified in the rule. I am doubtful whether this is a correct conclusion, but in view of the construction of the rule which I have adopted, it is unnecessary for me to make any decision on this point.

Mr. Khanna raised certain other objections to the application for review. He points out that at the date when the application was filed no decree had been drawn up. The decree was in fact drawn up three days later and ten days before the hearing of the application, and in my view any irregularity there may have been in this respect was cured when the decree was passed. He has also argued that once a decision has been given on the merits, the matter is *res judicata*: but this argument while it may be a valid one against setting aside a judgment under O. IX, r. 10 or r. 24, appears to ignore the essential nature of review. The case on which he particularly relied *Spira v. Spira* (2), [1939] 3 All E.R. 924 is a decision on the English O. XXVII, r. 15, which corresponds to our O. IX, r. 10 and has no relevance to review.

I need only add that notwithstanding Mr. Shroff's admission that a summary judgment under O. XXXV cannot be set aside under O. IX, r. 24, I am by no means satisfied that this rule is inapplicable. Under O. IX, r. 17 (i) (a) where the plaintiff appears and the defendant does not appear when the suit is called for hearing, the court may proceed *ex parte*. In this case the advocate for the defendants was present, and said he had no instructions. Under O. V, r. 1 (2) (i) a party may appear "by an advocate duly instructed". Mr. Shah was not duly instructed, and accordingly there was no appearance, and the application was heard *ex parte*. Under O. IX, r. 24 when a decree is passed *ex parte*, the defendant may apply for an order to set it aside: and if he satisfies the court that he was prevented by any sufficient cause from appearing when the suit was called for hearing, the court must set aside the decree. There is no reference in the rule to "default" as there is in r. 10 and the only doubtful point is whether on an application under O. XXXV, it can be said that the suit was called for hearing. As the defendants have expressly declined to rely on this rule, I do not propose to express an opinion on this point, since it has not been argued before me.

For the reasons given, the appeal will be dismissed with costs, and the case is remitted to the magistrate for a date to be fixed for the further hearing.

Appeal dismissed.

For the appellant:

DN Khanna

DN & RN Khanna, Nairobi

For the respondents:

H Shroff

EP Nowrojee, Nairobi

Malungu s/o Kieti v R
[1959] 1 EA 797 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgement:	25 November 1959
Case Number:	182/1959
Before:	Forbes V-P, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya–Pelly Murphy, J

[1] Criminal law – Murder – Misdirection – Intoxication – Incapacity to form specific intent – Burden of proof.

Editor’s Summary

The appellant was convicted of murder. The evidence established that the appellant was drunk at the time he killed the deceased. The assessors were of the opinion that the appellant was incapable of forming the intent necessary to constitute the offence of murder but the trial judge took the view that the onus of rebutting the presumption that he was capable of forming the necessary intention to kill or do grievous bodily harm was on the appellant. On appeal

Held –

- (i) the burden of proving that an accused is capable of forming the intent necessary to constitute the offence of murder always remains on the prosecution.
- (ii) since it was not certain whether the judge on a proper direction would have necessarily reached the same conclusion the conviction of murder could not stand.

Appeal allowed. Conviction of murder and sentence of death set aside and conviction of manslaughter and sentence of ten years’ imprisonment substituted.

Cases referred to in judgment

- (1) *Manyara v. R.* (1955), 22 E.A.C.A. 502.

- (2) *Cheminingwa v. R.* (1956), 23 E.A.C.A. 451.
- (3) *Kongoro s/o Mrisho v. R.* (1956), 23 E.A.C.A. 532.
- (4) *Nyakite s/o Oyugi v. R.*, [1959] E.A. 322 (C.A.).
- (5) *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462.
- (6) *Chan Kau v. R.*, [1955] W.L.R. 192; [1955] 1 All E.R. 266.

Judgment

Forbes V-P: read the following judgment of the court: The appellant was convicted of murder by the Supreme Court of Kenya, sitting at Mombasa, and was sentenced to death. Crown counsel did not seek to support the conviction of murder, and we allowed the appeal to the extent of setting aside the conviction of murder and sentence of death, and substituting a conviction of manslaughter and sentence of ten years' imprisonment. We now give our reasons.

At the trial it was not contested that the appellant had caused the death of the deceased by inflicting on him with a panga five severe wounds. An eyewitness described the attack on the deceased as follows:

"I was wakened by noise of people 'fighting'. One man was shouting: 'you have taken my money and when I ask you for it you won't give it'.

The voice was *accused's*.

"I got up and went out. I saw two men coming out from Muthami

Musyoki's house. They were running—first Muthami and then accused, the accused following Muthami.

“My brother Kisomo arrived.]

“Muthami was cut by accused with a panga. I saw this happen while they were running. I saw accused cut him four times. Muthami fell down.”

The appellant did not give evidence or make a statement from the dock, but in a statement to the police, which was put in evidence he said:

“and that night about 8 o'clock or 9 o'clock I went and cut him with a panga, and at the time I cut him I did not know what I was doing because I had drunk beer. Then when I was going home to Kitui I realised I had done bad.”

That he was drunk was confirmed by the prosecution witnesses. The eyewitness referred to above stated that at the time of the attack on the deceased the appellant “spoke like a drunken man in a loud voice” and that he (the witness) thought the appellant was drunk. Another witness stated that at about 4 p.m. in the afternoon before the attack on the deceased (which apparently took place at some time after 8.30 p.m.) he saw the appellant in a beer shop drinking native beer, and that the appellant was then very drunk. The question whether the appellant was so drunk as to be incapable of forming an intention to kill or to do grievous harm was therefore clearly in issue.

As to this, the learned trial judge instructed the assessors as follows:

“Finally, you must consider the question of whether or not the accused, at the time when he inflicted those injuries on Muthami, was so drunk as to be incapable of forming an intention to kill or to do grievous bodily harm. This is a quite separate and distinct issue from the question of provocation. Normally drunkenness is no excuse for the commission of a crime. But if, by reason of intoxication, the accused was incapable of forming such an intention, the killing would amount in law to manslaughter, and not to murder. Evidence of drunkenness falling short of a proved incapacity in the accused to form the intent and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.

.....

“As I have indicated to you, it is for the accused to rebut the presumption that he was capable of intending the natural consequences of his acts. The burden of proof laid upon him in this matter is that he must at least establish the probability that, because of his intoxication, he was incapable of forming the necessary intention.”

In the course of his judgment the learned judge said:

“The most difficult question in this case is whether or not the accused at the time of committing the offence was so drunk as to be incapable of forming the intention to kill or do grievous bodily harm.

.....

“In my opinion the evidence that, almost immediately after the killing the accused realised that he had killed the deceased and was threatening to kill another man, points very strongly to the conclusion that at the time of the killing the accused intended to do what he did. I have weighed that evidence against the other evidence as to the accused's state and I have come to the conclusion that all the evidence on this point falls short

of a proved incapacity in the accused to form the intent and merely establishes that his mind was affected by drink so that he more readily gave way to his passion—that passion being the result of a grievance of some duration—and does not rebut the presumption that he intended the natural consequences of his acts. In my judgment the accused knew what he was doing and did intend to kill or do grievous harm to the deceased when he killed him.

“Directing myself in law as I directed the assessors in my summing-up, I find the accused guilty of the offence with which he is charged.”

With the greatest respect to the learned trial judge these passages constitute a serious misdirection in law. It is well established by a series of decisions of this court that the burden of proving that an accused was capable of forming the intent necessary to constitute the offence of murder always remains on the prosecution. *Manyara v. R.* (1) (1955), 22 E.A.C.A. 502; *Cheminingwa v. R.* (2) (1956), 23 E.A.C.A. 451; *Kongoro s/o Mrisho v. R.* (3) (1956), 23 E.A.C.A. 532; *Nyakite s/o Oyugi v. R.* (4), [1959] E.A. 322 (C.A.). The rule applies the statement of the law by the House of Lords in *Woolmington v. Director of Public Prosecutions* (5), [1935] A.C. 462, and by the Privy Council in *Chan Kau v. R.* (6), [1955] 2 W.L.R. 192, the relevant passages from which are cited in *Kongoro’s* case (3). In *Cheminingwa’s* case (2), in a passage cited with approval in *Kongoro’s* case (3), this court said:

“It is of course correct that if the accused seeks to set up a defence of insanity by reason of intoxication, the burden of establishing that defence rests upon him in that he must at least demonstrate the probability of what he seeks to prove. But if the plea is merely that the accused was by reason of intoxication incapable of forming the specific intention required to constitute the offence charged, it is a misdirection if the trial court lays the onus of establishing this upon the accused.”

In the instant case, despite the misdirection in the summing-up, all three assessors were of the opinion that the accused was incapable of forming the intent necessary to constitute the offence of murder. The learned judge, as he stated in the passage from his judgment cited above, regarded this question as “the most difficult question in this case”. There was evidence in the case on which the learned judge could have come to the conclusion that the appellant was capable of forming the intent to kill notwithstanding the drink he had consumed, but it is by no means clear that the learned judge would necessarily have reached this conclusion, in disagreement with the assessors, if he had given himself a proper direction on the matter.

In the circumstances we were of opinion that the conviction of murder could not stand.

Appeal allowed. Conviction of murder and sentence set aside and conviction of manslaughter and sentence of ten years’ imprisonment substituted.

The appellant in person.

For the respondent:

GP Nazareth (Crown Counsel, Kenya)

The Attorney-General, Kenya

Hassan s/o Waliseme and another v R
[1959] 1 EA 800 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgement:	25 November 1959
Case Number:	157/1959
Before:	Forbes V-P, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya–Harley, J

[1] *Criminal law – Procedure – “Trial within a trial” – Procedure in magistrate’s courts and at preliminary enquiries – Criminal Procedure Code (Cap. 27), s. 229 and s. 233 (K.).*

Editor’s Summary

The first appellant was convicted of rape and stealing and the second appellant of rape and defilement of a girl under the age of 16 years. When their appeals were dismissed the court commented on certain observations made by the trial judge in the course of his judgment on the procedure known as a “trial within a trial” and the use of this procedure in magistrate’s courts and at preliminary enquiries.

Held –

- (i) the procedure known as a “trial within a trial” should be adopted at trials before either a judge sitting with a jury or assessors or before a magistrate when the issue of the admissibility of a statement is to be determined.
- (ii) there is no necessity to resort to any procedure similar to a “trial within a trial” at preliminary enquiries.

Appeal dismissed.

Cases referred to in judgment

- (1) *Kinyori s/o Karuditu v. R.* (1956), 23 E.A.C.A. 480.
- (2) *R. v. Hammond*, [1941] 3 All E.R. 318; 28 Cr. App. R. 84.
- (3) *R. v. Murray*, [1951] 1 K.B. 391; [1950] 2 All E.R. 925.
- (4) *Israeli Kamukolse and Others v. R.* (1956), 23 E.A.C.A. 521.
- (5) *R. v. Thompson*, [1893] 2 Q.B. 12.
- (6) *M’Murairi s/o Karegwa v. R.* (1954), 21 E.A.C.A. 262.

Judgment

Forbes V-P: read the following judgment of the court: The first appellant in this case was convicted by the Supreme Court of Kenya on charges of rape and stealing and was sentenced to a total of four years’

imprisonment. The second appellant was convicted at the same time on charges of rape and defilement of a girl under the age of 16 years (different girls being concerned in the respective offences) and was sentenced to a total of seven years' imprisonment. They appealed to this court against conviction and sentence. There was no merit in their appeals, which we accordingly dismissed, but we feel it necessary to comment on certain observations made by the learned trial judge in the course of his judgment on the procedure commonly referred to as a "trial within a trial". The relevant passage in the learned judge's judgment reads as follows:

"It may not be out of place at this point to say something of what is commonly called 'trial within a trial'. I cannot but deprecate in Kenya the spread of this practice far beyond English limits. The phrase to my mind denotes evidence heard by one part of the court (the judge) in the

absence of the other part (the jury or possibly assessors). The principle is that if a statement is inadmissible—as being for instance an improperly induced confession—then its contents should not be heard by the jury. How can this principle apply in the magistrate’s court? Why should questions of fact (not of law) be decided in the middle of the trial?

“To my mind a dictum in the case of *Mwangi v. R.* (1954), XXI E.A.C.A. p. 377 has been interpreted out of context. In that case the court said: ‘The question whether a statement tendered in evidence was or was not made by an accused person is a question of fact, affecting the admissibility of the statement.’ This was not intended to mean that every statement must immediately be tested at the time when it is offered in evidence. If it were so the whole procedure of a court would be disrupted. The dictum does not mean: ‘No untrue statement is admissible in evidence.’

“Perhaps I may quote a simple example of what may happen in a magistrate’s court:

“A police inspector gives evidence that: ‘I kept accused under observation for an hour. He did this and then that’.

“ ‘It is a lie’, interpolates the prisoner.

“ ‘When he was charged’, continues the inspector, ‘he said “It is true”.’

“ ‘I did not’, says the prisoner.

“At what point is the magistrate to invite the prisoner to have his objection heard? There may be two questions to be decided—

(1) Was a statement in fact made?

(2) Was it voluntary?

“Point 2 must of course be decided in such a way as not to prejudice a jury, in cases where there is a jury.

“Question 1 can normally wait for a decision until after it is the turn of the defence to give evidence. I would prefer to limit the suggested application of these remarks to magistrate’s courts and in particular to courts of preliminary inquiry. The practice of other courts has with approval of authority probably gone too far for its progress or for the supporting authority to be reversed. Yet in a court of preliminary inquiry at least, it seems to me wrong during the presentation of the prosecution case to invite objection to a statement alleged to have been made by the prisoner to the police or to any other person. In such court it may happen that he makes no objection: if that fact (even though recorded in the lower court depositions) is not given in evidence in the Supreme Court, it is naturally ignored. Should the fact however, that he has not objected in the lower court be proved in the Supreme Court, the prisoner may then be prejudiced because he is liable to be asked: ‘You said in the lower court that you did not object to the statement. Why do you object to it now?’ I would add at once that in any trial before me I would not allow this argument to operate against an accused person. Nor, if he retracted or repudiated a statement, would I hold it against him if the retraction or repudiation was the result of an invitation in court.

“The prevailing practice in the lower courts—and indeed in the Supreme Court—of inviting a prisoner to object to a recorded statement, to my mind is more likely than not to result prejudicially against an accused person. At least in a court of preliminary inquiry, a prisoner should not be invited to object or to give the grounds of his objection, or to give

evidence in support of those grounds. If he is there invited to object, I suggest that his proper answer is: 'I am at liberty in this court to reserve my defence. This court has no right to call upon me to give evidence, no matter what objections I make, or whatever evidence I refuse to accept as true. I will keep my objections to myself until I appear before the court of trial'."

With respect, this passage appears to disclose some misapprehensions on the part of the learned judge as to one of the reasons for the use of the procedure described as a "trial within a trial".

In the first place the learned judge does not refer to and apparently did not have brought to his attention the recent decisions of this court which not only describe in detail the procedure to be followed in conducting a "trial within a trial" but also point the reason why a similar procedure is to be adopted in a magistrate's court when a question arises as to the admissibility of an extra-judicial statement. In *Kinyori s/o Karuditu v. R.* (1) (1956), 23 E.A.C.A. 480, this court, for the reasons there given reaffirmed the necessity for treating assessors as though they were jurors when the issue of the admissibility of a statement arises, and set out in detail the procedure to be followed in such cases. The procedure indicated in *Kinyori's* case (1) is based on the English practice: *R. v. Hammond* (2), 28 Cr. App. R. 84; *R. v. Murray* (3), [1951] 1 K.B. 391. We may say that in the instant case the procedure followed by the learned trial judge was in accord with that laid down in *Kinyori's* case (1).

The necessity for adopting a similar procedure in trials before a magistrate where questions of the admissibility of extra-judicial statements arise is explained in *Israeli Kamukolse and Others v. R.* (4) (1956), 23 E.A.C.A. 521, at p. 525, where the then learned president of this court said:

"Lastly we must point out that although, as already stated, every one of the accused present at the trial objected to the admission of statements alleged to have been voluntarily made by them to Inspector Manohar Singh Sandhu (who was the investigating officer) and in the case of the first and second appellants, to Inspector Musoke, yet in no case did the learned magistrate try the issue of admissibility by the procedure known as 'a trial within a trial'. In every case he appears to have admitted the statement in evidence and had it read without first asking the accused whether they intended to object to its admissibility. The accused could, therefore, only cross-examine on their allegations of ill-treatment and inducement after the statement had been admitted and could only give evidence in support of their allegations after they had been called on for their defence, thereby exposing themselves to cross-examination on the general issue. The procedure to be followed by all trial courts where an issue of admissibility of such a statement is raised was recently considered at length by this court in *Kinyori v. The Queen*, C.A. 551 of 1955 (unreported). Although in a magistrate's court there is neither jury nor assessors the onus is still upon the prosecution to show that any statement made by the accused and tendered in evidence was voluntarily made and the court must satisfy itself on that issue before admitting the statement."

The phrase "trial within a trial" is perhaps not strictly applicable to the procedure to be followed in a magistrate's court when the issue of the admissibility of a statement is to be determined, since, as the learned trial judge in the instant case remarked, it would normally indicate a trial of the issue by a judge in the absence of either jury or assessors, as the case might be. In *Israeli Kamukolse's* case (4) it was, no doubt, used by the learned president as a convenient phrase to describe the corresponding procedure which must be adopted in a trial in a magistrate's court when the issue of the admissibility of a statement arises, although in such case there is no question of part of the

court withdrawing pending the determination of the issue. The case stated in *R. v. Thompson* (5), [1893] 2 Q.B. 12 indicates that in England also it is the practice in trials before justices at quarter sessions for the issue of the admissibility of a confession to be determined when objection to its admission is taken by the defence. In trials where an accused person is not represented by an advocate it is obviously only fair to the accused for the magistrate or judge, as the case may be, to ascertain whether he desires to take objection to the admission in evidence of a statement before admitting the statement in evidence.

The point taken in *Israeli Kamukolse's* case (4) is explained more fully in *M'Murairi s/o Karegwa v. R.* (6) (1954), 21 E.A.C.A. 262 at p. 264 and p. 265, where this court said:

"In this connection we think it necessary to draw attention to one aspect of the matter which has never been specifically referred to in any of the reported cases. It is this: when the court follows the procedure of a 'trial within a trial', the accused may elect to give evidence and may call witnesses limited to the one particular issue of admissibility and, in such case, neither he nor his witnesses can be cross-examined on the general issue. If, however, his opportunity to adduce evidence is postponed until he is called on to make his defence to the charge then, although he may restrict his own evidence-in-chief and that of his witnesses to the particular issue, yet nevertheless both he and they once in the witness-box are exposed to cross-examination on the general issue. There is obviously a very real danger of prejudice here: the defence may be caught on the horns of a dilemma—if no evidence is given the statement will be admitted and a conviction inevitably follow: if the accused goes into the witness-box, the probability is that he will make such damaging admissions under cross-examination that a conviction is almost as inevitable."

It would seem that the learned trial judge did not appreciate this aspect of the matter.

In view of what we have said, we are unable to approve the learned judge's observations in so far as they relate to trials whether before a judge sitting with a jury or assessors or before a magistrate. In preliminary enquiries, however, entirely different considerations apply and here we find ourselves in agreement with the view expressed by the learned trial judge.

The object of a preliminary enquiry is to disclose the substance of the case which it is proposed to present against an accused person so that he shall not be taken by surprise at his trial. It is not his trial and, as the learned judge remarks, he has every right to remain silent at the preliminary enquiry. The procedure to be followed is set out in s. 229 of the Criminal Procedure Code which provides for the taking down of the depositions "of those who know the facts and circumstances of the case" and confers on an accused person the right to put questions to each witness produced against him and to have the answers of the witnesses to such questions recorded as part of the depositions. By s. 233 the accused person is himself given the right, if he desires to avail himself of it, of making a statement or giving evidence on oath. We see no necessity for resorting to any procedure similar to a "trial within a trial" in the course of a preliminary enquiry. In the normal case it is sufficient, if objection is taken to the admissibility of an extra-judicial statement, for the magistrate to note such objection and include the statement with the depositions. The question whether or not the statement is admissible must be decided by the trial court and even if the statement is excluded at the preliminary enquiry there is nothing to prevent the prosecution seeking to have it admitted at the trial. In the exceptional case where the exclusion of an extra-judicial statement would result in the accused person having no case to answer, the accused (or

his advocate) would, no doubt, cross-examine the witnesses for the prosecution with a view to showing that the statement ought to be excluded, and the accused would also, no doubt, avail himself of the opportunity to give evidence on the point provided by s. 233 of the Criminal Procedure Code. If, on the consideration of the whole of such evidence, the magistrate reaches the conclusion that the extra-judicial statement is not admissible he would then presumably reach the conclusion that the accused has no case to answer and refuse to commit the accused. There is no object to be achieved by trying the issue of admissibility during the course of the preliminary enquiry, and it would seem contrary to the provisions of s. 233 of the Criminal Procedure Code to require the accused to give evidence or make a statement on such an issue. We entirely agree with the learned trial judge that no significance should be attached to the fact that an accused either has or has not taken objection at the preliminary enquiry to the admissibility of a statement.

Appeal dismissed.

The appellants in person.

For the respondent:

GP Nazareth (Crown Counsel, Kenya)

The Attorney-General, Kenya

Remat Nanji Ahmed v R
[1959] 1 EA 804 (HCT)

Division:	HM High Court of Tanganyika
Date of judgement:	28 July 1959
Case Number:	320/1959
Before:	Biron Ag J
Sourced by:	LawAfrica

[1] Street traffic – Vehicle used whilst steering, tyres, brakes and mechanical condition defective – Vehicle owned by firm of which accused sole proprietrix – Whether accused ignorant of state of vehicle can be properly convicted of “causing” vehicle to be used whilst defective – Traffic Ordinance (Cap. 168), s. 36, s. 63 (T.) – The Traffic Rules, r. 29, r. 45, r. 65 (T.) – Indian Evidence Act 1872, s. 105, s. 106 – Indian Acts (Application) Ordinance (Cap. 2) s. 8 – Road Traffic Act, 1930, s. 67, s. 72.

Editor’s Summary

The appellant was charged on four counts with causing a vehicle to be used whilst the steering, brakes, tyres and mechanical condition were defective. It was proved that the vehicle was in the condition

described in the charges, that it belonged to a firm of which the appellant was sole owner and was being driven at the material time by the appellant's son. The appellant's case was that the business was managed by her husband, and her son normally used the vehicle on the firm's business. She denied having caused the vehicle to be on the road as alleged. The magistrate held that the appellant was vicariously liable for the condition of the vehicle and convicted her. On appeal.

Held –

- (i) it is not necessary for the prosecution to prove that the owner of a vehicle which is being driven by an employee in the course of his duties whilst in a defective condition has express knowledge of the condition of the vehicle at the material time.
- (ii) it is in such a case immaterial whether the charge is for “permitting” or “causing” as the owner is equally liable for either offence.

Appeal dismissed.

Cases referred to in judgment

- (1) *Bhatt v. R.*, [1957] E.A. 332 (C.A.).
- (2) *Alimohamed Osman v. R.* (1952), 1 T.L.R. (R.) 391.
- (3) *Small v. Warr* (1882), 42 J.P. 20.
- (4) *Greenwood v. Backhouse* (1902), 66 J.P. 519.
- (5) *Rushton v. Martin*, [1952] W.N. 258.
- (6) *Goldsmith v. Deakin* (1934), 150 L.T. 157.
- (7) *McLeod (or Houston) v. Buchanan*, [1940] 2 All E.R. 179.
- (8) *Shave v. Rosner*, [1954] 2 All E.R. 280.
- (9) *Clark v. Hunter* (1956), S.L.T. 188.
- (10) *Green v. Burnett*, [1954] 3 All E.R. 273.
- (11) *Mousell Brothers v. L. & N.W. Railway*, [1917] 2 K.B. 836.
- (12) *Allen v. Whitehead*, [1930] 1 K.B. 211.
- (13) *Linnett v. Commissioner of Metropolitan Police*, [1946] K.B. 290; [1946] 1 All E.R. 380.

Judgment

Biron Ag J: The appellant was charged with and convicted on four counts under the Traffic Ordinance (Cap. 168 Laws):

- (1) Causing a motor vehicle to be used with defective steering contrary to s. 36 (d) and s. 63.
- (2) Causing a motor vehicle to be used whilst it was not equipped with efficient brakes contrary to s. 36 (a) and s. 63.
- (3) Causing a motor vehicle to be used with defective tyres contrary to r. 29 (j) and r. 65 of the Traffic Rules.
- (4) Causing a motor vehicle to be used when not in proper mechanical repair contrary to r. 45 and r. 65.

She was sentenced on the first count to pay a fine of Shs. 100/- or distress in default, on the second count to a fine of Shs. 50/- or distress in default, on the third count to a fine of Shs. 100/- or distress in default, and on the fourth count to a fine of Shs. 50/- or distress in default. She is now appealing from the convictions and sentences.

The first ground of appeal as set out in the memorandum of appeal is:

“That the learned resident magistrate erred in law in holding that there was a case to answer against the accused.”

The prosecution led evidence to the effect that the appellant was the proprietor of a firm Hooda & Company, that the vehicle with the defects as set out in the charge sheet was found being driven on the

road by a Mr. Hooda, and that the said vehicle was licensed in the name of Hooda & Company. At the close of the prosecution case, learned counsel for the appellant submitted that there was no case to answer. The learned magistrate rejected this submission, stating:

“A *prima facie* case is made out by proof that a vehicle owned by the accused was on the road at the mentioned time. If it was there without her knowing then the burden of . . . (indecipherable) by s. 106 Indian Evidence Act is on accused. The burden may not be so great as that lying on the prosecution. It lies on accused nevertheless. Submission rejected.”

Section 106 of the Indian Evidence Act has been amended by the Indian Acts (Application) Ordinance (Revised Laws Cap. 2–Supp. 56), s. 8 (2) of which reads:

“The Indian Evidence Act, 1872, as applied to the Territory, shall take

effect as if for s. 106 the following section were substituted:

“ ‘106. In civil proceedings, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him’.”

The section then has no application to criminal proceedings. However, s. 105 of the Indian Evidence Act as amended by the same ordinance would apply in such a case. Section 8 (1) of the Ordinance reads:

“The Indian Evidence Act, 1872, as applied to the Territory, shall take effect as if for s. 105 the following section were substituted:

“ ‘105. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

“ ‘Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist; and

“ ‘Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence’.”

As stated by the Court of Appeal in *Bhatt v. R.* (1), [1957] E.A. 332 (C.A.) it is not easy to define what is meant by a “*prima facie* case” but the court goes on to define it as at p. 335:

“... at least it must mean one on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

In this instant case it was established by the prosecution and not apparently contradicted, that the defective vehicle was found to be driven on the road with the defects as set out in the charge sheet, and that it was owned by the appellant. In addition, the driver of the vehicle was a Mr. Hooda, the name being the same as that of the firm owning the vehicle, of which firm the appellant was the proprietress. A reasonable tribunal could then, to my mind, convict the appellant of causing this vehicle to be on the road if no explanation were offered by the defence. The learned resident magistrate therefore was right in ruling that there was a case to answer.

The second ground of appeal as set out in the memorandum of appeal is:

“That the learned resident magistrate erred in convicting the appellant on the charge of ‘causing’ when there is no evidence whatsoever to support the conviction.”

The relevant part of the judgment of the learned resident magistrate reads as follows, and I feel that it is necessary to quote it verbatim:

“It is manifest, and undisputed by the defence that the vehicle in question was being driven by the son of the accused on the day in question, that accused is the owner of the vehicle and that the vehicle was in the dangerous condition revealed by the charges which are fully supported as to those details by the evidence.

“The defence put forward by the accused is that she did not cause the vehicle to be on the road that day, or indeed at all. The vehicle she states

is normally driven by her son in the course of the business of the firm of Hooda & Co. of which firm the accused is the sole proprietor and in the name of which firm the vehicle in question is registered. But, says accused,

“ ‘I take no part in the business of the firm at all, save perhaps to sell in the shop. I know nothing of what goes on. The whole management of the firm including the management of the vehicle I leave to my husband.’ This I accept as true.

“Now had accused been charged with the offence of ‘permitting’ the vehicle to be on the road then the court would have no difficulty in deciding the case lay within the scope of *Alimohamed Osman v. R.* (2) (1952), 1 T.L.R. (R.) 391. But accused is charged with ‘causing’ the vehicle to be on the road and the words of Abernethy, J., on p. 392 of that case make it clear that his subsequent remarks applied to the offence of ‘permitting’ only.

“There is a long line of English cases on the subject of ‘causing’ and the consensus of the decisions therein is undoubtedly to the effect that means rea is an essential ingredient. Guilty knowledge cannot be implied merely because accused had some authority over the matter the subject of the charge: *Small v. Warr* (3) (1882), 42 J.P. 20; nor is a ‘suspicious amount of ignorance’ on the part of one in authority sufficient—*Greenwood v. Backhouse* (4) (1902), 66 J.P. 519. A more recent case on the same lines is *Rushton v. Martin* (5), [1952] W.N. 258. There it is said ‘The justices had found that the defendant had been personally unaware of the condition of the vehicle and it was therefore difficult to understand how they could convict him of causing the vehicle to be on the road in an improper state’.

“Again, passive acquiescence is not sufficient to establish the intent—*Goldsmith v. Deakin* (6) (1934), 150 L.T. 157.

“In the House of Lords decision in *McLeod (or Houston) v. Buchanan* (7), [1940] 2 All E.R. 179 Lord Wright said: ‘To cause the use involves some express or positive mandate from the person causing to the other person, or some authority from the former to the latter arising in the circumstances of the case’.

“Thus it seems clear that to justify a conviction for ‘causing’ there must be some positive mandate or some circumstances from which a specific authority can be inferred.

“The question here is whether there are any circumstances from which the specific authority to use and the specific knowledge of the defects can be inferred. Reluctantly I am bound to say that I do not think they can. The accused is a not infrequent phenomenon of the trading world of the Territory—the titular head of a family business of which she knows nothing. This business construction is indulged in for a number of reasons which need not concern the court in this case but clearly any court must be reluctant to find that the owner of a vehicle can flout laws, affecting the safety of all road users, with impunity merely by wilfully or negligently making him or herself unaware of the manner in which the business of which he or she is the head is conducted.”

Mr. Taylor who appeared for the respondent/Crown submitted that the learned resident magistrate misdirected himself on the law in requiring knowledge of the defects on the part of the owner before the owner could be convicted of causing the vehicle to be used in the defective condition. Mr. Taylor put forward two propositions:

“The first proposition is that these offences of causing or permitting are absolute offences in which the question of knowledge does not arise,

so that all the prosecution has to prove is a defective car on the road owned by the accused, and if they say 'permit' then they have to establish permission, and if 'cause' then they must come within what has been defined as 'causing'."

Mr. Taylor then went on to quote from the judgment of Lord Justice Goddard in *Shave v. Rosner* (8), [1954] 2 All E.R. 280 at p. 281:

"Regulation 72 (1) says that a vehicle

'... shall at all times be in such condition . . . that no danger is caused or is likely to be caused to any person on the vehicle or trailer or on a road.'

"The regulation which imposes a penalty and creates the offence is reg. 101, which says:

'If any person uses or causes or permits to be used on any road a motor vehicle or trailer in contravention of or fails to comply with any of the preceding regulations contained in Part III of these regulations he shall for each offence be liable to a fine not exceeding £20.'

"That is an absolute prohibition; there is no question of negligence."

I have been unable to find the first two English cases quoted by the learned magistrate, as the relevant law reports are not available here. Also, these earlier cases were decided at a time when there was a stricter insistence on the presence of mens rea even in statutory offences, and may not now be regarded as authorities. The "more recent case" quoted by the learned magistrate, *Rushton v. Martin* (5), is not, I think, a relevant authority—as in that case it would appear from the judgment of Oliver, J., that the driver of the vehicle in question was not a servant of the defendant. With regard to the case of *Goldsmith v. Deakin* (6), that again to my mind is not authority for the proposition that knowledge is required in the case of "causing". In that case Avory, J., stated:

"It is in my opinion all-important to bear in mind that under s. 67 the offences of 'causing' a vehicle to be so used and of 'permitting' it to be so used are two separate offences. It may well be that upon the facts of this case it could not be said that the respondent has caused the vehicle to be used in contravention of the statute, but I am satisfied that in the circumstances he was permitting it to be used in contravention of the statute."

That case dealt with an owner hiring out a vehicle, where it was held:

"If an owner hires out an unlicensed vehicle in circumstances in which he ought to know that it will probably be, or may be, used as a stage carriage, and puts his servant in charge of it for use according to the directions of the hirer, the owner is guilty of permitting the vehicle to be used as a stage carriage without the licence required by s. 67 and s. 72 of the Road Traffic Act, 1930, respectively."

The last case quoted by the learned magistrate is *Mcleod (or Houston) v. Buchanan* (7). The learned magistrate after quoting Lord Wright in that case goes on to direct himself:

"The question here is whether there are any circumstances from which the specific authority to use and the specific knowledge of the defects can be inferred."

Mr. Taylor submitted that the learned magistrate misdirected himself in holding

Lord Wright's dictum as an authority for his second proposition that specific knowledge of the defects is necessary. The passage in Lord Wright's judgment at p. 187 reads as follows:

"It is clear that the respondent did not 'cause' his brother to use the van on the road as the brother was doing. To 'cause' the user involves some express or positive mandate from the person 'causing' to the other person, or some authority from the former to the latter, arising in the circumstances of the case. To 'permit' is a looser and vaguer term. It may denote an express permission, general or particular, as distinguished from a mandate. The other person is not told to use the vehicle in the particular way, but he is told that he may do so if he desires. However, the word also includes cases in which permission is merely inferred. If the other person is given the control of the vehicle, permission may be inferred if the vehicle is left at the other person's disposal in such circumstances as to carry with it a reasonable implication of a discretion or liberty to use it in the manner in which it was used. In order to prove permission, it is not necessary to show knowledge of similar user in the past, or actual notice that the vehicle might be, or was likely to be, so used, or that the accused was guilty of a reckless disregard of the probabilities of the case, or a wilful closing of his eyes. He may not have thought at all of his duties under the section."

On the whole I am inclined to agree with the learned magistrate in his construction of that passage. The learned magistrate referred to the Tanganyika case of *Alimohamed Osman v. R.* (2). The relevant passage in the judgment of Abernethy, J., in that case reads:

"The appellant's strongest ground of appeal and the one argued at greatest length by learned counsel for the appellant is the second ground of appeal, which reads as follows:

"The trial magistrate erred in finding that the accused caused or permitted the motor vehicle in question to be used on a highway contrary to s. 29 of the Rules."

"Now, can it be said that the appellant caused or permitted the vehicle to be used on a road whilst its tyres were not properly maintained? If the word 'caused' is interpreted in its ordinary way there is no evidence to show that the appellant caused it to be used in that state. But the question as to whether or not he permitted it to be used on a road with tyres which were not properly maintained is a more difficult one."

The learned judge went on to find that the defendant was guilty of "permitting". Both the learned magistrate and learned counsel for the appellant in arguing this appeal laid great stress on this case, learned counsel for the appellant maintaining that it is on all fours with this instant case. It can, however, be argued that in both the last two cases the dicta of Lord Wright and Abernethy, J., respectively are obiter, as in both these cases the court held the defendant to be guilty of "permitting".

It may equally well be said that Lord Goddard's dictum in *Shave v. Rosner* (8) above quoted is also obiter, as in that case it was held that the defendant had not "caused" the vehicle to be used on the road. The case of *Clark v. Hunter* (9) (1956), S.L.T. 188 as reported in the Current Law Year Book, 1956, would appear to be an unqualified authority for Mr. Taylor's proposition. This is a Scottish case and the Scots Law Times in which it is reported is not available here. As quoted in the Current Law Year Book, 1956, at para. 7759 it reads:

"... a lorry had been found to have a defective handbrake and not to have weight and maximum speed details painted on it. The appellant was

a partner in the firm owning the lorry and had ordered the lorry to be used on the day in question. The High Court of Justiciary (Lord Sorn dissenting in part) *upheld* his conviction for causing the use of the lorry with these defects, holding that knowledge of the defects was immaterial.”

It is clear that had the appellant been charged with “permitting” or “using” there would have been no difficulty in finding her liable. The authority for this last, i.e. “using”, is to be found in the judgment of Parker, J., in *Green v. Burnett* (10), [1954] 3 All E.R. 273). The relevant passage reads:

“... Regulation 75, so far as it is material, provides:

‘... every part of every braking system and of the means of operation thereof fitted to a motor vehicle or trailer ... shall at all times, while the motor vehicle or trailer is used on a road, be maintained in good and efficient working order and shall be properly adjusted.’

“Regulation 101 provides:

‘If any person uses or causes or permits to be used on any road a motor vehicle or trailer in contravention of or fails to comply with any other preceding regulations contained in Part III of these regulations (which includes reg. 75), he shall for each offence be liable to a fine not exceeding £20.’

“It seems clear that while the driver of a vehicle on the road ‘uses’ that vehicle within the meaning of reg. 101, so also, if he be a servant, does his master, whether that master be a private individual or a limited company, provided always that the servant is driving on his master’s business. It cannot be said that only the servant uses and that the master merely causes or permits such use. In common parlance a master is using his vehicle if it is being used by his servant on his business, and there is still room for application of the words ‘causes or permits’ since he may request or permit a friend to use the vehicle. Further applying the well-known test laid down by Atkin, J., in *Mousell Bros. v. L. & N.W. Rly.* (11), [1917] 2 K.B. at p. 845), it seems clear that a prohibition against using in contravention of reg. 75 is absolute in the sense that no mens rea apart from user need be shown to constitute the offence.”

The learned magistrate found himself in difficulty because the appellant had been charged with “causing”.

Leaving aside the question of authorities, I fail to see why, when a defective vehicle is driven by a servant in contravention of the law in the ordinary course of his employment and duties, the liability of his master, in so far as knowledge of the defects is concerned, should be affected by the form of the charge preferred against the master and owner of the vehicle, that is to say, if he were charged with “using” or “permitting” the use of the vehicle, he would be liable, but not if he were charged with “causing” the vehicle to be so used. In fact, in the case of master and servant or an employee, the expression “cause” is more appropriate than “permit”. As indicated by Lord Goddard, C.J., in *Shave v. Rosner* (8) at p. 281:

“I think that, when one finds those two expressions ‘causes’ or ‘permits’ in contrast or juxtaposition, ‘permit’ means giving leave and licence to somebody to use the vehicle, and ‘causes’ involves a person, who has authority to do so, ordering or directing another person to use it. If I allow a friend of mine to use my motor-car, I am permitting him to use it. If I tell my chauffeur to bring my car round and drive me to the courts, I am causing the car to be used.”

On due consideration of the authorities I do not consider myself precluded from holding that where an employee uses or drives his master's vehicle in a defective state in contravention of some regulation, in so far as the knowledge of the master of such defects is concerned, no distinction need be, or should be made between "permitting" and "causing". On these grounds alone I would be quite prepared to uphold the convictions in this instant case. But the matter does not end there. The learned resident magistrate, after directing himself that on his view of the authorities he could not convict the appellant of causing, solely on account of the user by her servant, went on to direct himself that the appellant could be held guilty of vicariously causing the vehicle to be so used because her manager, who was in control of her business, had caused the vehicle to be so used. The learned magistrate stated:

"Now in this case the accused had clearly delegated the complete management of her business including the use of the vehicle to her husband. Thus she has on the face of it, the duty breach of which is alleged being a statutory duty, brought herself within the scope of the test mentioned above. If her manager caused the vehicle to be on the road in that condition then she is liable.

"What evidence is there before the court that the manager caused the vehicle to be on the road? The prosecution certainly have adduced none. But they could not be expected to do so as they were not to know the accused was merely the nominal head of the firm. The fact that she was clearly a matter within her special knowledge and, therefore, it must follow that the burden of establishing that the vehicle was on the road in that condition without the knowledge of the manager was on the defence. This burden the defence have not attempted to discharge, and I find, therefore, the accused to be guilty as charged."

The third ground of appeal as set out in the memorandum of appeal is against such finding and reads:

"That the learned magistrate erred in law that it was for the appellant to prove that the appellant has not caused the vehicle being driven on the road."

If the learned magistrate were saying that because the burden of establishing that the vehicle was on the road in the condition it was without the knowledge of the manager was on the defence, then, because the defence had not discharged such burden he must find the appellant guilty, he would be wrong, as the onus is not on the defence to establish innocence. But I do not think that the judgment should be so construed, or that such was intended by the learned magistrate. All that the learned magistrate appears to be saying is that, in the absence of any evidence that the appellant's husband and manager of her business was not aware of the defects in the vehicle, he was entitled to presume that the husband was aware of such defects. With regard to the learned magistrate's direction that the appellant was vicariously responsible in law for the causing by her husband and the manager of her business, such proposition is, I think, amply supported by the authorities. In *Allen v. Whitehead* (12), [1930] 1 K.B. 211, Lord Hewart, C.J., at p. 220 stated:

" 'I think that the authorities cited by my Lord make it plain that while *prima facie* a principal is not to be made criminally responsible for the acts of his servants, yet the legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute, in which case the principal is liable if the act is in fact done by his servants. To ascertain whether a particular Act of Parliament has that effect or not, regard must be had to the object of the statute, the words used, the nature of the duty laid

down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed'. Applying that canon to the present case, I think that this provision in this statute would be rendered nugatory if the contention raised on behalf of this respondent were held to prevail. That contention was this, that as the respondent did not himself manage a refreshment house and had no personal knowledge that prostitutes met together and remained therein, and had not been negligent in failing to notice these facts, and had not wilfully closed his eyes to them, he could not in law be held responsible . . . This seems to me to be a case where the proprietor, the keeper of the house, had delegated his duty to a manager, so far as the conduct of the house was concerned. He had transferred to the manager the exercise of discretion in the conduct of the business, and it seems that the only reasonable conclusion is, regard being had to the purpose of this Act, that the knowledge of the manager was the knowledge of the keeper of the house."

In *Linnett v. Commissioner of Metropolitan Police*, (13) [1946] K.B. 290, Lord Goddard, C.J., at p. 294 stated:

"There are many cases under the Licensing Acts, the Food and Drugs Acts and other Acts in which convictions have been upheld of persons knowingly permitting certain acts, without any actual knowledge by them, the acts having been knowingly committed by a servant or manager and that knowledge having been imputed to the master or principal. The principal on the line in these decisions does not depend upon the legal relationship existing between the master and servant or between principal and agent; it depends on the fact that the person who is responsible in law, as for example a licensee under the Licensing Acts, has chosen to delegate his duties, powers and authority to another."

The same reasoning can, I think, be applied to this instant case. However, if the earlier ruling of the court is right, that in such a case of causing knowledge need not be established, the husband and manager would be liable for causing even without any evidence express or implied, of knowledge on his part of the defects.

The fourth ground of appeal as set out in the memorandum of appeal is:

"That the learned resident magistrate should have held that there is no evidence to support the conviction."

The evidence was certainly there and the whole case—and, I may add, the appeal—really turned on the legal construction to be put on the term "cause".

The fifth ground of appeal as set out in the memorandum of appeal is:

"In the alternative, the sentence is excessive."

In assessing the penalties and passing sentence, the learned magistrate fully directed himself on the offences, and I see no reason to hold that he was wrong in principle in such direction, nor are the sentences so excessive as to warrant any interference by this court.

The appeal is accordingly dismissed.

Appeal dismissed.

For the appellant:

MS Chaddah

M S Chaddah, Dar-es-Salaam

For the respondent:

AE Taylor (Crown Counsel, Tanganyika)

Mehar Singh Bansel v R
[1959] 1 EA 813 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgement:	13 October 1959
Case Number:	115/1959
Before:	Forbes Ag P, Windham JA and Sir Owen Corrie Ag JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya—Mayers, J

[1] Criminal law – Trial – Irregularity – Assessors asked specific questions but opinions not taken on case generally – Whether irregularity fatal or accused prejudiced – Criminal Procedure Code (Cap. 27), s. 318, s. 381 (K.).

Editor’s Summary

The appellant, a surgeon, was convicted of manslaughter and appealed on grounds of alleged misdirection in the summing-up and the irregular procedure of the trial judge in formulating specific questions for the opinion of the assessors instead of taking their opinions on the case generally which it was submitted was contrary to s. 318 of the Criminal Procedure Code and to natural justice.

Held –

- (i) there had been minor but no material misdirections which would justify any interference with the conviction.
- (ii) section 318 of the Criminal Procedure Code is mandatory in requiring the trial judge to take the opinions of the assessors generally on the case as a whole but there is no objection to specific questions being put to the assessors either before or after a general opinion on the case has been obtained.
- (iii) the irregularity did not cause any prejudice to the accused and was curable under s. 381 of the Criminal Procedure Code.

Appeal dismissed.

[Editorial Note: An application was subsequently made to the Privy Council for special leave to appeal in order to pursue the procedural point taken in this appeal. After hearing counsel, the application was refused.]

Cases referred to in judgment

- (1) *R. v. O'Donnell*, 12 Cr. App. R. 219.
- (2) *R. v. Gusambizi Wesonga* (1948), 15 E.A.C.A. 65.
- (3) *Washington s/o Odindo v. R.* (1954), 21 E.A.C.A. 392.
- (4) *Mohamed Bachu v. R.* (1956), 23 E.A.C.A. 399.
- (5) *R. v. Bourne*, [1939] 1 K.B. 687; [1938] 3 All E.R. 615.
- (6) *Brown and Others v. R.*, [1957] E.A. 371 (C.A.).
- (7) *Habib Kara Vesta and Others v. R.* (1934), E.A.C.A. 191.
- (8) *Miligwa and Another v. R.* (1953), E.A.C.A. 255.
- (9) *Joseph v. R.*, [1948] A.C. 215.
- (10) *Bharat v. R.*, [1959] 3 W.L.R. 406.

Judgment

Forbes Ag P: read the following judgment of the court: The appellant was convicted by the Supreme Court of Kenya on July 10, 1959, of the offence of manslaughter contrary to s. 198 of the Penal Code and was sentenced to serve a term of imprisonment of thirty months. He has appealed to this court against his conviction.

The appellant is a Fellow of the Royal College of Surgeons who was in private practice in Nairobi at the material time. The charge of manslaughter

on which the appellant was tried arose out of the death in his surgery on February 24, 1959, of a young Sikh woman named Pavanjit Kaur, the wife of Gurdip Singh, after an operation performed on her by the appellant for the termination of her pregnancy. The following extract from the judgment of the learned trial judge summarises the case for the Crown and the case for the defence, and sets out the principal circumstances surrounding the death of the deceased:

“Quite shortly, the case for the Crown is that the deceased died by reason of injuries inflicted upon her by the accused in the course of an illegal operation, that is to say an operation having as its object the termination of her pregnancy, otherwise than in a bona fide belief by the accused that the termination of that pregnancy was necessary for the preservation of the life of the deceased or to save her from serious prejudice to her health.

“Alternatively, the Crown alleges that even if the operation admittedly performed by the accused with a view to terminating the pregnancy of the deceased, was performed in the honest belief that it was necessary for the purpose of saving her life, or of preserving her from serious injury to her health, nevertheless in arriving at his diagnosis as to her condition, in the nature and manner of the operation performed by him and in inflicting, as the Crown alleges, two wounds, of which again as the Crown alleges she died, (he) was criminally negligent.

.....

“In equally brief outline, the case for the defence is that the operation performed by the accused was performed in the honest belief that it was necessary for the preservation of the life of the deceased in as much as she was bleeding from the vagina consequent upon a state of inevitable abortion and might have bled to death had not resort been had to surgical intervention to empty her uterus of the products of conception; that this diagnosis was arrived at after an adequate examination and was, in fact, correct; that at least one and possibly both of the wounds which are alleged by the Crown to have been the cause of death were not occasioned by the accused; that the operation was conducted in a proper manner; and that the cause of death alleged by the Crown, shock and haemorrhage from these wounds, may not, in fact, have been the true cause of death.

“The deceased was at the time of her death about twenty-two years of age, living with her husband at a flat in Jackson Road about a mile and a half from the house of her parents in Desai Road. In July, 1958, she had a son, who was at the time of her death about seven months of age. Towards the end of December, 1958, not having had a menstrual flow since October, she consulted a Dr. Haq, who expressed the opinion that she was probably pregnant. Some weeks later she informed her mother of her pregnancy. Shortly before February 24, she had some altercation with her husband, the cause of which was not before the court, and in the course of which she is alleged—with what justification I have yet to hear—to have been beaten by her husband. The relevance of this incident to these proceedings is that it is contended for the defence that it may have led to her attempting to terminate her own pregnancy, or may, as a result of emotional stresses, have occasioned the inception of a miscarriage.

“On the morning of February 24 she was seen by a neighbour, one Avtar Singh, sitting on the floor cleaning her husband’s shoes. Avtar Singh did not notice anything wrong with her, but that may not be of any significance as, although he spoke to her husband he did not say anything to the deceased and therefore is, in my view, not likely to have really noticed how she was looking. The defence elicited from Avtar Singh in cross-examination

that Indian women sit on the ground when in mourning or when feeling ill. I doubt, however, whether it would be proper to draw the inference that the deceased must have been feeling ill from her sitting on the ground, in view of the fact that she was cleaning her husband's shoes. Be that as it may, about 9 a.m. she arrived at her mother's house with her baby, mentioned to her mother that she was going to a photographer in Nairobi to inspect a proof of a photograph and left her baby at her mother's. There was no evidence as to how she travelled from her home to that of her mother, but there was evidence that the nearest bus stop was about 400 yards away. Her mother testified that she appeared to be in normal health and was quite positive that the trousers that she was wearing were not bloodstained. These trousers, which were tendered in evidence and were in fact when so tendered heavily bloodstained in front and in the vicinity of the fork. The accused maintains that when the deceased removed the trousers in the surgery for the purpose of his examining her, he observed that the trousers were soaked in blood and the anaesthetist who was present at the operation performed by the accused on the deceased also claims to have seen blood on the trousers when they were lying on the floor. The mother was, however, quite positive that she could not have failed to observe the bloodstains when the deceased was at her house, had they then been present. I have no doubt at all that had the trousers been bloodstained to anything like the extent to which they now are the mother would have noticed them, but that does not dispose of the possibility that they may have been bloodstained by the time that the deceased arrived at the accused's surgery, as there is medical evidence that assuming the vaginal wound, to which reference will be made hereafter, to have been inflicted before the deceased arrived at the accused's surgery, a blood clot might have formed which stopped bleeding pro tem but which was dislodged in the course of walking, with the result that the bleeding started again. Within a very short distance of her mother's house the deceased was seen and spoken to by a contractor, who was called on behalf of the Crown. Some 20 to 25 minutes later this witness again saw the deceased on a footpath leading to Grogan Road. When seen on the second occasion she was walking normally. Shortly after 10 a.m., probably between 10.20 and 10.30 a.m., the deceased arrived with her husband at the accused's surgery. According to the statement subsequently made by the accused to the police the deceased's husband told him that his wife was pregnant, had been bleeding from her vagina since the night before and complained of pain. The accused then proceeded to examine the deceased per vaginam. As a result of his examination he found the os dilated, blood in the vagina and a membranous portion protruding. On these signs he diagnosed a condition of inevitable abortion and decided that as the deceased was—I quote—'a bit shocked' and was bleeding it was necessary to operate. He therefore telephoned to a Dr. Sohanpal, who lived nearby, and asked him to assist in administering the anaesthetic. Within half an hour Dr. Sohanpal, who was called for the Crown, arrived. According to Dr. Sohanpal the deceased confirmed to him the fact that she had been bleeding from the night before and after satisfying himself as to her fitness to undergo anaesthesia he administered the anaesthetic to her and the accused operated.

"The operation performed was, according to the accused's police statement, a D. & C.—that is to say, a dilatation and curettage. This operation involves the dilation of the os and the removal from the womb of its contents by the use of an instrument known as the curette.

"Prior to the operation the pulse rate and blood pressure of the deceased

were 80 and 110 respectively, which, according to all the medical witnesses, either for the Crown or for the defence were not markedly abnormal in the case of a pregnant woman of the deceased's age.

"The accused, having completed the operation as he thought, successfully, and without incident, when the deceased recovered from the anaesthetic the anaesthetist left. Shortly after 1 o'clock the accused went home for lunch, leaving the deceased alone with her husband in the surgery. On his return about 2.30 p.m. he sent the deceased's husband to collect clothes for her because of the blood-stained condition of her trousers already referred to. About 4 o'clock, when an attempt was being made to dress her, she collapsed and despite efforts to resuscitate her died about 4.30 p.m. From then until about 7 p.m. the body remained in the accused's surgery, nothing being done in the interval by either the accused or the husband of the deceased, except to make attempts, at first unsuccessfully, to communicate with a Mr. Kartar Singh, a relative of the deceased's, with a view to removing the body of the deceased. Mr. Kartar Singh finally arrived at about 7 p.m. and it was suggested to him by the accused that he should stop on the way to the deceased's flat at Eastleigh Police Station with a view to reporting the death. Kartar Singh, however, first took the body to the deceased's flat before making the report to the police. Subsequently the body was removed to the mortuary by the police and a post-mortem was performed by Dr. Rogoff, the police pathologist. At that examination Dr. Rogoff found that the deceased had suffered four wounds. The first, a small perforating wound about ½ in. in diameter in the front of the vagina, about ½ in. below and in front of the mouth of the womb. This wound extended upwards through the left broad ligament into the peritoneal cavity in front of the mid line of the uterus. Secondly, a perforation through the wall of the uterus coming 1 in. above the mouth of the uterus, in a groove through the left broad ligament into the peritoneal cavity 1 in. below the fallopian tubes. The third wound was a series of indentations on to the lip of the cervix of a kind typical of the marks produced by surgical forceps. Fourthly, a tearing of the cervix indicative of the act produced by artificial dilation of the undilated mouth of the womb.

"The third and fourth of these wounds, while of some significance in relation to the performance of the operation, are not to be regarded as of any importance in themselves.

"Dr. Rogoff also found in the peritoneal cavity a quantity of free blood which he estimated at 1 to 1½ pints and in the tissues an accumulation of blood, the quantity of which he estimated at from 1 to 3 pints, extending from the left of the womb to the back of the left kidney. Dr. Rogoff found no other abnormalities capable in his opinion of causing death and therefore diagnosed as the causes of death shock and haemorrhage from the uterus and the vaginal wounds.

"Owing to these wounds having followed substantially the same track and to them having damaged other vessels in the broad ligament, he was unable to express any opinion as to which of those wounds had occasioned the most bleeding. He considered that both vaginal wound and the uterine wound were capable of having been inflicted with an instrument, tendered in evidence, known as the curette, which was subsequently delivered to the police by the accused as one of the instruments used by him in the operation. Dr. Rogoff, however, was of opinion that the wounds had been inflicted within an interval of about half an hour of each other, and that the maximum period of infliction before death was eight hours and the probable period up to about six hours before death. His view that the wounds were inflicted within half an hour of each other

was based on his subsequent discovery that in neither wound were there signs of healing processes having commenced. Inside the womb he found small portions of placental tissue and the head of the foetus.

“Subsequently, the police having been notified of the death of the deceased, efforts were made to contact the accused, at first unsuccessfully, as he had gone out; and ultimately at about 2 a.m. on February 25—i.e., within twelve hours of the death of the deceased—he made a statement to the police at police headquarters. In that statement, which was tendered in evidence, he described the circumstances in which he was consulted by the deceased, already set out, and the operation performed by him, and specifically stated that the only instruments used were dilators and a curette. He further said that the shock which he regarded as the probable cause of death might have been attributable either to the operation itself, or to the haemorrhage, and that the operation was not a dangerous one. In his view, had he not performed the operation when he did the patient might have died. He considered that her condition was such that he did not consider it safe to waste time by seeking another opinion. Had she been taken to hospital he considered that in all probability the same operation would have been performed there.”

In convicting the appellant, the learned trial judge said, at the conclusion of his judgment:

“For these reasons it seems to me impossible to hold otherwise than as has been held by the assessors in this case, that this operation was performed by the accused for some purpose other than the termination with a view to saving the life or preventing from prejudicing the health of the deceased, and that not only was it an illegal operation in that sense of the term, but that it was also an operation which was performed with the grossest of negligence, of such a degree as to indicate a reckless disregard for the life and safety of his patient.

“I therefore find the accused guilty.”

As mentioned by the learned trial judge, the trial was one held with the assistance of assessors. The relevant provisions of the Criminal Procedure Code relating to trials with assessors are contained in s. 318. We will have occasion to refer to the terms of this section later.

A very considerable body of evidence was given in the course of the hearing, a great deal of it being expert evidence of medical witnesses called by the prosecution and by the defence. The hearing of the evidence took some two weeks. Counsel for the appellant and counsel for the Crown then addressed the court, after which the learned trial judge summed up at length to the assessors. This summing-up, which is set out in full in the record, extends to some 105 pages of typescript, and is on the whole, a careful and painstaking review of the relevant law and evidence. It is, nevertheless, the subject of complaint in the appellant’s memorandum of appeal. At the conclusion of the summing-up the assessors retired, and, on their return, the learned judge proceeded to put certain questions to them. The procedure followed at this stage of the trial is the subject of one of the grounds of appeal, and we will revert to it later.

The memorandum of appeal as originally drawn set out five grounds of appeal. Grounds 4 and 5 were in the nature of general complaints and no specific arguments were addressed to the court on them. Grounds 1 and 2, which attacked the form of the information and the choice of assessors, were rightly abandoned, but in lieu a further ground, numbered 2a, was added with the leave of the court. This is the ground which concerns the procedure followed in obtaining the opinions of the assessors. Ground 3 of the memorandum of appeal alleges that “the learned judge misdirected himself and/or the assessors” and sets out in paras. (a) to (r) inclusive the particular matters

complained of as misdirections. These all relate to matters of fact, and it is convenient to deal with this ground of appeal first.

The alleged misdirections are concerned principally with passages in the summing-up to the assessors. Counsel for the appellant stated that he was not making a general attack on the summing-up, which, he conceded, was painstaking and in large measure fair and full. He submitted, however, that in certain directions the summing-up and the learned judge's comprehension of the evidence were ill-balanced and failed to take account of important matters of defence.

The first three matters complained of in para. 3 of the memorandum of appeal, that is, in sub-paras. (a), (b) and (c), can conveniently be considered together, and were so treated by counsel for the appellant. They relate to the second part of the Crown case namely, that the appellant was criminally negligent in the making of his diagnosis and conduct of the operation, and they allege misdirections on the part of the learned judge:

- “(a) in failing to appreciate the significance of or to refer to the admission made by Dr. Candler (P.W. 19) at p. 228 that in the treatment of abortion there are different schools of medical thought; that whereas Dr. Candler, Mr. Ormerod (P.W. 17) and Mr. Duff (D.W. 3) adhered to the ‘conservative’ school, Dr. Yusuf Ali Eraj (D.W. 6) adhered to the surgical school, and as Dr. Candler admitted at p. 228, the treatment is a matter of opinion.
- (b) in his summary treatment (at p. 581) of the evidence of Dr. Yusuf Ali Eraj (D.W. 6) a consultant having the same qualifications as Dr. Candler.
- (c) in failing adequately to deal with the evidence of Dr. Yusuf Ali Eraj who alone of the medical witnesses (other than the appellant) related his medical experience and knowledge to the circumstances of the Asian community in Kenya.”

Four gynaecologists gave evidence during the case. For the Crown, Mr. Ormerod and Dr. Candler were called, and for the defence, Mr. Duff and Dr. Eraj. The expert evidence given by Dr. Eraj was to a large extent in conflict with that of Mr. Ormerod, Dr. Candler, and Mr. Duff. The learned judge very clearly preferred the evidence of the latter three when there was a conflict. The following passages from the summing-up contain the references to the evidence of Dr. Eraj. The first is in relation to the question whether the diagnosis made by the appellant prior to the operation on the deceased was so wrong as to amount in itself to gross negligence, and is as follows:

“Now, I do not think, gentlemen, that it is necessary for me to say very much more about the diagnosis to the operation, although I will have to refer to it a little later in relation to the operation itself. But you will remember that in addition to the views of Dr. Candler and of Mr. Ormerod, that the material revealed by the case notes was not such as warranted a diagnosis of an inevitable abortion and in spite of the answers of Mr. Duff to which I have already called your attention, that in spite of those things another medical witness, Dr. Eraj, he would seem to have wholly endorsed the findings of the accused. He seems to think that the material was sufficient to warrant a diagnosis of inevitable abortion. All that I would say about that medical witness, gentlemen, is that you have seen him in the witness box.”

The second reference relates to the question whether the use of a curette was a matter for criticism. It reads as follows:

“Mr. Ormerod, Dr. Candler and Mr. Duff alike would seem to regard the use of a curette on a woman who was sixteen-weeks pregnant as a matter of grave danger, by reason of the likelihood that in scraping the womb, as Dr. Candler put it ‘You might in taking away the placenta take a bit of the womb itself, and by reason of (it cause) excessive haemorrhage’.

“Dr. Eray whom I have already mentioned and whom I have no doubt you will remember, he seems to regard the use of the curette as a most normal procedure to be adopted in cases of this nature. He would also seem to regard the use of a curette as being not a particularly dangerous matter as it is usually entrusted to the least experienced member of the gynaecological team in any hospital, if he is considered fit by his superiors to do any operation at all at that stage.

“You have these contrasting views. The accused says he used a curette. He has said so all along. It is recorded in his case notes. He said so in his statement to the police on the night of the operation and he has never wavered at any stage as to that. Passages were cited from a textbook which would also suggest the use of a curette was permissible.

“It may very well be therefore from that evidence you will feel that whether the use of a curette is the best method or not, it is not a method which in itself could be regarded as so dangerous as to amount to gross negligence on the part of the accused, but remember even the defence, or one of the defence expert gynaecologists, Mr. Duff, would apparently never use a curette.”

There follows a further review of the relevant evidence, and the learned judge then says:

“So now the separation was done with a curette on his own showing and that, according to the prosecution witnesses at any rate, would be a very dangerous step. That would be a view apparently shared by Mr. Duff who would not go in that way at all. None the less it commends itself to Dr. Eray as being a normal practice.”

Finally, towards the end of his summing-up the learned judge said:

“Next, gentlemen, you will consider this. Was the diagnosis of inevitable abortion warranted on the material before the accused. You have heard the evidence, I have summarised it to you. You will consider whether in view of the evidence before you the making of that diagnosis was or was not in itself gross negligence. If you adopt the view of Dr. Eray, the view that the material before the accused warranted the diagnosis, well then you obviously cannot say there was negligence in making it. If you adopt the view that the accused was mistaken in thinking—honestly mistaken in thinking—this is a case of inevitable abortion you will ask yourselves: Was that a mistake, not only an honest mistake, but a mistake which no one could make unless they had been grossly negligent?

“Whatever your conclusion as to that gentlemen, you will go on to ask yourselves, was the operation performed in such a manner as to indicate gross negligence? You have the account of the accused of exactly what he did. You have the evidence of Dr. Eray that to perform an operation of this nature is not a particularly difficult task and that the operation was thoroughly justified. Against that you have other evidence, including parts of Mr. Duff’s evidence, which would suggest that even if the diagnosis of inevitable abortion was right none the less the proper treatment would have been not to have operated in the accused’s surgery, but to have transported the patient to hospital and not even to have operated immediately, but to wait to see if the bleeding could be controlled in another manner.

“You have further evidence from the Crown medical witnesses that the proper method of clearing the placenta from the uterus wall would have been by using the finger and then the forceps, and you have the evidence of Dr. Eraj that the curette is used as a matter of course in every case. You have Mr. Duff’s evidence that he would use his finger, if he used anything, but he would not have gone in that way at all, but would go in with another form of operation. You will consider whether the technique in using a curette was or was not indicative of gross negligence of the nature to which I have already referred.”

It was conceded by counsel for the appellant that this latter passage was not in itself open to complaint, but he contended that the opening reference to Dr. Eraj was in such contemptuous terms as to preclude the assessors from giving serious consideration to his evidence; that such treatment was not warranted in view of Dr. Eraj’s qualifications and was not justified on the face of the record; that the learned judge gave no reasons for his attitude to Dr. Eraj; and that Dr. Eraj was, like the appellant, a doctor in general practice who knew the conditions of general practice among Asians in Kenya, whereas the other three medical witnesses were specialists who would apply a higher standard of skill and care than was to be expected from a doctor in general practice. We have not had the advantage of seeing Dr. Eraj in the witness box, but he clearly impressed the learned judge very unfavourably, and the learned judge indicated his view to the assessors. However, he left it to the assessors to form their own conclusion as to the credibility of the witness, and took pains to draw attention to Dr. Eraj’s evidence where it was in conflict with that of the other three medical witnesses, again leaving it to the assessors to reach their own conclusion as to which evidence they would accept. In a summing-up to a jury a judge is entitled to express his view of the facts provided he leaves the issues of fact to the jury (*Criminal Procedure Code*, s. 302 (2); *R. v. O’Donnell* (1), 12 Cr. App. R. 219). He must, at least, be entitled to do the same in a summing-up to assessors. We see no reason why a trial judge should not draw the attention of assessors to a witness’s demeanour, which is a material factor in assessing the value of the witness’s evidence. We do not think there is any material misdirection in the passages set out above.

In a trial with assessors the final decision on the facts, of course, rests with the judge. In the instant case the learned judge in his judgment says:

“The views of Dr. Candler, Mr. Ormerod and Mr. Duff above referred to, despite the opinion of Dr. Eraj to the contrary, leave me in no doubt at all that a D. & C. should not be performed in relation to any four months pregnancy except in the direst of emergencies; and that such an operation should not be so performed except in the direst of such emergencies elsewhere than in a hospital.

It is evident that, apart from any question of demeanour, the learned judge preferred, as he was entitled to do, to rely on the evidence of Dr. Candler, Mr. Ormerod and Mr. Duff rather than on that of Dr. Eraj. The conflict in the medical evidence appears on the face of the record and we certainly cannot say the learned judge was wrong in rejecting Dr. Eraj’s version. It is clear that he did not overlook it.

It may be that the standard of skill to be expected in a doctor in general practice is not as high as that to be expected in a specialist, though we doubt whether it can be said that different standards of care should apply. In any case, we are satisfied that the learned judge’s direction in the following passage from the summing-up as to the standard of care to be expected in a doctor was unexceptionable. He said:

“Now, on that evidence it may be that you will conclude that he, accused,

arrived at his diagnosis that this was a case of inevitable abortion on a matter which was not adequate to warrant that conclusion. You will, however, remember this, the accused is not omniscient. The law does not impose upon medical men the intolerable burden of being right on every occasion. The obligation upon the accused, the obligation upon every medical practitioner who undertakes the care of a patient is an obligation to do his best for that patient, to arrive at an honest opinion as to the cause of the patient's complaint, whatever it may be, to form an honest opinion as to the appropriate treatment; but it is not an obligation to be right every time either in his diagnosis or in the treatment which he adopts. So long as a medical man acts honestly in the sense that he does not perform an operation because he wants to earn a fee or he does not say that a condition is other than what he really believes it to be for some other purpose, or that he does not adopt some treatment because it happens to be the one that he thinks more convenient although he thinks that it is not the right treatment for the disease, all that is required of him is to exercise prudence and care of an average standard. He may be wrong. Doctors are not the only people who are sometimes wrong in the opinions that they form about the most important things. It would be intolerable if they had to bear the burden of saying to themselves every time they examined a patient: Now, if I do not come to the right conclusion about this I am liable to at least an action for damages and possibly to find myself standing where the accused is standing now. What you have got to say is this: even if we feel certain that the accused's diagnosis of this as a case of inevitable abortion is wrong, are we entitled to say that it is so wrong as to indicate that he did not honestly form that opinion; or that if he honestly formed that opinion that it was an opinion which he could not properly have arrived at had he used the ordinary degree of care that one expects a doctor to exercise?

"And, as I have said, this being a criminal case, you must bear in mind that the standard of negligence which is necessary to warrant conviction of the accused must be a standard of negligence which is so gross as to go beyond the mere realm of compensation and to amount to a crime against the State because it showed a reckless disregard of human life. In other words, gentlemen, if the accused's diagnosis was wrong you can only say that that fact renders him guilty of the offence with which he is charged, that is assuming because of that wrong diagnosis he did other things that he ought not to have done which resulted in the death of the deceased, if you are certain that the reason that the diagnosis was wrong was that he was completely reckless in the way in which he obtained the material on which he based that diagnosis."

As we have said, we do not think that the learned judge's treatment in the summing-up of Dr. Eraj's evidence amounts to a misdirection. In any case it relates only to the "negligence" aspect of the Crown case, and does not affect the finding that the appellant was in fact performing an illegal operation.

Counsel for the appellant did not press the complaints set out in sub-paras. (d), (e) and (f) of para. 3 of the memorandum of appeal, and it is sufficient to say that we do not think there is any substance in them.

Counsel for the appellant next argued paras. 3 (g), (k) and (l) of the memorandum as a group, and we deal with them together also. Paragraph 3 (m) also falls into this group. The misdirections alleged in these paragraphs are:

"(g) in failing when commenting at p. 586 on the evidence of Dr. Sohanpal (P.W. 7) to refer to the evidence (recorded at p. 60) of this witness that he concurred in the diagnosis of the appellant.

- (k) in failing to appreciate that the curette produced in evidence was neither a sharp nor a pointed instrument nor capable of causing a stabbing wound six inches long from and through the vaginal wall to and through the peritoneum.
- (l) in failing to appreciate that because the appellant admitted using a curette it was not therefore any more likely that the vaginal wound was caused by a curette.
- (m) in suggesting to the assessors that they were entitled to assume that the appellant had in his surgery some instrument likely to cause the vaginal wound.”

The passage in the summing-up which is the subject of the complaint in para. (g) is as follows:

“And the only other thing that I would say about the diagnosis at this stage is this: that diagnosis, we were told in evidence by the accused, was concurred in by Dr. Sohanpal. Dr. Sohanpal may have concurred in that diagnosis, but he has not said so, and the accused did not say so in his original statement to the police. What the accused said in his statement to the police was, when Dr. Sohanpal came he told Dr. Sohanpal what he had found; and explained the operation which he was proposing to do and Dr. Sohanpal appeared to understand what was going to be done. You may think, gentlemen, that that represents what one would expect to happen. You may think that a surgeon who is about to perform an operation will of necessity tell his anaesthetist what he is going to do and why he is going to do it, but you may think to yourselves he is not so likely to say to the anaesthetist: these are the conditions that I found. What do you think of it? Do you think this is an inevitable abortion or is it something else? But, as I say, in the box the accused’s story was that ‘Dr. Sohanpal had agreed with my diagnosis’. Sohanpal himself says as to this. Dr. Sohanpal tells us that he did not examine the lady’s genital organs. He did not examine her at all below the waist. He told us earlier that the deceased had told him she was bleeding. And he says this, he relates how he arrived at Dr. Bansel’s surgery and he says (p. 51 of shorthand note) ‘He told me the lady had been bleeding from her private parts and he wanted to operate on her to stop it bleeding.

‘Q. Did he say anything else about the lady’s condition?

‘A. He said she was bleeding and he wanted to stop the bleeding.

‘Q. You said that. Did he say anything else about her condition?

‘A. He said he had examined her already and she was bleeding from the uterus. The uterus was dilated.

‘Q. Did he mention his own diagnosis in the lady’s case?

‘A. Yes.

‘Q. What did he say?

‘A. He said probably she had an abortion.

‘Q. A case of abortion?

‘A. Yes.

‘Q. Did Dr. Bansel tell you anything more about what he wanted you to do than he had told you on the telephone?

‘A. Yes, he said he wanted to operate on the uterus to stop the bleeding.

‘Q. Did he say what he wanted you to do?

‘A. He wanted me to give an anaesthetic.’

“That does not suggest that Dr. Sohanpal was ever consulted by the accused as to whether the symptoms were such as, in fact, to suggest inevitable abortion, or threatened abortion, or anything else. It does not

even refer to Dr. Sohanpal's having been told that there was any pain. And you may therefore think that Dr. Sohanpal could not have agreed with the diagnosis or with the treatment. I am not suggesting for a moment, gentlemen, that Dr. Sohanpal thought that they were wrong, but you cannot agree about something unless you have been asked about it and he certainly had not got the material, so far as the evidence goes, before him which would enable him to arrive at any conclusion as regards the bleeding and the treatment. It was not Dr. Sohanpal's business, as the anaesthetist, to make any examination of a patient in relation to whom a surgeon had formed a certain conclusion and his business was to find out what was necessary to be known, I suppose, for the purpose of determining what anaesthetic he should use and how he should use it. It was not part of his job to agree as to the diagnosis or otherwise."

The particular complaint is that in saying "Dr. Sohanpal may have concurred in that diagnosis, but he has not said so" the learned judge overlooked the following questions and answers of Dr. Sohanpal in cross-examination:

- "Q. Now doctor you arrived at the surgery of Dr. Bansel and you found him in the process of taking out his instruments and sterilising them?
- "A. Yes.
- "Q. And he gave you the case history and his diagnosis?
- "A. Yes.
- "Q. And he told you that he found that the os was dilated already and there was membrane protruding from it?
- "A. Yes.
- "Q. Now from what he told you, do you agree with him that it was a case of inevitable abortion?
- "A. I think it was right.
- "Q. And when he told you that he intended to evacuate the uterus you agreed that was the correct procedure?
- "A. I thought that was the correct procedure."

It is by no means clear to us that by those answers Dr. Sohanpal meant that he had been consulted by the appellant and had concurred in the diagnosis and proposed treatment. He certainly had not suggested anything of the sort in examination-in-chief. We are inclined to the view that the learned judge's direction was correct. In any event we do not think that, if misdirection it was, it was of any significance. It is clear, as the learned judge was at pains to point out, that Dr. Sohanpal had not examined the patient below the waist and was in no position to form an independent opinion. If he did concur, he concurred on the information given by the appellant. In the judgment the learned judge merely says:

"He therefore telephoned to a Dr. Sohanpal, who lived nearby, and asked him to assist in administering the anaesthetic. Within half an hour Dr. Sohanpal, who was called for the Crown, arrived. According to Dr. Sohanpal the deceased confirmed to him the fact that she had been bleeding from the night before and after satisfying himself as to her fitness to undergo anaesthesia he administered the anaesthetic to her and the accused operated."

This, really, is the essence of this part of Dr. Sohanpal's evidence. We do not think any material misdirection occurred.

As to paras. 3 (*k*), (*l*) and (*m*) which relate to the question whether the curette could have been the instrument which inflicted the fatal injuries, or whether some other instrument might have been used by the appellant, a substantial part of the evidence in the case was concerned with the question whether it

was possible or probable for the curette to have inflicted the vaginal

wound. There was considerable conflict on the point, and the learned judge deals with this evidence at length both in the summing-up and judgment. Counsel for the appellant argued that on the evidence the curette was the only weapon with which the injury could have been inflicted if it was inflicted by the appellant, and that, from a view of the instrument itself, which was before us, it was absolutely incredible that the wound could have been inflicted with it. And he drew attention to an undoubted misdirection in the learned judge's judgment where he says:

"Mr. Ormerod and Dr. Candler alike thought that the vaginal wound could have been made by a curette, by its use in a thrusting motion in such a manner that the serrated edge which it contains was the forward part of the thrust."

Mr. Ormerod and Dr. Candler did indeed think that the wound could have been made by the particular curette which was in evidence although it certainly had no serrated edge which could be "the forward point of the thrust". However, it does not seem to us that any of this is material in view of the learned judge's finding in relation to the curette. It was no part of the Crown case that the vaginal wound had in fact been inflicted by the curette, and the learned judge finds that the probability is that it was not caused by the curette. Dr. Teare had given evidence for the defence as to experiments he had performed to show the improbability of the wound having been caused by the curette, and the learned judge says:

"While I am inclined to the view that Dr. Teare's evidence in this regard is more likely to be accurate than that of Mr. Ormerod and Dr. Candler, by reason of his having performed actual experiments with a curette, it must not be lost to sight that the only evidence that a curette was, in fact, the instrument used is derived from the accused inasmuch as Dr. Sohanpal who was called on behalf of the Crown, while saying that he saw a curette on the table before the operation was none the less precluded by his duties and his position as anaesthetist from seeing what instrument was, in fact, used."

Counsel for the appellant argued that it was unreasonable to find that any instrument other than the curette might have been used by the appellant in view of Dr. Sohanpal's evidence, but in the passage cited the learned judge correctly sets out the effect of Dr. Sohanpal's evidence. There was certainly evidence on which the learned judge could find that the appellant could have inflicted the wound with some instrument other than the curette.

Counsel for the appellant did not press para. 3 (*h*) of the memorandum of appeal.

Paragraphs 3 (*i*) and 3 (*j*) of the memorandum relate to the evidence of the condition of the deceased immediately before her visit to the appellant's surgery. This, and the evidence of the condition the deceased was in when she was at the surgery before the operation, were treated by the learned judge, in our view correctly, as the vital evidence in the case. Paragraphs (*i*) and (*j*) allege misdirections:

- "(*i*) in failing to give any direction at p. 542 and p. 559, or at all, that although the mother (P.W. 4) of the deceased had said that her daughter was in normal health and looked well on the morning of February 24, the witness was 'busy at the water tap' when her daughter called and, accordingly, unable to assess the condition of her daughter.
- (*j*) in failing when directing the assessors as to the evidence of Avtar Singh Virdee (P.W. 3) to mention his statement in evidence that

when he saw the deceased polishing her husband's shoes at 7 a.m. on February 24, 1959, she was seen to rest her head in her hand (p. 27)."

As regards the evidence of the deceased's mother, counsel for the appellant argued that a possible interpretation of her evidence was that she had never seen the deceased at all when the deceased visited her house immediately before going to the appellant's surgery. With respect, we are quite unable to put this interpretation on the mother's evidence as recorded. This evidence was given through an interpreter, but it is quite clear the mother intended to convey that she had seen the deceased. The following questions and answers alone make this clear:

"Q. Were they [i.e. the trousers the deceased was wearing] in any way stained with blood when she was in your house on the morning of the 24th?

"A. No, Sir.

"Q. If they had been so stained in front and between the legs would you have been able to say so?

"A. Yes, I should have seen."

Counsel for the appellant complained that the learned judge in the summing-up gave the impression that mother and daughter were in each others company, while on a fair reading of the mother's evidence the opportunity for seeing the condition of the deceased and the deceased's clothes was almost non-existent. It is true that the learned judge does not mention that the mother said she was at the water tap when the deceased arrived, but he does point out that the deceased was

"not there for very long, but she was there for long enough to say she was going to see the print of the picture taken the day before, or words to that effect."

The mother was clear in her evidence that the deceased during her visit was "cheerful as usual", that she made no complaint about her health, and that her clothes were not then bloodstained. This the learned judge correctly put to the assessors. We do not think that his failure to mention the water tap amounted to a material misdirection.

Paragraph 3 (j) of the memorandum of appeal relates to evidence given by Avtar Singh Virdee of seeing the deceased sitting on the floor cleaning her husband's shoes on the morning of her visit to the deceased's surgery. Counsel for the appellant conceded that the summing-up of this witness's evidence was fair as far as it went, but he complained that no mention was made of a reply, or rather a demonstration, given by the witness. This was in re-examination, and the relevant part of the record reads as follows:

"Q. You have been asked one or two questions about how Pavanjit was sitting on the floor in the flat when you saw her in the morning. Will you describe yourself how she was sitting?

"A. When she was polishing the shoes—I can't remember exactly—she sat once or twice as if she—something like this (demonstrates with head on hand)."

There is nothing to indicate just what position the witness demonstrated, but it can hardly have been of much significance as the point was not pursued either by counsel for the Crown or by the learned judge. The learned judge in his judgment drew no particular conclusion one way or the other from this witness's evidence of the shoe-cleaning incident. Though he does not specifically mention the demonstration, we have no reason to believe that he overlooked it or that it was such that it would have affected his assessment of this part of

the evidence.

Paragraphs 3 (*n*), (*o*) and (*p*) of the memorandum of appeal form the next group of complaints which can be dealt with together. They concern the conduct of the appellant after the death of the deceased, and allege that the learned judge misdirected the assessors:

- “(n) in his direction to the assessors as to how they could assess the credibility of the appellant.
- (o) in view of the appellant’s refusal to sign a death certificate and of the number of persons who were aware on February 24, 1959, of the operation performed by the appellant, that the assessors were entitled to consider whether the conduct of the appellant showed a desire to conceal the death of the patient.
- (p) in his direction to the assessors at p. 621 and p. 622 as to the message left by the appellant as to his whereabouts during the evening of February 24, 1959.”

A considerable amount of evidence was given in relation to the events during the afternoon and evening following the death of the deceased and the conduct of the appellant during that period, and the learned judge deals with this evidence at some length in the summing-up. The Crown suggestion was that the delay in the removal of the body of deceased and the delay in informing the police of the death of the deceased was not consistent with an innocent mind in the appellant. So far as the removal of the body of the deceased was concerned, it does not seem to us that the learned judge’s direction to the assessors is open to complaint by the appellant. He says at one stage:

“Perhaps the delay in relation to the removal of the body will not be regarded by you as a matter of major significance.”

Later, after drawing to their attention an item of evidence which might have some significance, he says:

“On the other hand you will remember the deceased’s husband and the accused were no doubt both very naturally in a state of considerable distress and when people are distressed they do not always do exactly the right thing which they would have done if they had been free from emotional tension.”

Finally, the learned judge in his judgment does not draw any inference adverse to the appellant from the delay in the removal of the body.

The learned judge in the summing-up deals with the delay in reporting the death to the police as follows:

“The accused made no effort himself to report the death to the police. He has explained that when he was giving his evidence and he says that he had known a case where some death had been reported to the police and there had been a considerable delay in the obtaining of the appropriate death certificate.

“He says that he himself has had experience of having his surgery broken into and that it had been two days after he made the report, before the police came to take his statement.

“Well now, gentlemen, is that the sort of reason which is going to influence a responsible man like the accused, a man in a responsible position, for not reporting the death of his patient in his surgery promptly. He need only have gone into the actual surgery itself, where there is a telephone as distinct from the waiting room where there is a telephone and merely telephoned the police and said this: ‘This is Dr. Bansel speaking, so and so has just died in my surgery after the performance of an operation.’

Instead of that he asks Gurdip Singh [this should read 'Kartar Singh'] and Jaswant Singh three hours later to report the matter when they are on their way to the deceased's flat with the body.

"Now gentlemen, it will be for you to consider whether conduct of that nature is or is not a matter which affords some indication as to possibly the motive with which the operation was performed and possibly some information as to the manner in which the operation was performed. If the accused were, as he says that he was, quite convinced at the time of the death that he had not done anything wrong because he says: 'Had I made those other wounds I would have known it and I did not know it', if he had done nothing wrong and had no reason to believe he had done anything wrong in the operation, gentlemen, you will ask yourselves would it not have been perfectly natural for him in his desire to help the husband of the deceased to make the necessary arrangements for the removal of the body and perhaps in his own interest because after all this is his surgery and he is in practice as a surgeon. It might not be wholly convenient to have a dead body of a patient lying in the surgery for any longer than was possible. Suppose another patient comes to see him or something of that sort.

"As I say you have to consider whether the failure to report the matter, the failure to take any more active step than telephoning a message to Mr. Kartar Singh to communicate with him at the surgery was indicative of a desire on the part of the accused to conceal what had happened or whether they are due possibly to the state of his emotional distress and possibly to his fear that the police might not pay attention to any report he made because when he had reported his surgery broken into they had taken two days to come and take a statement from him. I should think the latter argument is not the one you will favour because I should have thought that a surgeon would realise that however neglectful the police may have been in pursuing enquiries into a breaking they were not likely to treat a case of sudden death in a doctor's surgery in so carefree a manner, but that is a matter which you must consider and weigh."

The essence of the objection to this part of the summing-up is that it failed to put to the assessors an interpretation of the appellant's inaction which was consistent with his innocence; namely that the appellant did not sign a death certificate; that had he desired to conceal the death from the police he would have signed a death certificate; that since he did not sign the death certificate he knew the matter must come to the knowledge of the police and be the subject of an investigation; and that in the circumstances the delay in informing the police could be of no significance. There is some force in this argument, though it does not constitute a complete answer to the delay in reporting to the police. It could be inferred from the delay that the appellant, though realising that the matter must eventually be investigated, yet wished to delay the commencement of the investigation as long as possible. This, in fact, seems to be the view the learned judge himself takes of the matter. He says in his judgment:

"The failure of the accused to make any attempt to notify the police of what had happened in his surgery for a period of over two hours after it had happened seems likewise to me to be indicative of an attempt to conceal what had been going on there that afternoon for as long as possible."

It may be that the learned judge over-stressed the matter to the assessors and that he should have drawn attention to the non-signature of a death certificate. We cannot say, however, that the inference drawn by the learned judge himself is wrong, and, in any case, it is clearly not a matter relied on by

the learned judge to any extent. We are satisfied that there has not been such a misdirection as would justify us in interfering with the conviction.

Again, as regards the message regarding his whereabouts alleged to have been left by the appellant at his house on the evening of the day of the deceased's death, it may be that in the summing-up the learned judge has given the matter more attention than it merited, and that no inference adverse to the appellant is to be drawn from the incident. The learned judge deals with the matter as follows:

"You have to consider whether you think that he ever left a message as to where he could be found. If he did not leave such a message the fact that he did not leave it does not mean that he has committed the offence with which he was charged. It may merely mean this, that having had a very harassing day, when he was going off to attend the affairs of the community he did not think to himself-'I must leave my exact reference, the exact place where I can be found.' The significance in it is this gentlemen, if you believe that he did not leave a message why then has he told us here that he did leave such a message. Again I would remind you of what I said this morning. People who are faced with a charge in relation to an offence which they have not committed sometimes very reprehensibly in their own interests almost always disastrously try to lie their way out of a difficult situation. You may ask yourselves this, assuming we do not believe that the accused left any reference as to his whereabouts with his wife or son, has he lied about it because he thinks failure to leave that message would be regarded as some evidence that he had committed the crime with which he is charged, or has he lied about it for some ulterior motive. It will be a matter which you must consider."

Counsel for the appellant pointed out that there was no police evidence to the effect that the police had been told that the appellant had not left a message as to his whereabouts. The police officer-Inspector Corrigan-who first visited the house of the appellant on the night in question merely stated in examination-in-chief that on the occasion of that visit the appellant was not there, and the matter was not pursued either in examination-in-chief or in cross-examination. In these circumstances we think that the latter part of the learned judge's direction to the assessors set out above amounts to a misdirection in that there was insufficient evidence on which they could find that the appellant had lied in asserting that he had left a message as to his whereabouts. However, in the passage set out the learned judge indicated his own view that there was little assistance to be derived from this aspect of the matter, even on a view that the appellant had lied, and in fact the only reference to it in the judgment is in the following terms:

"Subsequently, the police having been notified of the death of the deceased, efforts were made to contact the accused, at first unsuccessfully, as he had gone out; and ultimately at about 2 a.m. on February 25, i.e. within twelve hours of the death of the deceased-he made a statement to the police at police headquarters."

We are satisfied that the misdirection, which in any case concerns a very minor aspect of the case, played no part in the learned judge's own decision as to the guilt or innocence of the appellant.

The final matter relied on by counsel for the appellant under para. 3 of the memorandum of appeal is that raised in sub-para. (q), namely that the learned judge gave no direction as to the impossibility of assessing the amount of bleeding attributable to each wound. This is linked with a general submission that on the probabilities it was extremely unlikely that the appellant was responsible for the vaginal wound. Had there been a finding to this effect,

the failure to give a direction as to the bleeding attributable to each wound might have been material. In fact both the assessors and the learned judge found that both wounds were caused by the appellant, and we are satisfied that there was ample evidence on which they could so find. In the circumstances the amount of bleeding attributable to each wound is of little or no consequence.

We turn now to the procedural point taken by counsel for the appellant, that is, ground 2a of the memorandum of appeal, which reads:

- “2 a. That the failure of the learned judge to elicit the opinion of each of the assessors generally on the case, and his formulation of specific questions for their opinion, done without reference to counsel for the defence, was contrary to s. 318 of the Criminal Procedure Code and the principles of natural justice, and vitiated the trial.”

In support of his contention on this point counsel for the appellant referred to s. 309 of the Indian Code of Criminal Procedure and Indian cases decided on that section. The terms of s. 309 of the Indian Code of Criminal Procedure are, however, different from those of s. 318 of the Criminal Procedure Code. Section 318 of the Criminal Procedure Code (or the corresponding provision in other East African Codes) has been the subject of comment in this court, and we prefer to be guided by the cases on the particular section which we have to consider. Section 318 reads as follows:

- “318. (1) When, in a case tried with assessors, the case on both sides is closed, the judge may sum up the evidence for the prosecution and the defence, and shall then require each of the assessors to state his opinion orally, and shall record such opinion.
- “(2) The judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors.
- “(3) If the accused person is convicted, the judge shall pass sentence on him according to law.
- “(4) Nothing in this section shall be read as prohibiting the assessors, or any of them, from retiring to consider their opinions if they so wish; or, during any such retirement or at any time during the trial, from consultation with one another.”

It is clear that there is a mandatory requirement to obtain the opinions of the assessors generally on the case as a whole, and this court has so held in the past. The following is the relevant portion of the record which sets out what occurred in the instant case:

“Assessors Retire—4.35 p.m.

“4.50 p.m. July 9, 1959. Assessors return.

“Judge: Now, gentlemen, I propose to ask you a series of questions. It will be necessary for each of you to answer those questions separately. It will, however, save trouble if instead of having to repeat each question three times I merely ask the question and then call on you by your numbers, Assessor No. 1, 2 and 3, for your answers.

“The first question is this: was the operation performed by the accused on the deceased performed by him in the honest belief that it was necessary to terminate her pregnancy for the purpose of saving her life, or for the purpose of preserving her from grave prejudice to her health?

“Assessor No. 1: The operation was illegal.

“Assessor No. 2: (Likewise).

“Assessor No. 3: Illegal.

“Judge: Now the second question: Was the vaginal wound suffered by the deceased inflicted by the accused?

“Assessor No. 1: The wounds were inflicted by the accused, both wounds.

“Assessor No.: (Likewise).

“Assessor No. 3: (Likewise).

“Judge: Were both or was either of the wounds inflicted upon the deceased inflicted by reason of such gross negligence as to go beyond the realms of compensation between subject and subject and as to amount to a crime meriting punishment by the State by reason of being indicative of a reckless disregard of human life?

“Assessor No. 1: Gross negligence.

“Assessor No. 2: (Likewise).

“Assessor No. 3: (Likewise).

“Judge: Do you desire me to put any further questions to the assessors?

“Mr. Mangat: No, my lord.

“Mr. Marnan: No, my lord.

“Judge: Very well.

“Now, gentlemen, it will be necessary for me to ask you to attend again tomorrow, so that I may deliver my judgment in the light of the opinions, which you have today recorded. But I will not say 10 o'clock, because I shall have to write a fairly extensive judgment, so I shall say 2.30 p.m. tomorrow.

“5.00 p.m. July 9, 1959, adjourned.”

It is evident that the learned judge failed to take the opinions of the assessors as to the guilt or innocence of the appellant on the case as a whole, and there has therefore been an apparent failure to comply with provisions of s. 318 of the Criminal Procedure Code. We will consider the effect of this failure later. Counsel for the appellant went further, and contended that in any event a judge must not ask questions of the assessors until after he has obtained their opinions on the case as a whole. This contention is based on certain Indian decisions, which relate to s. 309 of the Indian Code of Criminal Procedure. It is not supported by the dicta in cases heard by this court. The first of such cases to which our attention was drawn was *R. v. Gusambizi Wesonga* (2) (1948), 15 E.A.C.A. 65. At p. 68 of the report on that case it was said:

“We also note that at the end of his summing-up the learned judge put three questions to the assessors in order that he might have their opinions on the lawfulness by native law and custom of the entry into the house. We can see no objection to a judge requiring assessors to answer specific questions after his summing-up provided that he is careful to tell them that they should state opinion generally on the whole of the evidence, for this seems to be required by the terms of s. 277 of the Uganda Criminal Procedure Code.

“Both these points we are aware involve the much larger one as to what are the precise functions or the exact status of assessors in a criminal trial. The legislatures of all the East African Territories have been vague, perhaps intentionally so, in defining or setting out their functions, and until they are so defined it would be unsafe and impossible for the court to set them out in comprehensive certainty. All that can be said is that in the examination of the actual exercise by assessors of any function this court will always apply the test of what is fair to an accused person and will keep in mind the principles of natural justice.”

The next case in which the matter arose was *Washington s/o Odindo v. R.* (3) (1954), 21 E.A.C.A. 392 where, at p. 393, the court said:

“He [i.e. the learned trial judge] has recorded a series of specific questions which he put to them [i.e. the assessors] and the answers received . . .

There is, of course, no objection to a judge putting specific questions to the assessors after the addresses have been concluded but when he does so we should have thought that they should at least be reminded of the salient points in the evidence before being required to answer them. It has also been laid down by this court that where the opinion of the assessors is taken in the form of answers to specific questions, they must also be asked to state their opinion on the case as a whole and on the general issue as to the guilt or innocence of the accused.”

Finally the matter was again considered, though from a somewhat different aspect, in *Mohamed Bachu v. R.* (4) (1956), 23 E.A.C.A. 399. The relevant passage in the judgment in that case (at p. 400) commences as follows:

“The one matter of any substance argued on this appeal was a submission that the trial must be held to be a nullity because the learned trial judge did not obtain specific opinions from the assessors as to whether the evidence showed sufficient provocation to cause an ordinary person of the appellant’s community to lose his power of self-control and to induce him to stab the deceased.

“It was conceded that upon the evidence in the case the learned trial judge could have found as he did, whatever answers the assessors might have given if they had been specifically required to give their opinions as to whether there had been provocation, but it was contended that if these opinions had been obtained and if they were favourable to the appellant the learned trial judge might have reached a different conclusion.

“It was further contended that in any case the judge was bound to ascertain the opinions of the assessors on every aspect of the case, failure so to do not being a trial with the aid of assessors as regards that aspect, and consequently not in compliance with s. 258 of the Kenya Criminal Procedure Code which provides that subject to the provisions of Part VII all trials before the Supreme Court shall be with the aid of assessors: s. 293 and s. 294 of the Code were also invoked, the point being that both these sections refer to ‘a trial with the aid of assessors.’

“In our opinion none of these sections indicate how the aid of the assessors is to be obtained by the court. The only section of the Kenya Criminal Procedure Code which contains mandatory provisions in that regard is s. 318 and it was complied with.”

The judgment then sets out s. 318 of the Kenya Criminal Procedure Code, and proceeds:

“That section does not require the court to obtain specific opinions from the assessors on every question that arises in a case. We know of no authority for such a proposition.”

The passage from the judgment in *R. v. Gusambizi Wesonga* (2) which is set out above is then cited, and the relevant part of the judgment in *Mohamed Bachu* (4) concludes:

“We can well imagine cases in which it would be proper and indeed advisable for the trial judge to obtain a specific opinion from the assessors on a certain point in addition to their opinions on the case as a whole. In fact it is often done, but the Kenya Criminal Procedure Code does not specifically require it to be done in all cases and the interference by this court solely on the ground that the court had not required an opinion from the assessors upon a particular point as well as upon the case as a whole could only be justified if it were shown that it was unfair to the accused or contrary to the principles of natural justice.

“The application of this test to the present case does not justify

interference with the learned trial judge's findings."

We think it is clear from the passages cited, particularly that from the judgment in *R. v. Gusambizi Wesonga* (2), that this court in the past has seen no objection to specific questions being put to assessors either before or after a general opinion on the case has been obtained, provided, of course, that a general opinion is obtained. We see no reason to differ from that view.

It remains to consider the effect of a failure to obtain a general opinion. It is to be noted that in neither *R. v. Gusambizi Wesonga* (2) nor *Washington s/o Odindo v. R.* (3) did the failure to obtain a general opinion result in the trial being declared a nullity. We think it follows that the court must have treated such a failure as an irregularity curable under s. 381 of the Criminal Procedure Code, and, once again, we see no reason to differ from this view. We think the test to be applied in each case is that set out in *R. v. Gusambizi Wesonga* (2). We accordingly proceed to consider whether any prejudice to the appellant resulted in the instant case or whether there has been any contravention of principles of natural justice.

Counsel for the appellant argued that the questions put to the assessors were inapt; that the first question put to the assessors was the kind of question which arises in a case such as that of *R. v. Bourne* (5), [1939] 1 K.B. 687, but that no such issue arose in the instant case; that the whole question was whether the appellant believed an abortion had already commenced when he started to operate; that the appellant was not here terminating a pregnancy—he was clearing up after some other cause had terminated the pregnancy; that the assessors were therefore misled by the form of the question; and that the third question invited an opinion on negligence in reference to both wounds although the Crown had withdrawn the suggestion of negligence in relation to the uterine wound.

With respect, we are unable to agree that the questions are inapt. The first branch of the Crown case was that this was an illegal operation, and that contention was pressed throughout. The learned judge carefully, and in our view correctly, directed the assessors on what constituted an illegal operation. He said:

"The case for the Crown as I understand it is primarily that the accused occasioned the death of the deceased by performing upon her what is called an illegal operation.

"An illegal operation is an operation which is intended to terminate pregnancy for some reason other than what can, perhaps be best called a good medical reason and the only good medical reason in the eyes of the law for the termination of pregnancy, is the genuine belief that the operation is necessary for the purpose of saving the patient's life or preventing severe prejudice to her health."

The question whether or not the operation was an illegal one was certainly in issue, and there was ample evidence on which the assessors and the court could reach the conclusion that it was an illegal operation. As we have mentioned before, the vital evidence in this regard was that of the deceased's condition immediately before going to the appellant's surgery, and her apparent condition at the surgery. In the light of the learned judge's direction to the assessors we think the question was apt and proper, and the assessors' reply shows that it was not misunderstood.

As to the third question, we think this must be considered in the light of the assessors' answer to the second question, namely, that both wounds had been inflicted by the appellant. It is true that in his closing address counsel for the Crown had accepted that the uterine wound could have been caused without negligence though he did not accept that the subsequent treatment did not constitute gross negligence. In view of the assessors' previous answer,

however, it was immaterial which wound had been inflicted by reason of gross negligence if one or other had been so inflicted. Had the learned judge disagreed with the assessors on the question whether the appellant had inflicted both wounds, he might have sought an opinion in relation to the uterine wound. On the opinions expressed by the assessors, however, with which the learned judge agreed, it was unnecessary to consider the uterine wound in isolation.

We are accordingly of opinion, as we have already said, that the questions asked were not inapt. We are further of opinion that the assessors' replies in fact fully disclosed their opinions on the case as a whole. It is true they were not specifically asked to state whether they thought the appellant was guilty or not guilty, and that they should have been so asked. It is clear, however, that such a question would in the circumstances have been a mere formality. No reply other than "guilty" was possible on the opinions they had already expressed. We are satisfied that the appellant suffered no prejudice from the failure to obtain from the assessors general opinions on the case, and that, in fact, such general opinions were apparent from the specific answers given. We think that in the circumstances of this case the failure to obtain general opinions amounted to no more than a formal irregularity and that it is one curable under s. 381 of the Criminal Procedure Code, the material part of which reads:

"381. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account:

- (a) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code;

.....

unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice:"

We are not prepared to interfere with the conviction on this ground.

We have dealt specifically with the principal matters of fact argued by counsel for the appellant. He touched on various other matters, but, as we understood it, did not rely on them. In any case we are satisfied that there was no substance in them. This was a long and difficult trial with a vast mass of evidence, much of it of a technical nature. We are satisfied that the learned judge's summing-up as a whole was perfectly fair to the appellant. As was remarked by this court in *Brown and Others v. R.* (6), [1957] E.A. 371 (C.A.) at p. 378:

"In a long summing-up, such as this was, the ingenuity of counsel will nearly always be able to suggest that something should have been said which wasn't said, or something said which should have been left unsaid or said differently."

This was not a jury trial but was a trial with assessors. At one stage, if we understood him correctly, counsel for the appellant suggested that, whatever may have been the original function of assessors, today it approximated to that of a jury, though, of course, the judge could still over-rule them. We do not subscribe to this view. The position is correctly stated in *Habib Kara Vesta and Others v. R.* (7) (1934), 1 E.A.C.A. 191, cited with approval in *Miligwa and Another v. R.* (8) (1953), 20 E.A.C.A. 255, as follows:

"(The section) . . . confers an absolute power on the judge to give effect to his own views. The most he is directed to do is to require each assessor to state his opinion which logically means he must consider that opinion . . . The assessors are not, as the jury, judges of fact so as to bind the judge.

It is the latter who must decide the case on the facts as well as the law but he will of course have regard to their opinion, even though it is not binding on him'. We have dealt thus with what seems to us quite obvious because we think it as well to indicate that no argument in future directed to persuading us to diminish or in any way to qualify that absolute power of a judge to give effect to his own views should receive any attention from this court."

See also *Joseph v. R.* (9), [1948] A.C. 215. Most of the objections raised have related to the summing-up to the assessors. So far as the learned judge's judgment is concerned, we are satisfied that it contains no material misdirection. The learned judge states clearly the evidence which he accepts and on which he relies, and such evidence fully supports his conclusions. Notwithstanding this, had we thought that the summing-up contained material misdirections we might have reached the conclusion that the learned judge had thereby disabled the assessors from giving him the aid which they should have given, and thus disabled himself from taking their opinions into account—*Bharat v. R.* (10), [1959] 3 W.L.R. 406. We are, however, satisfied that none of the alleged misdirections was such as to disable the assessors from giving a proper opinion on the case.

For these reasons we dismiss the appeal.

Appeal dismissed.

For the appellant:

JT Molony QC (of the English bar) and *FR Stephen Stephen & Roche*, Nairobi

For the respondent:

JP Webber and *AR Hancox* (Crown Counsel, Kenya)
The Attorney-General, Kenya

Harnam Dass v John Corbin and another [1959] 1 EA 834 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgement:	20 October 1959
Case Number:	22/1959
Before:	Forbes Ag P, Windham JA and Sir Owen Corrie Ag JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya—Connell, J

[1] *Damages – Assessment – Sum paid into court – Judgment awarding damages containing references to sum paid into court – Whether award of damages influenced by payment into court.*

Editor's Summary

The appellant sued the defendants for damages for personal injuries. The defendants in their defence admitted liability and paid into court the special damages claimed with an additional sum of Shs. 10,000/- which they pleaded was sufficient to satisfy the plaintiff's claim for pain and injury. In the course of his judgment the trial judge, after commenting that when appellate courts increase awards of damages they rarely award less than double the amount given by the trial judge, went on to hold that it would be wrong to double the sum paid into court which was not in his view an illiberal estimate and he therefore adopted it. On appeal the only question argued was whether the trial judge had misdirected himself in his approach to the assessment of damages.

Held –

- (i) the trial judge had wrongly equated himself to a court of appeal; if the matter was being considered by an appellate court the principles he had applied would have been correct but the assessment of damages by a trial judge must be based exclusively on the evidence and neither coloured nor fettered by knowledge of what had been paid into court.
- (ii) it was impossible to avoid the suspicion that the trial judge might have considered assessing the damages at a sum higher than Shs. 10,000/- but less than Shs. 20,000/- but had wrongly considered himself precluded from doing so upon the false analogy he had referred to.

Appeal allowed. Order that the case be remitted to the trial judge again to assess the damages unfettered by the sum paid into court.

[**Editorial Note:** The damages were subsequently assessed by the trial judge at Shs. 12,000/-.]

Cases referred to in judgment

- (1) *Flint v. Lovell*, [1935] 1 K.B. 354.
- (2) *Owen v. Sykes*, [1936] 1 K.B. 192.
- (3) *Kungo s/o Marumba and Another v. Clark* (1952), 19 E.A.C.A. 60.
- (4) *Davies v. Powell Duffryn Associated Collieries Ltd.*, [1942] 1 All E.R. 657.
- (5) *Harrison v. Liverpool Corporation*, [1943] 2 All E.R. 449.

October 20. The following judgments were read by direction of the court:

Judgment

Windham JA: The appellant was a patient in the second respondent's nursing home in Nairobi, where the first respondent, a qualified surgeon, performed an operation on his bladder on March 29, 1956. As a result of the admitted leaving of five gauze swabs in the appellant's body at the operation, which necessitated, among other things, a further operation to remove two of the swabs (the remaining three having earlier emerged from the wound by themselves), the appellant sued the respondents for damages for negligence. He claimed Shs. 5,060/- as special damages, and general damages for pain and injury suffered. In their statement of defence the respondents admitted liability, admitted and paid into court the Shs. 5,060/- claimed for special damages, while in respect of general damages they paid into court Shs. 10,000/-, which they pleaded was "enough to satisfy the plaintiff's claim for pain and injury".

Thus the case went to trial upon the single issue of the quantum of general damages, the agreed wording of the issue being–

“the amount of general damages comprising pain and suffering and any permanent damage proved as a result of leaving in of the swabs”.

After hearing a considerable body of evidence on this issue the learned trial judge found that there had been both pain and suffering and also some permanent damage. He then proceeded to award, as general damages, the sum of Shs. 10,000/-, which was the sum paid by the respondents into court to satisfy them.

The appellant appeals to this court to re-assess, or to order a re-assessment of, the general damages awarded by the learned trial judge. His grounds for appealing are not that the figure awarded, Shs. 10,000/-, is manifestly too low, but that the learned judge, in arriving at it, did not exercise his discretion freely and base his decision purely on the evidence before him, but wrongly felt himself to be fettered, and his discretion to be limited, by the fact that the respondents had paid Shs. 10,000/- into court. It is conceded for the respondents, on the authority of such decisions as *Flint v. Lovell* (1), [1935]

1 K.B. 354, *Owen v. Sykes* (2), [1936] 1 K.B. 192, and *Kungo s/o Marumba and Another v. Clark* (3) (1952), 19 E.A.C.A. 60, that a court of appeal may properly interfere with a trial court's assessment of the quantum of damages if satisfied that the judge, in arriving at his assessment, acted, or may have acted, on some wrong principle of law. The respondents contend, however, that in the present case the learned judge did not so act, and that his assessment of general damages at Shs. 10,000/- was independent of, and uncoloured by, the fact that this was the sum that had been paid into court.

The relevant and final paragraph of his judgment, on which both parties rely in support of their respective contentions, appears after a careful review of the evidence, and the resulting findings of fact, regarding the degree of pain, suffering and permanent damage incurred by the appellant; it reads as follows:

"In connection with the assessment of damages it was stated by Singleton, L.J., in *Atkinson's* case, p. 221 of Kemp, Vol. 1, "The task of a judge in a case of this kind is as difficult as anyone could have'. Nevertheless it is the court's duty to assess a fair estimate. I would mention this factor, that in such of the cases I have looked at, if an appellate court does increase damages, I have not come across a case where it has interfered in what I may call 'a comparatively small way'. I think it is fair to state that where an appellate court does increase, few cases (if any) will be found in which it was increased by less than the proportion to 2:1. Now to my mind and in my considered judgment, in all the circumstances I think it would be wrong to 'double' the amount of £500 paid into court. In my judgment I consider the amount of £500 paid in to be not any illiberal estimate. I think in all the circumstances it is a fair estimate even though I have found some attribute of 'permanent damage' in the way of recurring cystitis. That being my considered conclusion I do not think this is a case for increase and I therefore adopt the amount of £500 as it stands as an award of damages; such being the case I will hear arguments as to costs."

In addition to the foregoing passage, the learned judge, near the beginning of his judgment, had spoken of the necessity of his having to "re-assess" the general damages with special relation to his finding on the question whether the appellant had sustained any permanent injury.

Now, in the final paragraph of the judgment which I have quoted, the passage from the words "I would mention this factor" to the words "I consider the amount of £500 paid in to be not any illiberal estimate", and in particular the references to "an appellate court", make it clear, to my mind, that the learned judge was wrongly equating himself with a court of appeal. He was considering the £500 paid into court as if it had been an assessment of damages by a court of first instance, and putting himself in the position of an appeal court that was being asked to vary that assessment. If such had been the position, then no doubt the rule that an appeal court will rarely interfere unless it does so "in a big way" would have applied: in the House of Lords' decision in *Davies v. Powell Duffryn Associated Collieries Ltd.* (4), [1942] 1 All E.R. 657, at pp. 664-5, it was said by Lord Wright that

"the scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency".

But here, the learned trial judge was in no sense in the position of a court of appeal. His task, as he himself observed elsewhere in the paragraph from his judgment which I have quoted, was to "assess a fair estimate". And such an estimate, by a court of first instance, must be based exclusively on the evidence, and must not in any way be coloured or fettered by knowledge of what the

defendant may have paid into court. In England, by O. 22, r. 6, of the Rules of the Supreme Court, it is expressly provided that

“no statement of the fact that money has been paid into court . . . shall be inserted in the pleadings and no communication of that fact shall at the trial of any action be made to the judge or jury until all questions of liability and amount of debt or damages have been decided . . .”

There is no corresponding provision in the Civil Procedure (Revised) Rules, 1948, of Kenya. Nevertheless, although in Kenya the amount paid into court may be pleaded and disclosed to the trial judge, the basis for the English rule is the same in this territory, and should be given effect to by a court of trial, namely that the court’s assessment of damages should be unaffected by any knowledge of what sum has been so paid in. The only fetter which the payment of a sum into court imposes upon a court of trial is that, if it is paid with an admission of liability, as here, judgment cannot be given for less than the sum so paid: *Harrison v. Liverpool Corporation* (5), [1943] 2 All E.R. 449 at p. 452.

Learned counsel for the respondents has conceded the above propositions. But he argues, from a reading of the whole of the final paragraph of the judgment below, and from certain passages in particular, that the learned judge, in spite of his observations regarding the extent to which an appellate court will interfere with an assessment of damages, did arrive at an independent estimate of damages uninfluenced by the fact that £500 had been paid into court, and that it was merely by chance that he happened to arrive at that same figure. Learned counsel contends that his observations regarding how seldom an appellate court will increase damages in any degree short of doubling them are mere parenthetical digressions, and that they are followed by a clear independent assessment in the words—

“In my judgment I consider the amount of £500 paid in to be not any illiberal estimate. I think in all the circumstances it is a fair estimate . . .”

It may be that learned counsel for the respondents is right in this contention. It may be that £500 is the figure which the learned judge would have assessed, and did assess, quite independently of that figure having been paid into court. But reading the last paragraph of his judgment as a whole I cannot feel sure that such was the case. He does state, it is true, that he considers £500 to be a fair estimate. But before that statement he observes, “I think it would be wrong to ‘double’ the amount paid into court”; and after that statement he observes—

“I do not think this is a case for increase and I therefore adopt the amount of £500 as it stands . . .”

From these observations in particular, and from the last paragraph of the judgment as a whole, it is impossible to avoid the suspicion that the learned trial judge may perhaps have considered assessing the damages at some figure greater than £500 but less than £1,000, but have wrongly felt himself precluded from doing so upon the false analogy that an appellate court would not increase an assessment of £500 to anything less than £1,000.

For these reasons, I would allow the appeal. We intimated to counsel at the hearing that, in the event of the appeal being allowed, we did not consider this was a case where we could ourselves make any satisfactory assessment of damages, upon the record, whether by leaving the figure of £500 untouched or by increasing it, and that the only practicable alternative to dismissing the appeal would be to remit the case to the court of trial to make a new assessment of damages. I would accordingly remit the case to the learned trial judge, with directions that, upon the evidence already taken by him and the findings

of fact already made by him, he do make a fresh assessment of damages upon the principles that I have enunciated, and in particular that he should hold himself entirely unfettered by the fact that the respondents paid £500 into court. It may be that his estimate of that figure was indeed uncoloured by that fact; if so, he is free to award the same figure as he did before. If not, he is free to increase it in any degree. I would allow the appellant his costs of the appeal, and would reserve to the court of trial the costs in that court.

Forbes Ag P: I agree and have nothing to add. An order will be made in terms suggested by the learned Justice of Appeal.

Sir Owen Corrie Ag JA: I agree.

Appeal allowed. Order that the case be remitted to the trial judge again to assess the damages unfettered by the sum paid into court.

For the appellant:

Mrs L Kean

Sirley & Kean, Nairobi

For the first respondent:

FR Stephen

Stephen & Roche, Nairobi

For the second respondent:

SM Akram

SM Akram, Nairobi

Bhaichand Bhagwanji Shah v D Jamnadas & Co Ltd
[1959] 1 EA 838 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgement:	20 October 1959
Case Number:	38/1959
Before:	Forbes Ag P, Gould Ag V-P and Sir Owen Corrie Ag JA
Sourced by:	LawAfrica

[1] Appeal – Application for extension of time lodging appeal – Application made after prescribed time expired – Affidavit supporting application containing insufficient information – Further affidavit sworn – Whether application competent – Information required by appellate court in supporting affidavit to enable court to determine application – Eastern African Court of Appeal Rule, 1954, r. 9, r. 54.

Editor's Summary

The applicant being dissatisfied with a judgment of the Supreme Court of Kenya delivered on July 6, 1959, filed notice of appeal within the prescribed fourteen days but served the notice upon the respondent a day late. On August 6, 1959, application was made to the court for copies of the proceedings and exhibits which were not ready on September 19 when the applicant filed notice of motion seeking an extension of time for lodging his appeal. The affidavit in support of the motion sworn on September 19, 1959, was confined to the steps taken to secure the documents and an estimate of the further time which would be required to complete the record for the appeal. A further affidavit sworn on October 7, 1959, deposed to the prospects of the appeal. The respondent opposed the application for further time on the grounds that the application was made after the prescribed time for filing the appeal had expired, that there was a month's delay in applying for the proceedings and that the original affidavit did not state the nature of the case as required by r. 9 of the Eastern African Court of Appeal Rules, 1954.

Held –

- (i) an application for an extension of time for lodging an appeal may be made after the prescribed time has expired.
- (ii) failure by an applicant to explain delay in prosecuting an appeal may lead to an application for an extension of time being refused.
- (iii) an applicant for an extension of time must support his application by a supplementary statement of the nature of the judgment and of his reasons for desiring to appeal from it to enable the appellate court to determine whether refusal of the application would cause injustice.

Application for extension of time granted.

No Cases referred to in judgment in judgment

October 20. The following judgments were read by direction of the court.

Judgment

Sir Owen Corrie Ag JA: The applicant is seeking an order for the extension of the time for lodging an appeal against the judgment delivered on July 6, 1959, of the Supreme Court of Kenya sitting at Kisumu.

Notice of motion and the applicant's affidavit in support of it are dated September 19, 1959.

Paragraphs 2, 3 and 4 of the affidavit are in the following terms:

- “2. That on the 6th day of August, 1959, after the copy of the judgment had been supplied, an application in writing together with a cheque for court fees for the necessary copying, was sent to the district registrar of the said registry, requesting both copies of proceedings and copies of exhibits in the above suit, for the purpose of the preparation of record in the intended appeal, and such application was followed up by a further registered letter dated August 20, 1959, and a telegram dated August 29, 1959. Copies of the said three (letters and telegram) documents are annexed hereto in a bundle marked ‘A’.
- “3. That to the date of this affidavit no such copies have been furnished, and the prescribed time for lodgement of the record and memorandum of appeal is now about to expire.
- “4. That the preparation of record will take about six to eight weeks in view of the number of copies and length of record to be lodged, and it is necessary and just that an extension of time be granted for that purpose, and this affidavit is made in support of an application for such extension, to this honourable court.”

On October 7, 1959, the day before the motion was due to be heard a supplementary affidavit by the applicant was filed. Paragraph 3 of that affidavit is in the following terms:

- “3. That I have a good appeal on merits, since, on identically the same grounds, viz., where the moneylender calculated and recovered interest on the basis of 360 days to the English year, instead of 365 days as they are, the Honourable Mr. Justice Farrell has in a later Civil Case No. 1669 of 1958 in which Messrs. Daly and Figgis acted for the Moneylender Genuine Finance Ltd. and my advocate herein acted for the borrowers—Manchester Outfitters, gave on the basis of English authorities, a judgment dismissing the moneylenders' claim; and moreover, in my case the plaintiff moneylender had by pleadings offered to refund excess interest.”

On behalf of the respondents, Mr. Khanna opposes the application upon several grounds.

In the first place he argues that an application for extension of time cannot be granted after time for filing the appeal has expired. This, in my view, is

an objection which cannot be sustained under r. 9 (1) of the Eastern African Court of Appeal Rules, 1954, which is in the following terms:

“9. (1) The court shall have power for sufficient reason to extend time for making any application, including an application for leave to appeal, or for bringing any appeal, or for taking any step in or in connection with any appeal, notwithstanding that the time limited therefore may have expired, and whether the time limited for such purpose was so limited by order of the court or by these rules or by order of a Superior Court or by any written law of any of the Territories.”

Mr. Khanna argues that while the rule empowers the court to make an order extending the time, it does not authorise the application to apply for such an order after the expiry of the time limited for filing the appeal: and he even suggested that the applicant should apply to the court for leave to make his application for an extension of time. I see no substance whatever in this argument, and the procedure suggested by Mr. Khanna would be entirely contrary to the established practice of this court.

Secondly Mr. Khanna opposes the application on the ground that the copy of the applicant's notice of appeal which, under r. 54 (5), should have been served upon the respondent within fourteen days after the decision complained of, was in fact served upon the respondent one day late.

Notice of appeal however was filed with the registrar within the prescribed period of fourteen days: and it is not suggested that the respondent was in any way prejudiced by the fact that a copy of the notice was not received by him until the following day. Clearly this is not a ground on which the application should be refused.

Mr. Khanna also points out that no explanation has been given for the delay of a month which occurred between the delivery of the judgment of the Supreme Court and the application to the deputy registrar for copies of the proceedings and exhibits. There is some substance in this objection in view of the statement in the applicant's affidavit that the preparation of the record would take about six to eight weeks, and an explanation of the delay should have been furnished. Failure to provide a satisfactory explanation in a case where there has been excessive delay might well result in the application being refused. In the instant case the delay between the lodging of the notice of appeal and the application for copies of the proceedings was seventeen days, leaving a period of some 5½ weeks available for the preparation of such copies. The applicant might reasonably consider this period adequate for the preparation of the copies of the proceedings before he had ascertained the true position. I am not prepared to hold that the delay is so excessive that in the absence of a satisfactory explanation the application must fail, and I consider, therefore, that failure to supply this information is not fatal to the application.

Finally it is objected that the nature of the case which gives rise to the application should have been stated. This is in my view the most substantial ground of objection. The object of including r. 9 in the rules of court is to ensure that the strict enforcement of the limitations of time for filing documents prescribed by the rules shall not result in a manifest denial of justice. It is thus essential, in my view, that an applicant for an extension of time under r. 9 should support his application by a sufficient statement of the nature of the judgment and of his reasons for desiring to appeal against it to enable the court to determine whether or not a refusal of the application would appear to cause injustice. In the applicant's affidavit of September 19 last no indication whatever of the nature of the case is included; and I hold that if that affidavit stood alone, no sufficient ground would have been shown for granting the application.

In para. 3 of his supplementary affidavit of October 6, however, the applicant has given some indication of the nature of the case and of the ground upon which he desires to appeal and in my opinion that statement is sufficient for the purpose.

I hold therefore that the applicant should be granted an extension of thirty days from this date within which to file his appeal.

The costs of this application must be paid by the applicant in any event.

Forbes Ag P: I agree and have nothing to add. The applicant is granted an extension of thirty days from today within which to file his appeal. Costs of the application are to be paid by the applicant in any event.

Gould Ag V-P: I also agree.

Application for extension of time granted.

For the applicant:

GR Mandavia

GR Mandavia, Nairobi

For the respondent:

DN Khanna and PV Raichura

Kohli, Patel & Raichura, Kisumu

Rufus Riddlesbarger v Brian John Robson
[1959] 1 EA 841 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	6 October 1959
Case Number:	90/1959
Before:	Forbes Ag P, Windham JA and Sir Owen Corrie Ag JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya—Sir Ronald Sinclair, C.J and Templeton, J

[1] Appeal – Jurisdiction – Private prosecutor – Accused acquitted by magistrate – Appeal by case stated dismissed – Further appeal filed by private prosecutor without consent of attorney-general – Whether second appeal competent – Penal Code (Cap. 24), s. 308, s. 309 (K.) – Criminal Procedure Code (Cap. 27), s. 2, s. 86, s. 88, s. 89, s. 90, s. 360, s. 367 (K.).

Editor's Summary

Pursuant to s. 89 of the Criminal Procedure Code the appellant made a complaint against the respondent, following which a summons, bearing the appellant's name as the complainant, was issued by a magistrate to the respondent, requiring him to answer two charges under s. 308 and s. 309 of the Penal Code. The attorney-general having declined to prosecute, the appellant was permitted by the magistrate to conduct the prosecution and did so by counsel. At the close of the prosecution the magistrate held there was no case for the respondent to answer and acquitted him. The appellant then obtained leave, under s. 367 of the Criminal Procedure Code, and applied for a case to be stated for the opinion of the Supreme Court. In the case stated the appellant, and not the Crown, was again shown as "appellant". The case stated having been dismissed, the appellant sought to appeal again, but a preliminary objection was taken for the respondent that the appeal was incompetent, since the appeal had not been brought by the Crown, nor had the consent of the attorney-general been obtained.

Held –

- (i) when an application is made for a case to be stated under s. 367 of the Criminal Procedure Code the applicant, in the case of an acquittal by a subordinate court is, in law, the Crown, and the proviso which requires the consent of the attorney-general to be obtained in the case of an application by a private prosecutor for a case stated is a necessary safeguard to prevent an accused being put in jeopardy a second time, except upon the soundest grounds.
- (ii) section 360 of the Criminal Procedure Code, which provides for second appeals, contains no special provision enabling a private prosecutor, with the consent of the attorney-general, to appeal and, accordingly, under s. 360 an appeal against acquittal can only be instituted by the Crown acting at the instance of the attorney-general or, pursuant to s. 86 of the Criminal Procedure Code, by a public prosecutor.
- (iii) a right to bring a second appeal cannot be inferred from the phrasing of the proviso to s. 367 of the Criminal Procedure Code, which is not even the section concerned with second appeals.
- (iv) the confusion had arisen through the case having been wrongly intituled throughout.

Preliminary objection upheld. Appeal dismissed.

Cases referred to in judgment

- (1) *M. K. Shah v. Patel and Others* (1954), 21 E.A.C.A. 236.
- (2) *Tenywa Maganda v. Attorney-General* (1954), 21 E.A.C.A. 290.
- (3) *Benson v. Northern Ireland Road Transport Board*, [1942] 1 All E.R. 465.
- (4) *Cox v. Hakes* (1890), 15 App. Cas. 506.

Judgment

Forbes Ag P read the following judgment of the court: This is a second appeal from a judgment of the Supreme Court of Kenya dismissing an appeal by way of case stated from a decision of the resident magistrate, Nairobi, acquitting the respondent on a count of obtaining money by false pretences contrary to s. 308 of the Penal Code, and a count of obtaining the execution of a security by false pretences contrary to s. 309 of the Penal Code. The learned magistrate at the close of the prosecution case held there was no case to answer, and the Supreme Court upheld this decision. On the appeal coming on for hearing the respondent has taken a preliminary objection that the appeal is incompetent.

The proceedings against the respondent were initiated by a “complaint” made by the appellant under s. 89 of the Criminal Procedure Code (hereinafter referred to as the Code). The relevant provisions of that section read as follows:

- “89. (1) Proceedings may be instituted either by the making of a complaint or by the bringing before a magistrate of a person who has been arrested without warrant.
- “(2) Any person who believes from a reasonable and probable cause that an offence has been committed by any person may make a complaint thereof to a magistrate having jurisdiction.
- “(3) A complaint may be made orally or in writing, but if made orally, shall be reduced to writing by

the magistrate, and, in either case, shall be signed by the complainant and the magistrate.

- “(4) The magistrate, upon receiving any such complaint or where an accused person who has been arrested without a warrant is brought before him, shall, subject to the provisions of the next succeeding sub-section,

draw up or cause to be drawn up and shall sign a formal charge containing a statement of the offence with which the accused is charged, unless such a charge shall be signed and presented by a police officer.”

The original complaint is not on the record before us but it is not suggested that sub-s. (4) was not duly complied with. On the charges signed under s. 89 (4) a summons was issued to the respondent under s. 90 of the Code, the terms of which are not material to this case. The summons issued does not appear on the record either, but it would appear to have been intituled:

Rufus Riddlesbarger Complainant

v.

Brian John Robson Accused.

A question then arose as to the conduct of the prosecution. Section 88 of the Code provides:

- “88. (1) Any magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specially authorised by the Governor in this behalf shall be entitled to do so without permission.
- “(2) Any such person or officer shall have the like power of withdrawing from the prosecution as is provided by the last preceding section, and the provisions of that section shall apply to any withdrawal by such person or officer.
- “(3) Any person conducting the prosecution may do so personally or by an advocate.”

The learned resident magistrate in a written ruling noted that the attorney-general had previously declined to institute the proceedings, but expressed the hope that the attorney-general would see fit to undertake the conduct of them. In default of the attorney-general doing so the learned magistrate ruled that the appellant should have the conduct of the prosecution, and the appellant did, in fact, through his counsel, conduct the prosecution.

After the close of the case for the prosecution the learned magistrate upheld a submission of no case to answer, and acquitted the respondent. The appellant thereupon applied to the learned magistrate to state a case for the opinion of the Supreme Court under s. 367 of the Code. That section reads as follows:

- “367. After the hearing and determination by any subordinate court of any summons, charge, information or complaint, either party to the proceedings before the said subordinate court may, if dissatisfied with the said determination as being erroneous in point of law, or as being in excess of jurisdiction, apply in writing within thirty days after the said determination to the said subordinate court to state and sign a case setting forth the facts and the grounds of such determination for the opinion thereon of the Supreme Court, and such party, hereinafter called the appellant, shall within fourteen days after receiving the case transmit the same to the Supreme Court, and within thirty days after receiving the case serve a copy of the case, so stated and signed, on the other party to the proceedings in which the determination was given, hereinafter called the respondent:

“Provided always that no application shall be made under this section by a private prosecutor within the meaning of s. 171 of this Code without the previous consent in writing of the attorney-general.”

The appellant had duly obtained the consent of the attorney-general as required by the proviso to the section before making his application for a case to be stated. The proceedings in the Supreme Court were intituled:

Rufus Riddlesbarger Appellant

v.

Brian John Robson Respondent.

As has already been said, the Supreme Court dismissed the appeal. The appellant has now appealed to this court, and the respondent takes the preliminary objection:

- “1. That this appeal is incompetent in that it has not been filed by the Crown at the instance of the private prosecutor in the original Criminal Case No. P. 18 of 1958 of the resident magistrate’s court at Nairobi, and
- “2. The consent of the honourable, the attorney-general has not been obtained by the appellant to file this appeal.”

In support of the preliminary objection it was argued by Mr. Harris for the respondent that all prosecutions, whether “private” or not, are Crown prosecutions; that a complainant is not the prosecutor though he may be allowed the conduct of the prosecution; that therefore a complainant, though he may have the conduct of the prosecution, is not a “party”; that the only “parties” there can be to a prosecution are the Crown and the accused; that the proceedings in the instant case were wrongly intituled both in the magistrate’s court and the Supreme Court in purporting to show the appellant as a party, but that this cannot alter the position in law; and that as a right of appeal to this court is only conferred on a “party” under s. 360 of the Code, an appeal can only be instituted by the Crown. And he relied on the decisions of this court in *M. K. Shah v. Patel and Others* (1) (1954), 21 E.A.C.A. 236, and *Tenywa Maganda v. Attorney-General* (2) (1954), 21 E.A.C.A. 290.

Mr. Jack, who was present on behalf of the attorney-general as amicus curiae at the hearing of argument on the preliminary objection, confirmed that the Crown was not a party to the appeal, and that the consent of the attorney-general had not been sought or obtained in respect of the appeal.

Sub-section (1) of s. 360 of the Code (as amended by the Criminal Procedure (Amendment) Ordinance, 1959), which provides for a second appeal from the decision of a magistrate in a criminal case, reads as follows:

- “360. (1) Any party to an appeal from a subordinate court may appeal against the decision of the Supreme Court in its appellate jurisdiction to the Court of Appeal on a matter of law (not including severity of sentence) but not on a matter of fact.”

Sub-section (7) expressly provides that

“a decision of the Supreme Court on a case stated shall be deemed to be a decision of the Supreme Court in its appellate jurisdiction.”

In *Shah v. Patel and Others* (1) this court said:

“In the Kenya case of *Nunes v. R.*, (1935) 16 K.L.R. 126 the Supreme Court of Kenya in its appellate jurisdiction, after considering the relevant sections of the Criminal Procedure Code, decided that a private prosecutor is not entitled to be heard on an appeal, even if the attorney-general has intimated that he does not wish to be heard. In our opinion, this view is clearly right, and under the Criminal Procedure Code the proper respondent in every Criminal Appeal is the Crown, represented by the attorney-general or someone instructed by him.

“The confusion that has arisen in this case, and probably in many others of a like character, is, we think, due to the fact that the parties have failed to realise that even in a private prosecution the prosecutor is in law the

Crown at the instance of the private prosecutor, whoever he may be. That this must be so flows directly from the provisions of s. 82 of the Code,

which gives the attorney-general a residuary control over every criminal case at any stage thereof. Furthermore, it should not be overlooked that under s. 88 no person can conduct a private prosecution without permission of the magistrate. We see no other course open to us, therefore, in the present case but to declare that all proceedings after the order of June 21, 1952, were a nullity. The case will accordingly be remitted to the Supreme Court of Kenya with a direction to comply with the provisions of s. 353 of the Criminal Procedure Code."

In *Tenywa Maganda v. Attorney-General* (2), a case in which the appellate proceedings in the High Court of Uganda were intituled "*The Attorney-General of Uganda, Appellant v. Tenywa s/o Maganda, Respondent*" this court said at p. 293:

"Finally we wish to draw attention to the title given to the appeal to the High Court. The case before the district court was intituled correctly as '*Regina v. Tenywa Maganda*'. In Uganda, as in the other East African Territories, in all criminal matters the prosecutor is in law the Crown see *M. K. Shah v. A. C. Patel and Others*, ante p. 236. Likewise, when by s. 327 of the Criminal Procedure Code a right to appeal from an acquittal is conferred upon the attorney-general he exercises that right as Her Majesty's attorney-general, and the aggrieved party or appellant is in law still the Crown acting at the instance of the attorney-general. We think, therefore, that as a matter of form the appellate proceedings in the High Court should have been intituled in the same manner as in the trial court."

For the appellant, Mr. Nowrojee asked us to over-rule *Shah v. Patel* (1) and *Tenywa Maganda v. Attorney-General* (2). His argument, as we understand it, is that the proviso to s. 367 of the Code envisages three possible parties: the Crown; or the private prosecutor; and the accused; that in s. 171, which is expressly referred to in the proviso to s. 367, the distinction between a "private prosecutor" and a "public prosecutor" is clearly defined; that a "public prosecutor" in that section is defined as any person prosecuting for or on behalf of the Crown or for or on behalf of a public authority; that this provision clearly envisages prosecutions in which the Crown is not the prosecutor; that in any case the appellant is a "private prosecutor" within the meaning of that term in the proviso to s. 367 and, as such, is a "party" to the proceedings within the meaning of that section; that, as such, he was entitled to, and did, with the written consent of the attorney-general, apply for a case to be stated, and accordingly was a party to the appeal on the stated case; and that he is therefore a "party" entitled to appeal to this court under s. 360 of the Code.

This argument is attractive at first sight but we do not think it is sound. We are, we think, bound by the decisions of the court in *Shah v. Patel* (1) and *Tenywa s/o Maganda v. Attorney-General* (2), but even if we were not, we should see no reason to differ from them. On the basis of those cases the Crown is the prosecutor in law; but the Crown must, of course, act through someone. Normally the Crown acts through a "public prosecutor" as defined in s. 2 of the Code—see s. 86 of the Code. But special provision is made in s. 88 to enable the Crown to act through a complainant in cases in which a public prosecutor does not wish to act. In such case the consent of the magistrate must be obtained before the complainant can "conduct" the prosecution.

When it comes to an application for a case to be stated under s. 367 of the Code, the applicant, in the case of an acquittal, is still in law the Crown, though the application must, of necessity, be made by someone on behalf of the Crown. If the application is made by the attorney-general, he does not thereby become the appellant. The appellant is still the Crown, though acting at the instance of the attorney-general. The proviso applies to a case where in the original

prosecution the Crown was acting at the instance of a private complainant and enables a complainant who has had the conduct of the prosecution to make application for a case to be stated. But such application is still in law an application by the Crown, and the right of the complainant is further restricted by the necessity of obtaining the consent in writing of the attorney-general. When it is remembered that the appeal is one against acquittal, the safeguard is very necessary to prevent the accused being put in jeopardy a second time except upon the soundest grounds. In the absence of special provision the Crown acts at the instance of the attorney-general (Halsbury's Laws of England (3rd Edn.), Vol.7, p. 380).

In s. 360, which provides for second appeals, there is no such special provision, and we think that under that section an appeal against acquittal can only be instituted by the Crown acting through the attorney-general, or, by virtue of s. 86 of the Code, through a public prosecutor. This seems entirely consistent with the intention of the legislature so far as can be gathered from the terms of the Code. We find it impossible to accept that the legislature, which has been careful to safeguard "private" prosecutions by requiring the consent of the magistrate thereto, and first appeals against acquittals by requiring the written consent of the attorney-general thereto, intended to allow second appeals against acquittals at the instance of a private prosecutor without any such safeguard. We would respectfully agree with the words of Viscount Simon, L.C., in *Benson v. Northern Ireland Road Transport Board* (3), [1942] 1 All E.R. 465 at p. 469 where, citing Lord Halsbury in *Cox v. Hakes* (4) (1890), 15 App. Cas. 506, he says:

"His pronouncement is not irrelevant to the present case, for the question whether a disappointed prosecutor who is ordered to pay costs, has a right of appeal from a magistrate's decision to acquit in Northern Ireland may equally well arise where the punishment on conviction would be imprisonment. The language used by Lord Halsbury is as follows [p. 522]:

"... your Lordships are here determining a question which goes very far indeed beyond the merits of any particular case. It is the right of personal freedom in this country which is in debate; and I for one should be very slow to believe, except it was done by express legislation, that the policy of centuries has been suddenly reversed and that the right of personal freedom is no longer to be determined summarily and finally, but is to be subject to the delay and uncertainty of ordinary litigation, so that the final determination upon that question may only be arrived at by the last court of appeal.

"In the light of the above pronouncements, very clear statutory language would be needed to establish, by way of exception to the general rule, a right of appeal from a decision dismissing a criminal charge."

We do not think such a right of appeal is to be inferred from the phrasing of a proviso to a section which is not even the section relating to second appeals. This is not such "clear statutory language" as is needed to establish the right of appeal.

Mr. Nowrojee has argued that the provisions of s. 171 of the Code, which in sub-s.(1) enable a court to order payment of costs by a person convicted to a private prosecutor or public prosecutor and in sub-s. (2) to order a private prosecutor to pay costs to a person acquitted, make it clear that the Code does recognise a class of private prosecutors distinct from the Crown.

We hold that such is not the meaning of the section. Under s. 88 the persons who can conduct a prosecution fall into two classes: a "prosecutor", in this sense, must be either "a public prosecutor" (as defined in s. 2 of the Code) "or other officer generally or specially authorised by the Governor in this behalf"

or else a person whom the magistrate may permit to conduct the prosecution. No other class of “prosecutor”, that is, of person entitled to conduct a prosecution, is recognised. It follows that the person described in s. 171 as the “private prosecutor” is in fact the person whom the magistrate has permitted to conduct the prosecution; and who is able to appeal only with the consent of the attorney-general.

Under sub-s. (1) of s. 171 costs may be awarded in his favour. Under sub-s. (2) he may, unlike a “public prosecutor”, be ordered to pay costs if the summons or warrant was issued on his application; that is to say, if he was also the person who made a complaint under s. 89 (2). The object of the definitions of “public prosecutor” and “private prosecutor” in s. 171 is to draw this distinction for the purpose of enabling an order for the payment of costs to be made in favour of or against the appropriate person who was responsible for the prosecution. They relate to s. 171 only and do not alter the position that in law the prosecutor is the Crown. The only relevance of s. 171 to the issue before us that we can see is that it is another example of the safeguards provided by the legislature against the dangers of malicious and vexatious prosecutions at the instance of individuals in that it provides *inter alia* for the payment of costs to an accused in the event of an unsuccessful prosecution at the instance of a private complainant.

For these reasons we think the preliminary objection must succeed, and that this appeal is incompetent and must be dismissed. We would remark that, as in the other cases in this court to which reference has been made, the confusion in the instant case has arisen through the case having been wrongly intituled throughout.

Preliminary objection upheld. Appeal dismissed.

For the appellant:

EP Nowrojee

EP Nowrojee, Nairobi

For the respondent:

JPG Harris

Stephen & Roche, Nairobi

For the Crown amicus curiae:

AP Jack (Deputy Public Prosecutor, Kenya)

The Attorney-General, Kenya

Musa Mubiru Luwala v The Collector for the Western Uganda Railway Extension

[1959] 1 EA 848 (CAK)

Division: Court of Appeal at Kampala

Date of judgment: 29 October 1959

Case Number: 46/1959

Before: Forbes Ag P, Windham JA and Bennett J
Sourced by: LawAfrica
Appeal from: H.M. High Court of Uganda–Sir Audley McKisack, C.J

[1] *Jurisdiction – Compulsory acquisition of land – Compensation awarded by Collector – Reference to “court” – “Award” by High Court – Whether further appeal lies – Whether “award” is an order from which a further appeal lies – Indian Land Acquisition Act, 1894, s. 6, s. 16, s. 18, s. 26, s. 54 – Africa Order-in-Council, 1899 – Appeals Ordinance, 1902 – East African Order-in-Council, 1897, art. 7, art. 30 – Eastern African Protectorates (Court of Appeal) Order-in-Council, 1902, art. 2 – Africa Order-in-Council, 1892 – Eastern Africa Court of Appeal Order-in-Council, 1950 – Uganda Order-in-Council, 1902, art. 15 (U.) – Uganda Appeal Ordinance, 1904, s. 7 (U.) – Uganda Appeal Ordinance, 1910, s. 3 and s. 6 (U.) – Courts Ordinance, 1911(U.) – Courts Ordinance, 1919, s. 12, s. 15 (U.) – Subordinate Courts Ordinance, 1940, s. 13(U.) – Civil Procedure Ordinance, 1928, s. 77 (1) (U.) – Civil Procedure Rules, O. 43, r. 12(U.).*

Editor’s Summary

The appellant owned Mailo land which the Government had acquired for a public purpose pursuant to the Indian Land Acquisition Act, 1894. The appellant, being dissatisfied with the compensation awarded by the collector, required the collector to refer the matter to the “court” specified in s. 18 of the Act, as a result of which the reference was heard and an “Award” made by the Chief Justice of Uganda. From this award the appellant sought to appeal again, but the respondent objected that the Court of Appeal had no jurisdiction to entertain the appeal.

Held –

- (i) by s. 18 of the Act the matter is referred “for the determination of the court”, as distinct from a judge of the court, and the determination of the reference was by the High Court of Uganda.
- (ii) section 54 of the Act cannot be read as if “Court of Appeal for Eastern Africa” were substituted for the words “High Court”; the Court of Appeal for Eastern Africa is not in any sense the equivalent of a High Court in India, nor did the Court of Appeal take over the jurisdiction of the High Court of Bombay.
- (iii) the award of the High Court was an “order” and not a “decree” within the meaning of those terms as defined in the Civil Procedure Ordinance, and was not an order within s. 77 of the Ordinance, and accordingly was not appealable thereunder.
- (iv) since a right of appeal can only exist if expressly conferred by statute and as no such right appeared to have been given, the court had no jurisdiction to entertain the appeal.

Appeal dismissed.

Cases referred to in judgment

- (1) *Rangoon Batatoung Co. Ltd. v. The Collector, Rangoon* (1913), 40 Cal. 21.
- (2) *Mityana Ginners Ltd. v. Public Health Officer, Kampala*, [1958] E.A. 339 (C.A.).

October 29. The following judgments were read by direction of the court:

Judgment

Forbes Ag P: This is an appeal from a decision of the High Court of Uganda. A preliminary objection has been taken that this court has no jurisdiction to entertain the appeal. After hearing argument we adjourned the hearing pending a decision on the preliminary objection.

The appellant in this case was the owner of a plot of Mailo land (registered in the Mailo Register as Vol. 112, folio 17, final certificate 14153) which has been acquired by the Government for a public purpose. Acquisition was effected under the Indian Land Acquisition Act, 1894, (hereinafter referred to as the Act) which applies in Uganda by virtue of an Order of the Secretary of State of August 17, 1899. Both the Order of the Secretary of State and the Act are set out as Cap. 120 in Vol. III of the 1951 edition of the Laws of Uganda. The Order of the Secretary of State effected certain modifications of the Act in its application to Uganda, but these are not material in the instant case. The declaration that the land in question (hereinafter referred to as the appellant's plot) was needed for a public purpose, which was required to be made by s. 6 of the Act, was made on July 3, 1958, and possession of the land was taken by Government under s. 16 of the Act on August 15, 1958. In the year 1951 the appellant's plot had been entered and surveyed for the purpose of constructing a railway line, and later the same year construction of the line across the appellant's plot was commenced. The line was duly completed and put into operation. The acquisition of the appellant's plot was for the purpose of this railway line, but, as already indicated, steps for the compulsory acquisition of the plot were not commenced till July 3, 1958. The delay was apparently due to protracted and unsuccessful negotiations on the question of the compensation to be paid for the land.

Since the compensation to be paid for the appellant's plot could not be settled by negotiation, resort was had to the machinery for determining compensation prescribed by the Act. The senior valuation officer of the Lands and Surveys Department, who was the "collector" for the purposes of the Act, made inquiry and an award of compensation. The appellant did not accept the award and required the collector to refer the matter to the "court" as provided for in s. 18 of the Act.

"Court" is defined in the Act as:

"a principal civil court of original jurisdiction unless the local Government has appointed (which it is hereby empowered to do) a special judicial officer within any specified local limits to perform the functions of the court under this Act;"

No appointment of a special judicial officer was made in this case, and the reference was heard by the learned Chief Justice of the High Court. In India, the principal civil court of original jurisdiction would have been a district court, but it was common ground that in Uganda such principal civil court must be the High Court.

I will dispose here of an argument, advanced by Crown Counsel on behalf of the respondent, that the learned Chief Justice was sitting to hear the reference in a special capacity and not as the High Court of Uganda; the point of this argument being that in such case it could be argued that appeal under s. 54 of the Act would lie from the learned Chief Justice to the High Court. I do not see how learned Crown Counsel's contention can be supported. There is no suggestion that I can see in the Act that the reference under s. 18 is to a judge of the "principal civil court" as distinct from the court itself; unless, indeed, the judge is appointed as a special judicial officer to perform the functions

of the court, which has not happened here. It is clearly stated that the matter is to be referred “for the determination of the court”. I am satisfied that this means precisely what it says and that the determination of the reference was the determination of the High Court of Uganda, which in the instant case happened to be presided over for the purpose by the learned Chief Justice.

The collector’s award included apportionment of the total compensation awarded between the appellant and Government, and this apportionment was one of the principal matters in dispute. The claim for the apportionment arose because the collector’s valuation was based on the value of the land at the date of acquisition and included the value of improvements, that is to say, the value of the railway line laid across the appellant’s plot. The collector awarded the value of the site to the appellant and the value of the improvements to Government. No question of compensation for standing crops arose as this had been agreed and paid at the time the railway was constructed in 1951.

When the “reference” came on for hearing, evidence was called, and in due course, on March 17, 1959, the learned Chief Justice delivered a written decision. This decision is headed “Award”. This, in my opinion, is a correct description of the decision in view of the terms of the Act. Section 26, for instance, requires that every “award under this Part shall be in writing signed by the judge”. I will revert later to the question whether the award is also an “order” within the meaning of the Civil Procedure Ordinance.

By his award the learned Chief Justice held that the apportionment of the value of the improvements, i.e. the railway line and the earthworks connected therewith, to Government was correct in law. He further awarded Shs. 37,029/- compensation to the appellant in respect of the site value of the appellant’s plot, an increase of Shs. 13,354/50 over the amount awarded by the collector, together with the costs of the proceedings. This appeal is concerned solely with the learned Chief Justice’s decision that the apportionment of the value of the improvements to Government is correct in law, the appellant claiming that he is entitled to the compensation attributable to the value of such improvements.

As I have already indicated, the jurisdiction of this court to hear the appeal is challenged by the respondent, and this is the issue now before the court.

The first question for decision is whether an appeal lies to this court by virtue of s. 54 of the Act, which reads as follows:

- “54. Subject to the provisions of the Code of Civil Procedure applicable to appeals from original decrees an appeal shall lie to the High Court from the award or from any part of the award of the court in any proceedings under this Act.”

As I have said above, in India “the court” for the purposes of the Act would normally be a district court, from which, by virtue of s. 54, appeal lies to the High Court. In Uganda, however, the system of courts is entirely different from the Indian system, there is no court corresponding to the Indian district court, and it follows that reference from an award of a collector in Uganda must be to the High Court unless a special judicial officer is appointed for the purpose of such reference. In these circumstances, can s. 54 of the Act be interpreted as conferring a right of appeal to this court?

Mr. Wilkinson for the appellant contends that s. 54 of the Act was clearly intended to give a right of appeal to a court beyond the court dealing with the “appeal” from the collector; that at the time the Act was applied to Uganda no High Court or Court of Appeal for Eastern Africa existed; that the court in Uganda at that time was the consular court, from which appeal lay to the High Court in Mombasa, with a further right of appeal to the High Court in Zanzibar; that the reference to the “High Court” in s. 54

should be interpreted as meaning “such appellate court as now exists”; and that the

right of appeal conferred by s. 54 must now be to this court as being the existing Court of Appeal.

At the time the Act was applied to Uganda (i.e. August, 1899), the Africa Order-in-Council, 1899, as subsequently amended, was in force in Uganda. That Order-in-Council provides for consular courts and for appeals from consular courts in “civil matters” to “the prescribed Court of Appeal”; “prescribed” being defined as meaning prescribed by consular instructions or any order or notification signed or authorised by a Secretary of State. In the absence of the relevant instruction or order relating to appeals from the consular court in Uganda I have been unable to ascertain with certainty where such appeals from Uganda consular courts went. They may have been either to the High Court at Bombay, as stated at p. 247 of “Uganda” by H. B. Thomas and Robert Scott, published in 1935, a book to which we were referred by Mr. Wilkinson; or they may have been to the court at Mombasa or Zanzibar as alleged by Mr. Wilkinson, though without supporting authority. Mr. Wilkinson referred to “The Appeals Ordinance, 1902” (No. 28 of 1902) set out in Vol. 1 of Law Reports East Africa (1897-1905) at p. 115. That Ordinance relates to the then East Africa Protectorate and not to Uganda, but, as I understood it, Mr. Wilkinson suggested that in referring to:

“a right of appeal from His Majesty’s Court for East Africa . . . to His Britannic Majesty’s Court for Zanzibar”

the Ordinance was indicative of the position in Uganda as well as in the East Africa Protectorate. I do not, however, think that this is necessarily correct. Provision for the establishment of “Her Majesty’s Court for East Africa” is made by the East Africa Order-in-Council, 1897 (art. 7), and for appeals from that court to the Court for Zanzibar (art. 30). That Order-in-Council does not affect Uganda, and I am not aware of any corresponding provision for Uganda. A Court of Appeal for Eastern Africa, including Uganda, was established by the Eastern African Protectorates (Court of Appeal) Order-in-Council, 1902, and it can, perhaps, be argued that by reason of art. 30 of the East Africa Order-in-Council, 1897, and the Appeals Ordinance, 1902, of the East Africa Protectorate, so far as the East Africa Protectorate, i.e. Kenya, is concerned, an appeal provided by an applied Indian Act to “the High Court” would operate as an appeal to the Court of Appeal for Eastern Africa. However, in the absence of any corresponding provision for Uganda it does not follow that the same position prevails there. On such information as is available to me it seems likely that in 1899 appeals from the Uganda consular court lay to the High Court in Bombay. The original Africa Order-in-Council, 1889, does not provide for the application of Indian Acts, and I have been unable to get access to the relevant amendment which provided for this, presumably the Africa Order-in-Council, 1892, under which the Order of the Secretary of State applying the Act to Uganda appears to have been made. Even if, however, amendments to the Africa Order-in-Council, 1889 contain some provision corresponding to art. 30 of the East Africa Order-in-Council, 1897, to the effect that applied Indian Acts are to have effect as if, *inter alia*, the court for Zanzibar were:

“the highest Civil Court of Appeal for the district, and the court authorised to hear appeals from and to revise the decisions of the district court”,

I do not think that, in the absence of provision in Uganda corresponding to the Appeals Ordinance, 1902, of the East Africa Protectorate, the position is materially affected.

Article 2 of the Eastern African Protectorates (Court of Appeal) Order-in-Council, 1902, provides that the Court of Appeal for Eastern Africa

“shall exercise such appellate jurisdiction and such other powers in relation to the High Court and other courts in the said Protectorates as may from time to time be conferred by Ordinances passed under the provisions of the Orders-in-Council relating to the said Protectorates respectively.”

Substantially similar provision is contained in the Eastern African Court of Appeal Order-in-Council, 1950, which now governs the affairs of this court. The first provision conferring a right of appeal from the High Court (which was established by art. 15 of the Uganda Order-in-Council, 1902) appears to have been the Uganda Appeal Ordinance, 1904 (No. 16 of 1904). Section 7 of that Ordinance provided:

- “7. In civil cases an appeal shall lie to the Court of Appeal from any final or interlocutory judgment, decree or order of the High Court, whether made on appeal or in the exercise of its original jurisdiction, in a suit whereof the subject matter exceeds 1,000 rupees in value, or in any case by leave of the High Court or of the Court of Appeal.”

This Ordinance was repealed and replaced by the Uganda Appeal Ordinance, 1910 (No. 12 of 1910). Section 3 and s. 6 of that Ordinance read as follows:

- “3. Subject to the general provisions of the Code of Civil Procedure relating to appeals, and to the provisions of this Ordinance or any other law for the time being in force in the Protectorate, an appeal shall lie to the Court of Appeal in Civil Cases from the decrees, or from any part of the decrees, and from the orders of the High Court whether made on appeal or in the exercise of its original jurisdiction.”
- “6. Unless otherwise specially provided by Ordinance no appeal shall lie to the Court of Appeal from any decree or order of the High Court in the exercise of bankruptcy or other special jurisdiction, except by leave of the High Court or of the Court of Appeal.”

Those sections were re-enacted in the Courts Ordinance, 1911, which repealed the Uganda Appeal Ordinance, 1910, and were again re-enacted in the Courts Ordinance of 1919 (Cap. 4 of the 1923 Revised Edition of the Laws of Uganda) which repealed the Courts Ordinance, 1911. In the Courts Ordinance of 1919 s. 3 of the Uganda Appeal Ordinance, 1910, appears as s. 12 and s. 6 as s. 15. Section 12 of the Courts Ordinance remained in force till the enactment of the Civil Procedure Ordinance, 1928 (No. 1 of 1928) when it was repealed by that Ordinance (s. 101). Section 15 was not repealed by the Civil Procedure Ordinance, 1928, and remained in force until 1940, when it was repealed by the Subordinate Courts Ordinance, 1940 (s. 13). Thereafter, subject to any special provision which may exist in respect of particular proceedings, appeals from the High Court to this court have been governed by the provisions of the Civil Procedure Ordinance, 1928, as amended from time to time, which now appears as Cap. 6 in the 1951 Revised Edition of the Laws of Uganda.

I will revert later to the position under the Civil Procedure Ordinance. Prior to the enactment of that Ordinance and the repeal of s. 12 and s. 15 of the Courts Ordinance, 1919, it might well have been argued that, by virtue of those sections, an appeal would lie to this court from an award of the High Court under the Act. It is true that the term “civil cases” is not defined, but the reference in s. 6 to “other special jurisdiction”, seems wide enough to cover it. If so, an appeal would have lain to this court with leave under s. 6 of the Uganda Appeal Ordinance, 1910, and the subsequent re-enactments. It is to be noted, however, that this right of appeal, if it existed, was entirely independent of the provisions of s. 54 of the Act. It was a substantive right of appeal created by the sections in question, and when those sections were

repealed, the right of appeal conferred by them died except in so far as the provisions of the sections were re-enacted.

So far as s. 54 of the Act is concerned, I am clearly of opinion that it cannot be read as if “Court of Appeal for Eastern Africa” were substituted for High Court. As I have said, the appeal sections of the Uganda Appeal Ordinance, 1910, and subsequent legislation possibly gave an independent right of appeal, but they certainly did not either expressly or impliedly substitute the Court of Appeal for Eastern Africa for the High Court in s. 54. The Uganda Appeals Ordinance, 1904, certainly did not have this effect, if, indeed, it conferred any right of appeal at all in respect of an award under the Act. And there is nothing in the legislation prior to the enactment of the Uganda Appeals Ordinance, 1904, that I have been able to trace which could be interpreted as having that effect. The Court of Appeal for Eastern Africa did not take over the jurisdiction of the High Court of Bombay. It was expressly provided in the Courts Ordinance, 1911, (s. 6) and repeated in the Courts Ordinance, 1919, that the Uganda High Court should.

“have all the powers of a High Court under the Civil and Criminal Procedure Codes.”

It was also provided (s. 7) that the Uganda High Court “should be the principal court of original civil jurisdiction in the Protectorate”. The effect would seem to be that the Uganda High Court as constituted included, at least to a large degree, the functions of both district courts and High Courts in India. At least there is no justification for saying that the Court of Appeal for Eastern Africa is in any sense the equivalent of a High Court in India. There is one further consideration which appears material. The definition of “court” in the Act, which is set out above, includes a special judicial officer appointed to perform the functions of the court under the Act. If such a judicial officer were appointed for the purpose of any particular reference, it seems to me that, by virtue of s. 54, an appeal would lie from his award to the High Court. If this is correct, the term High Court in s. 54 can not be interpreted to bear a different meaning when an award under the Act is given by the High Court itself. The position of the Uganda High Court when functioning as the “court” under the Act is perhaps similar to that of the chief court of lower Burma in *Rangoon Batatoung Co. Ltd. v. The Collector, Rangoon* (1) (1913), 40 Cal. 21, a case arising under the Act as applied to Burma, when, in the judgment of their Lordships of the Privy Council, Lord Macnaughton said:

“The reference was taken by two judges of the chief court. They sat as ‘the court’ and also as the High Court to which an appeal is given by the Act from the award of ‘the court’.”

It may be that the High Court in the instant case is to be regarded as having performed the same double function. However that may be, for the reasons I have given I do not think that s. 54 of the Act confers a right of appeal to this court. It remains to consider whether such a right of appeal exists under the Civil Procedure Ordinance and Rules.

It was, I think, common ground that the award of the High Court was an “order” and not a “decree” within the meaning of those terms as defined in the Civil Procedure Ordinance. This, I think, is correct. The question what is a “suit”, a “decree” and an appealable “order” has been repeatedly considered by this court. The latest reported case is *Mityana Ginners Ltd. v. Public Health Officer, Kampala* (2), [1958] E.A. 339. (C.A.) In that case the then learned Vice-President, citing an earlier decision, said at p. 341:

“On the question whether it was a decree, I refer to s. 93 of the Civil Procedure Ordinance, which is in pari materia with s. 89 of the Civil

Procedure Ordinance of Kenya, to s. 85 which is for relevant purposes in pari materia with Kenya s. 81, and to the definitions in s. 2 of 'suit', 'prescribed' and 'rules', which are identical in both countries. Referring to s. 89 of the Kenya Ordinance, I said in *Mansion House Ltd. v. Wilkinson* (3) (1954), 21 E.A.C.A. 98, at p. 101 and p. 102,

"This makes it clear that the Supreme Court may have to entertain proceedings which are not "suit" within the meaning of the Ordinance. I next consider whether this proceeding was a "suit" in that sense. In s. 2 of the Ordinance "suit" is defined to mean "all civil proceedings commenced in any manner prescribed". One might imagine that this would mean "prescribed by any written law": but it does not, for "prescribed" is again defined by the same section to mean "prescribed by rules" and "rules" are defined to mean "rules and forms made by the rules committee to regulate the procedure of courts". The rules committee is clearly that created by s. 81 of the Ordinance. Accordingly a "suit" is any civil proceeding commenced in any manner prescribed by rules and forms made by the rules committee to regulate the procedure of courts under s. 81 of the Ordinance.

"Mr. Khanna contended that "suit" must for the purposes of this appeal be construed in a more liberal sense, under the over-riding provision against repugnancy which governs the whole of s. 2. Without giving reasons at the moment, I would say that it is here that I must differ from his views. I am unable to discover any repugnancy whatever, and I consider that "suit" must for the purposes of these proceedings have its precise and statutorily defined meaning.

.....

"The importance of this is at once apparent on considering in detail the definition in s. 2 of the Ordinance of "decree". A decree means "the formal expression of an adjudication . . . with regard to . . . matters of controversy in the suit . . . I put in immediate juxtaposition the definition of "order" in the same section. "Order" means "the formal expression of any decision of a civil court which is not a decree, and shall include a rule nisi. It seems clear that, whereas decrees arise only in suits, orders may arise in proceedings which are not suits, to which class of proceedings I have referred above. If, therefore, as I believe, the application to the Supreme Court was not a "suit", it could not result in a decree but only in an order'."

In the instant case there is no question of the reference to the High Court being commenced in any manner prescribed by rules made by the rules committee. It was commenced in the manner prescribed by the Act. Accordingly, it was not a "suit", and the decision of the High Court could not be a decree, but was an "order".

The types of orders which are appealable are set out in s. 77 of the Civil Procedure Ordinance. The material provisions of s. 77 are as follows:

- "77. (1) An appeal shall lie from the following orders, and save as otherwise expressly provided in this Ordinance or by any law for the time being in force from no other orders:
- (a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;
 - (b) an order on an award stated in the form of a special case;
 - (c) an order modifying or correcting an award;
 - (d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;

- (e) an order filing or refusing to file an award in an arbitration without the intervention of the court”;

Mr. Wilkinson argued that this was an order modifying the collector’s award, and so fell under para. (c) of sub-s. (1) of s. 77 of the Civil Procedure Ordinance. I do not think this is correct. It appears to me that the term “award” in para. (c) must be read in the context of the other paragraphs of the sub-section, particularly paragraphs (a) and (e). In that context, it seems clear that the “award” referred to in para. (c) is an award in an arbitration. While it is true that proceedings under the Act are proceedings in the nature of an arbitration, they are not, in my view, an “arbitration” within the meaning of the expression in s. 77. It is clear from the terms of the paragraphs that the arbitration contemplated in s. 77 is an arbitration such as is referred to in O. 43 of the Civil Procedure Rules. The types of order referred to are only apt in relation to such an arbitration. The order in the instant case was not an order modifying or correcting an award such as is provide for in O. 43, r. 12 of the Civil Procedure Rules, which is clearly the type of order to which para. (c) relates, but is, in fact, an original award. I do not think the award in this case is an order falling within the terms of s. 77 of the Civil Procedure Ordinance.

It is trite law that a right of appeal can only exist if it is expressly conferred by statute. I can find no such right conferred, either by the Act itself or by the Civil Procedure Ordinance. In the absence of such provision, I think this court has no jurisdiction to entertain the appeal.

I would accordingly dismiss the appeal with costs.

Windham JA: I agree.

Bennett J: I also agree.

Appeal dismissed.

For the appellant:

PJ Wilkinson

PJ Wilkinson, Kampala

For the respondent:

AM McMullin (Crown Counsel, Uganda)

The Attorney-General, Uganda

Khalil Mohamed Khalil v R
[1959] 1 EA 856 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	28 October 1959
Case Number:	123/1959
Before:	Forbes Ag P, Gould Ag V-P and Windham JA
Sourced by:	LawAfrica

Appeal from: H.M. Supreme Court of Aden–Gillett, J

[1] Criminal law – Evidence – Corruption – Evidence of witness contradictory to statement to police – Explanation by witness of inconsistencies – Application by counsel for accused to see statements to police – Application refused on ground that contradictions not material – Whether contradictions material – Whether if contradictions material failure of justice has occurred – Prevention of Corruption Ordinance (Cap. 136), s. 3, s. 10 (A.) – Criminal Procedure Ordinance, s. 115 (2) and (3), s. 363 (A.) – Evidence Ordinance, s. 161 (A.).

Editor's Summary

The appellant, who was superintendent of the prison at Aden, was charged with corruptly obtaining for himself two sums in December, 1957, and April, 1958, from one Al-Wagih, a wealthy merchant serving a sentence at the prison, as an inducement to show favour to Al-Wagih. At the trial Al-Wagih's evidence was that he had paid the two sums to the appellant, but in cross-examination he admitted having said to the police that he had neither received privileges from nor given bribes to the appellant. Counsel for the appellant then asked to see the recorded statements of Al-Wagih made to the police, which the magistrate in reliance upon s. 115, sub-s. 3 of the Criminal Procedure Ordinance refused to permit. From his subsequent conviction the appellant unsuccessfully appealed to the Supreme Court and then brought this further appeal on the ground *inter alia* that the magistrate had wrongly exercised his discretion under s. 115 of the Criminal Procedure Ordinance in refusing to allow the appellant's advocate to cross-examine Al-Wagih on statements made by Al-Wagih to the police prior to the trial.

Held –

- (i) the statements of Al-Wagih to the police materially and vitally contradicted the substantive evidence given by Al-Wagih; whilst Al-Wagih had admitted in evidence having denied to the police that he had received favours and made no mention to them of bribing the appellant and offered in evidence an explanation for this inconsistency, nevertheless the statements were so at variance with the evidence he had given about the favours received and payments made that the appellant was entitled to have access to the full statements, in order to assist him to impeach the credit of Al-Wagih.

P. R. Digaria v. R., [1958] E.A. 197 (C.A.) distinguished.

- (ii) since the case against the appellant was founded almost wholly on the evidence of Al-Wagih, an admitted accomplice, whose evidence, though not requiring corroboration, necessarily required very careful testing before it could be safely relied on, the appellant's defence had been prejudiced and a substantial miscarriage of justice had occurred, which was not curable under s. 363 of the Criminal Procedure Code.

Appeal allowed.

Cases referred to in judgment

- (1) *P. R. Digaria v. R.*, [1958] E.A. 197 (C.A.).
- (2) *Mahadeo v. R.*, [1936] 2 All E.R. 813.

Judgment

Windham JA: read the following judgment of the court:

This is a second appeal from a judgment of the court of the chief magistrate, Aden, in which the appellant, who was superintendent of Her Majesty's Prison in Aden, was convicted on two counts, under s. 3 (a) of the Prevention of Corruption Ordinance (Cap. 126), of corruptly obtaining for himself sums of Shs. 6,000/- and Shs. 3,000/-, in December, 1957, and April, 1958, respectively, from one Ali Hussain Al-Wagih, a wealthy merchant who was serving sentence in the prison, as an inducement for showing favour to the latter.

The conviction of the appellant was based mainly, and as regards the actual payment of the two sums of money to him by Al-Wagih, entirely, on the evidence of Al-Wagih himself, whose evidence, by virtue of s. 10 (3) of the charging Ordinance, was not to be deemed unworthy of credit merely by reason of the fact that he was an accomplice. It was in fact corroborated on some points, and was accepted by the learned trial magistrate, whose findings were upheld by the Supreme Court on first appeal. No appeal lies, upon second appeal, upon those findings of fact. But two points of law, concerning the refusal of the trial court to allow the appellant's counsel to present his case properly, have been argued before us.

The first and main ground of appeal is that the learned magistrate:

“wrongly exercised his discretion under s. 115 of the Criminal Procedure Ordinance in refusing to allow counsel for the defence an opportunity to cross-examine the first prosecution witness Ali Hussain Ghaleb Al-Wagih on statements made by the said witness to the police prior to the trial.”

The second ground of appeal is that the learned magistrate wrongly refused, on the ground of irrelevance, to allow counsel for the appellant to continue cross-examining one of the police witnesses regarding a search of the prison conducted by him in pursuance of the investigations which led to the prosecution of the appellant.

With regard to the first ground of appeal, it is common ground that in the recorded statements made by Al-Wagih to the police in the course of their investigations prior to the trial, and in particular in the first of those statements, Al-Wagih denied that he had received any favours from the appellant in prison and made no mention of having paid any bribes to him. The statements were thus flatly and vitally at variance with his evidence at the trial, upon which the appellant was convicted. At the trial Al-Wagih, in cross-examination, admitted that he had denied to the police having received any privileges and had made no mention of the bribes, but he accounted for this briefly by saying that he had at that time been in prison and was therefore afraid to tell the tale. When counsel for the appellant asked to be allowed to see Al-Wagih's recorded statements to the police in order to cross-examine him on them, the learned trial magistrate, after perusing them, refused to let him have access to them. In his ruling the learned magistrate conceded that

“if there were material contradictions it would obviously be essential in the interests of justice to give the accused an opportunity to cross-examine on the statements made to the police.”

But he refused to let defence counsel see them on the ground that they contained “no material contradictions” of Al-Wagih's evidence, and that it was therefore:

“not essential in the interests of justice to disclose these statements to the accused.”

The Supreme Court on first appeal, after also perusing the statements, supported this ruling, holding that

“it cannot be said that the appellant was unfairly handicapped in his

defence at his trial”

by the statements being withheld.

We think that the court of trial and the Supreme Court erred in so ruling. The statements of Al-Wagih to the police did on the face of them materially and indeed vitally contradict the substantive evidence given by Al-Wagih. Al-Wagih, it is true, admitted in evidence having denied to the police that he had received favours and having made no mention of giving bribes to the appellant, and he offered an explanation for this inconsistency; but this did not alter the fact that the statements themselves were wholly at variance with the evidence that he gave about the favours received and the payments made. That being so, the appellant was entitled to have access to the full statements in order to assist him to impeach the credit of Al-Wagih. The fact that the statements did materially contradict the substantive story told by Al-Wagih distinguishes the case from a recent decision of this court, upon otherwise somewhat similar facts, in *Aden, P. R. Digaria v. R.* (1), [1958] E.A. 197 (C.A.), where it was held that the production of a prior statement made to the police had rightly been ruled by the court of trial to be not “essential in the interests of justice” because in fact there was:

“no inconsistency and nothing in the statement which could in any way have assisted the appellant.”

We think there is a vital distinction between a case where the story told in a statement to the police does not differ materially from the story told in court, and a case where such stories differ materially, and are admitted to do so by the witness in evidence. The admission does not cure the inconsistency nor deprive an accused of his right to make use of the statement to destroy the witness’s credit.

The legal position is made clear from the provisions of s. 161 (1) (c) of the Evidence Ordinance (Cap. 58) and of sub-s. (2) and (3) of s. 115 of the Criminal Procedure Ordinance (Cap. 38), and from a passage from the judgment of the Privy Council in *Mahadeo v. R.* (2), [1936] 2 All E.R. 813, at p. 816 and p. 817, to which we will presently refer.

Section 161 (1) (c) of the Evidence Ordinance provides that

“The credit of a witness may be impeached in the following ways by the adverse party . . . (c) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.”

Subsections (2) and (3) of s. 115 of the Criminal Procedure Ordinance provide as follows:

- “(2) When any witness is called for the prosecution or for the defence, other than the accused, the court shall on the request of the accused or the prosecutor refer to any statement made by such witness to a police officer in the course of a police investigation under this chapter, and, subject to the provisions of sub-s. (3) of this section, shall then direct the accused to be furnished with a copy thereof, and such statement may be used to impeach the credit of such witness in the manner provided by s. 161 of the Evidence Ordinance,
- “(3) If the court is of opinion that the statement or any part thereof is not relevant to the subject matter of the inquiry or trial or that the disclosure to the accused is not essential in the interests of justice or is inexpedient in the public interest it shall record the reasons for such opinion and shall thereupon withhold the whole or part of such statement from the accused.”

While the learned trial magistrate, in refusing to allow Al-Wagih’s statements to the police to be made available to the defence, no doubt purported to act

under sub-s. (3) of s. 115 of the Criminal Procedure Ordinance, we think his ruling was manifestly wrong and fell outside the ambit of that section, since those statements, by virtue of s. 161 (1) (c) of the Evidence Ordinance, became relevant from the very fact that they were inconsistent with Al-Wagih's substantive story as told in evidence.

In view of the inconsistencies, it was essential in the interests of justice that the whole of those statements should be made available to the defence; and it was not enough that Al-Wagih, in evidence, should admit having in the course of the statements, said, or omitted to say, one or more specific things. This is made clear from the judgment of the Privy Council in *Mahadeo v. R.* (2) to which we have earlier referred. The passage which deals with previous inconsistent recorded statements made to the police, reads as follows:

“The refusal of these documents is the subject of the first comment which their Lordships feel bound to make upon the conduct of this trial. There is no question but that they ought to have been produced, and their Lordships can find no impropriety in the letter asking for their production. It is true that upon cross-examination without the statements Sukraj admitted that he had at first put forward a story of suicide. But it is obvious that counsel defending the appellant was entitled to the benefit of whatever points he could make out of a comparison of the two documents in extenso with the oral evidence given and an examination of the circumstances under which the statements of the witnesses changed their purport.”

It is true that no provisions similar to sub-s. (2) and sub-s. (3) of s. 115 of the Criminal Procedure Ordinance were applicable in *Mahadeo's* case (2), but the latter part of the passage quoted points out the use to which an earlier inconsistent statement may be put in cross-examination and accordingly indicates the considerations which must be present to the mind of a court in deciding whether it is in the interests of justice that a statement should be made available to counsel.

For these reasons we consider that the statements of Al-Wagih to the police ought to have been made available to the appellant; and since the case against the appellant was founded almost wholly on the evidence of Al-Wagih, an admitted accomplice whose evidence, though not requiring corroboration by law, necessarily required very careful testing before it could be safely relied on, we feel that the defence was so prejudiced by the withholding of the statements, cross-examination on which might have shaken his testimony, that a substantial miscarriage of justice occurred, and that the irregularity is therefore not curable under s. 363 of the Criminal Procedure Ordinance. In the result it becomes unnecessary to consider the second ground of appeal.

We allow the appeal, quash the conviction of the appellant and the sentence imposed on him, and order that he be released forthwith.

Appeal allowed.

For the appellant:

Bryan O'Donovan QC and SM Akram

SM Akram, Nairobi

For the respondent:

JP Webber (Crown Counsel, Kenya)

The Attorney-General, Aden

Doto s/o Mtaki v R
[1959] 1 EA 860 (CAD)

Division: Court of Appeal at Dar-Es-Salaam
Date of judgment: 10 December 1959
Case Number: 192/1959
Before: Sir Kenneth O'Connor P, Forbes V-P and Gould JA
Sourced by: LawAfrica
Appeal from: H.M. High Court of Tanganyika–Williams, Ag. J

[1] *Criminal Law – Murder – Misdirection – Provocation – Burden of proof – Intent – Penal Code s. 202 (T.)*.

Editor's Summary

The appellant who was convicted of the murder of his wife had admitted killing her but had contended that he was provoked by her. The provocation consisted of refusal to cook a meal and vulgar abuse by the deceased. The trial judge directed the assessors that it was for the appellant to establish probability of provocation and further put this issue to the assessors on the basis that the provocation should be such as to negative an intent to kill or to cause dangerous harm. Following the opinions of the assessors the judge held that the probability of legal provocation had not been established. On appeal

Held –

- (i) except where there is a plea of insanity, there is no burden on an accused to establish his defence.
- (ii) the judge had himself wrongly considered the question whether the probability of legal provocation had been established and it was not the law in East Africa that, for the defence of provocation to succeed, it must appear that the accused was so provoked as to be incapable of forming an intent to kill or cause dangerous harm.
- (iii) the assessors' opinions may have been influenced by misdirection and since the court was not sure that upon a proper direction the assessors and the judge would have reached the same conclusion the sentence and conviction must be set aside and a new trial ordered.

Appeal allowed. Conviction and sentence set aside. Order for a new trial.

Cases referred to in judgment

- (1) *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462.
- (2) *Alipayo Lol s/o Acuda v. R.*, E.A.C.A. Criminal Appeal No. 121 of 1959 (unreported).
- (3) *Holmes v. Director of Public Prosecutions*, [1946] 2 All E.R. 124; [1946] A.C. 588.

(4) *Attorney-General of Ceylon v. Kumarasinghe Don John Perera*, [1953] 2 W.L.R. 238.

December 10. The following judgment was read by direction of the court:

Judgment

The appellant was convicted by the High Court of Tanganyika of the murder of his wife, and was sentenced to death. He has appealed to this court against his conviction and sentence.

The appellant at the trial admitted killing his wife by firing a muzzle-loading gun at her. There were no eye-witnesses to the incident, the principal evidence for the prosecution, apart from an extra-judicial confession made by the appellant, being that of the appellant's children who were asleep at the time but who were awakened by the sound of the gunshot and found their mother dead.

The appellant gave evidence at the trial and stated that he had shot his wife as the result of a quarrel which, he alleged, arose because she refused to cook his meal for him. He alleged that when he asked her for food, she abused him foully, and slapped him twice. He said that this made him very angry, that he had just returned from the bush and was holding the loaded gun in his hand, and that he fired it once at the deceased and killed her. He then ran away into the bush. This evidence was in conflict in some respects with the extra-judicial statement which had been made by the appellant. The learned judge nevertheless accepted the version of the affair given by the appellant in his evidence.

There was some evidence of the appellant having taken drink during the afternoon before the shooting, but nothing to suggest that he was incapable of forming an intent at the time of the incident, and the learned trial judge, in our view rightly, excluded drink as a matter affecting the question of intention. The substantial defence relied on was provocation by the deceased which caused the appellant to lose control of himself and fire the gun at her.

In his summing-up to the assessors the learned trial judge directed them on the question of provocation as follows:

“Definition of provocation. Has been held mere vulgar abuse does not amount to insult constituting provocation. Similar considerations apply to deceased’s alleged refusals of food. Slaps and nature of insults not mentioned in extra-judicial statement. Statement and evidence also inconsistent as to whether gun loaded before quarrel–P.W. 3’s evidence relevant. Refusal of food not sudden? Lack of explanation for such a violent reaction by accused not in itself sufficient to nullify intent. Drink relevant to intention—only reference by P.W. 3. For accused to establish probability provocation or drink affecting intent. Burden of proof on prosecution. Reasonable doubt.”

The learned judge then put a series of questions to the assessors, which included the following:

“Do you consider that the acts and words of the deceased were such as to deprive an ordinary man of accused’s tribe and background of control so as to mean that accused did not have the intent to kill or cause dangerous harm to deceased when he fired the gun?”

In the course of his judgment the learned judge said:

“In my view the words referred to amount to mere ordinary vulgar abuse and the acts are such as also to be ordinarily expected in domestic quarrels, the first refusal to prepare a meal reducing the effect of the second as a sudden cause for anger. The accused stated that he and the deceased had lived together for fifteen years without any quarrels and there is confirmation of this in the prosecution evidence, but taking into account that the violence of the accused’s reaction is somewhat inexplicable in those circumstances I nevertheless find following the opinions of both assessors that the probability of legal provocation has not been established.”

With great respect to the learned trial judge, we are of opinion that the passages cited appear to contain two serious misdirections. First, in his summing-up to the assessors, the learned judge says, “For accused to establish probability provocation or drink affecting intent”; and the proposition that, for the defence to succeed, the “probability” of legal provocation must be established, is repeated in the passage from the judgment which is cited above. Secondly, in his question to the assessors set out above, the learned trial judge has put the matter on the basis of the provocation being such as to negative an intent to kill or cause dangerous harm.

It is well established by a series of decisions both in England and in East Africa that, except where there is a plea of insanity, there is no burden on an accused to establish his defence; but that the court must consider whether, on a consideration of the whole evidence, the Crown has established the guilt of the accused beyond reasonable doubt. The passage cited seems to indicate a direction to the assessors that some burden lay on the accused to establish his defence, and, further, to establish it as a matter of probability. It is true that immediately following the sentence above, the summing-up proceeds “burden of proof on prosecution. Reasonable doubt.” It is not clear, however, that in his direction as to burden of proof and reasonable doubt the learned judge dispelled the misapprehension which he must have created in the minds of the assessors by the misdirections in the preceding sentence. And the learned judge has himself wrongly considered the question whether the “probability” of legal provocation has been established. The proper approach to the matter is indicated in the following passage from the judgment of Viscount Sankey, L.C., in *Woolmington v. Director of Public Prosecutions* (1), [1935] A.C. 462 at p. 481:

“If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal.”

As regards the misdirection in the question put by the learned judge to the assessors, it is not the law in East Africa that, for the defence of provocation to succeed, it must appear that the accused was so provoked as to be incapable of forming an intent to kill or cause dangerous harm. The definition of provocation in s. 202 of the Tanganyika Penal Code makes this clear. The relevant part of that section reads as follows:

“The term ‘provocation’ means and includes . . . any wrongful act or insult of such a nature as to be likely, when done to an ordinary person . . . to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered”.

There is no reference in this definition to the question of the capacity or otherwise of the accused to form an intent. As was said by this court in *Alipayo Lol s/o Acuda v. R.*, (2) E.A.C.A. Criminal Appeal No. 121 of 1959 (unreported):

“A killing may be manslaughter in spite of an intention to kill if the intention was formed and executed in the heat of passion. For the defence of provocation reduces to manslaughter what would otherwise be murder, that is to say, a killing with malice aforethought, one kind of malice afore-thought being an intention to kill. Section 187 of the Penal Code makes this clear.”

That case was a Uganda case, but the relevant provisions of the Penal Code of Uganda are substantially the same as those of the Penal Code of Tanganyika.

No doubt the learned judge, in framing the particular question to the assessors, had in mind a passage in the judgment of Viscount Simon in the case of *Holmes v. Director of Public Prosecutions* (3), [1946] A.C. 588 at p. 598, which suggests that

“where the provocation inspires an actual intention to kill . . . or to inflict grievous bodily harm, the doctrine that provocation may reduce murder to manslaughter seldom applies”.

This passage, however, is in apparent conflict with the principle followed in

earlier cases, and the principle of the earlier cases has been re-affirmed by the Privy Counsel in *Attorney-General of Ceylon v. Kumarasinghe Don John Perera* (4), [1953] 2 W.L.R. 238, where, at p. 242, their lordships said:

“The Court of Criminal Appeal were at pains to consider whether the law in England relating to homicide and the reduction of a crime from murder to manslaughter was the same as in Ceylon where the lesser crime is known as culpable homicide not amounting to murder.

.....

But as the Court of Criminal Appeal set out in their judgment what they conceived to be the English law relating to manslaughter their lordships feel bound to observe that in one respect the court were in error. They said in reference to English law, ‘if it is established or clear from the evidence that though provocation of howsoever grievous a kind may have been offered, nevertheless, if it could be shown that the accused caused the death with an intention to kill, the offence is one of murder and not manslaughter. This is one of the fundamental differences between our law and that of England’. A little further down in the judgment they said ‘in the case of murder, there must be an intention to kill, in the case of manslaughter, no such intention can exist’. With all respect to the court, that is not the law of England.

“In English law there is, no doubt, a distinction between what is generally called involuntary and voluntary manslaughter. The former expression is used to describe that class of manslaughter where the death is caused by gross and culpable negligence, the most common example of which is death caused by the dangerous driving of a motor vehicle. In such a case there is, of course, no intention either to kill or to cause grievous bodily harm, and no question of provocation can arise in such a case. The defence of provocation may arise where a person does intend to kill or inflict grievous bodily harm but his intention to do so arises from sudden passion involving loss of self-control by reason of provocation. An illustration is to be found in the case of a man finding his wife in the act of adultery who kills her or her paramour, and the law has always regarded that, although an intentional act, as amounting only to manslaughter by reason of the provocation received, although no doubt the accused person intended to cause death or grievous bodily harm.”

The whole matter is very fully discussed in Russell on Crime (11th Edn.), pp. 578–585. We think that in East Africa the matter is beyond doubt in view of the definitions of provocation in the Penal Codes of the different territories, which are all on similar lines, but the Privy Council decision referred to above makes it clear that there is no difference between the law in East Africa and the law in England on this matter.

The learned judge’s finding in his judgment that

“I nevertheless find, following the opinions of both assessors, that the probability of legal provocation has not been established”

is the basis of his decision to convict the appellant. It is true that in an earlier passage he found that the words used by the deceased to the appellant amounted to mere vulgar abuse and that the acts were such as were also to be expected in domestic quarrels, but he did not found the conviction of the appellant upon a finding that there had been no legal provocation. The decision is based, as we have said, on the finding of the assessors and of the learned judge himself that the probability of legal provocation had not been established by the accused. The assessors’ opinions, however, may have been influenced by the

misdirections which we have indicated, and we cannot be sure that upon a proper direction the assessors and the learned judge would have reached the same conclusion. They might well have done so on the evidence, but we think it would be unsafe to allow the conviction to stand on the basis on which it now rests. It may be noted that an issue which might have been considered by the learned judge was whether or not the assault committed by the appellant upon the deceased was out of proportion to the insult offered. This, however, is not mentioned in the judgment.

In all the circumstances we are of the opinion that the conviction and sentence should be set aside and that a new trial should be held, and we order accordingly.

Appeal allowed. Conviction quashed and sentence set aside. Order for new trial.

The appellant did not appear and was not represented.

For the respondent:

AE Taylor (Crown Counsel, Tanganyika)

The Attorney-General, Tanganyika

Sheikh Mohamed Bashir v United Africa Co (Kenya) Ltd and Others [1959] 1 EA 864 (CAN)

Division:	Court of Appeal at Nairobi
Date of Judgment:	30 October 1959
Case Number:	35/1959
Before:	Forbes Ag P, Gould Ag V-P and Windham JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya—MacDuff, J

[1] *Mortgage – Foreclosure and Sale – Procedure to be followed – Whether general rules of civil procedure ousted by Rules of Court (Mortgage Suits Consolidation) – Civil Procedure Rules, 1927, O. XIX, r. 75 and r. 77 to r. 89 (K.) – Civil Procedure (Revised) Rules, 1948, O. XXI, r. 72 to r. 85, O. XXXVI, r. 3A, Appendix C, Forms Nos. 3 to 11, (K.) – Indian Transfer of Property Act, 1882, s. 86, s. 88, s. 89 and s. 104 – Rules of Court (Mortgage Suits Consolidation), r. 6, r. 12, r. 13, r. 14, r. 15, r. 17 and r. 18 (K.) – Indian Code of Civil Procedure, s. 310A – Indian Rules of Civil Procedure, O. XXI, r. 89, O. XXXIV – Indian Acts (Amendments) Ordinance (Cap. 2), s. 85 to s. 90 (K.) – Civil Procedure Ordinance, (Cap. 5), s. 1 (2), s. 3, s. 81 (K.) – Rules of Court (Mortgage Suits), 1932 (K.).*

Editor's Summary

The appellant created a first mortgage over property in Nairobi in favour of the second respondent, and a

second mortgage in favour of the first respondent. In January, 1958, the first respondent commenced proceedings for foreclosure in default of repayment by the appellant of the amount secured by the second mortgage and, to comply with the provisions of the Indian Transfer of Property Act, 1882, joined the second respondent as first mortgagee. Following a consent to judgment a preliminary decree for sale and an order absolute for sale were made, after which notice of sale was given and a warrant of sale issued to court brokers, which resulted in the sale of the property by auction in January, 1959. Two applications by the appellant to set aside the sale made under O. XXI, r. 75 and O. XXI, r. 78 were refused by the Supreme Court of Kenya whereupon

the appellant appealed, joining the purchasers at the auction, who had paid the purchase price into court, as “interested persons”. When a preliminary point was taken the appellant abandoned his appeal against the dismissal of his application under O. XXI, r. 75 and the appellate court ordered that the appeal relating to O. XXI, r. 78 should proceed. At the hearing of the appeal it was contended that the Rules of Court (Mortgage Suits Consolidation) made under s. 104 of the Indian Transfer of Property Act must be read in conjunction with the Civil Procedure (Revised) Rules, 1948, and accordingly the appellant was entitled to have the sale set aside.

Held –

- (i) the Indian Transfer of Property Act, 1882, s. 86, s. 88 and s. 89 and the Rules of Court (Mortgage Suits Consolidation) expressly provide for the procedure to be followed in sales in execution of mortgage decrees and these provisions prevailed over the general provisions contained in rules made under the Civil Procedure Ordinance.
- (ii) the Rules of Court (Mortgage Suits Consolidation) constitute a complete code in respect of the sale of property pursuant to mortgage decrees and oust any general rules made pursuant to the Civil Procedure Ordinance which might otherwise have been applicable, and r. 78 of O. XXI of the Civil Procedure (Revised) Rules, 1948, has no application to a sale of property pursuant to a mortgage decree.

[**Editorial Note:** For the report of the preliminary point referred to above see [1959] E.A. 706 (C.A.).]

Appeal dismissed.

Cases referred to in judgment

- (1) *Kedar Nath Raut v. Kali Churn Ram and Khubi Lal* (1898), 25 Cal. 703.
- (2) *Mallikarjunadu Setti v. Lingamurti Pantulu* (1902), 25 Mad. 244.

October 30. The following judgments were read by direction of the court:

Judgment

Forbes Ag P: This is an appeal from an order of the Supreme Court of Kenya dated March 5, 1959, dismissing applications made by the appellant under O. XXI, r. 75 and O. XXI, r. 78 of the Civil Procedure (Revised) Rules, 1948 (hereinafter referred to as the 1948 Procedure Rules).

The proceedings relate to a property in Nairobi which was owned by the appellant and had been mortgaged by him to the respondents, the second respondent being first mortgagee and the first respondent being second mortgagee. In January, 1958, the first respondent as plaintiff filed a plaint against the appellant and the second respondent seeking realisation of the security in default of payment off of the amount due in respect of the second mortgage and costs. No relief was claimed against the second respondent, who was merely joined as defendant in order to comply with the provisions of the Indian Transfer of Property Act, 1882 (hereinafter referred to as the Transfer of Property Act) which applies in Kenya.

Consequent upon a consent to judgment signed by counsel for the first respondent and counsel for the

appellant, a “preliminary decree for sale” was made on March 27, 1958. This preliminary decree for sale follows closely the form (Form 4) prescribed in the Schedule to the Rules of Court (Mortgage Suits Consolidation), (hereinafter referred to as the Mortgage Suit Rules) made under s. 104 of the Transfer of Property Act, and the terms of the decree accord

with the requirements of s. 88 of that Act. It may be noted that the form prescribed by the Mortgage Suits Rules differs slightly from the similar form set out as Form No. 4 in Appendix C to the 1948 Procedure Rules in that it provides for a schedule setting out the registrar's certificate of the amount due for principal, interest and costs, and that it is the form in the form in the Mortgage Suits Rules that has been used here. The material part of s. 88 of the Transfer of Property Act reads as follows:

"88. In a suit for sale, if the plaintiff succeeds, the court shall pass a decree to the effect mentioned in the first and second paragraphs of s. 86, and also ordering that, in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into court and applied in payment of what is so found due to the plaintiff, and that the balance, if any, be paid to the defendant or other persons entitled to receive the same."

The paragraphs of s. 86 referred to in s. 88 read:

"86. In a suit for foreclosure, if the plaintiff succeeds, the court shall make a decree, ordering that an account be taken of what will be due to the plaintiff for principal and interest in the mortgage, and for his costs of the suit, if any, awarded to him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree,

"and ordering that, upon the defendant paying to the plaintiff or into court the amount so due, on a day within six months from the date of declaring in court the amount so due, to be fixed by the court, the plaintiff shall deliver up to the defendant, or to such persons as he appoints, all documents in his possession or power relating to the mortgaged property, and shall transfer the property to the defendant free from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims; and shall, if necessary, put the defendant into possession of the property."

Section 89 of the Transfer of Property Act provides:

"89. If in any case under s. 88 the defendant pays to the plaintiff or into court on the day fixed as aforesaid the amount due under the mortgage, the costs, if any, awarded to him and such subsequent costs as are mentioned in s. 94, the defendant shall (if necessary) be put in possession of the mortgaged property; but if such payment is not so made, the plaintiff or the defendant, as the case may be, may apply to the court for an order absolute for sale of the mortgaged property, and the court shall then pass an order that such property or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in s. 88; and there-upon the defendant's right to redeem and the security shall both be extinguished."

No copy of the "order absolute for sale" appears in the record, but in a notification of sale which is on the record it is recited that:

"Notice is hereby given that an order has been passed by this court for the sale of the attached property mentioned in the annexed schedule, in satisfaction of the Decree, in the mortgage suit herein . . ."

I presume the order referred to is the order absolute for sale. At any rate, no suggestion was made that the sale was irregular for lack of an order absolute.

In pursuance of the notification of sale and a warrant of sale issued to court brokers (both of which are in the form prescribed in the Schedule to the Mortgage Suits Rules) the property was sold by auction on January 20, 1959.

The purchasers on such sale are the persons described as “interested persons” in the appeal. The purchase price was duly paid into court, other than a sum of about Shs. 4,500/- which was paid out of the purchase moneys to the city council in payment of certain charges in relation to the property which were outstanding.

Subsequently the appellant moved the Supreme Court under O. XXI, r. 75 and under O. XXI, r. 78 of the 1948 Procedure Rules to have the sale set aside. Both motions were rejected, the operative part of the formal order being:

“It is Ordered

- “(1) That the first defendant’s application under O. 21, r. 75 be dismissed with costs to the purchasers of plot No. 209/2821 and costs (not to include costs of opposing) to the plaintiff and the second defendants.
- “(2) That the first defendant’s application under O. 21, r. 78 be dismissed with costs to the purchasers and costs (excluding costs of opposing) to the plaintiff and the second defendants and that the purchasers’ advocates be awarded special costs of Shs. 210/- in respect of receiving instructions to oppose the aforesaid application.”

The appellant appealed to this court against both these orders, the respondents and the interested persons being made parties to the appeal. The contest, in fact, is between the appellant and the interested persons, and, on application, when the appeal came on for hearing, leave was given for counsel for the respondents to withdraw.

On the appeal coming on for hearing, preliminary objection was taken on behalf of the interested persons on the ground that leave to appeal granted by the Supreme Court had not been obtained within the time prescribed. The appellant thereupon abandoned his appeal against the dismissal of his application under O. XXI, r. 75, but contended that he was entitled to appeal as of right against the dismissal of his application under O. XXI, r. 78. In rulings delivered on July 24, 1959, this court upheld the appellant’s contention and ordered that the appeal relating to O. XXI, r. 78 should proceed. For reasons given in the ruling of Gould, J.A., no order for costs of the preliminary objection was made, but it was noted that on final disposal of the appeal the interested persons would be entitled to have considered in their favour in the matter of costs the abandonment of the appeal against one of the orders of the Supreme Court.

Accordingly, the appeal now before this court concerns only the dismissal of the appellant’s application under O. XXI, r. 78 of the 1948 Procedure Rules, and the matter of costs in respect of that part of the appeal which was abandoned.

The material part of O. XXI, r. 78 of the 1948 Procedure Rules reads as follows:

- “78. (1) Where immovable property has been sold in execution of a decree, any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing in court:
 - (a) for payment to the purchaser, a sum equal to five per cent, of the purchase-money, and
 - (b) for payment to the decree-holder, the amount specified in the public notification of sale as that for the recovery of which the sale was ordered, less any amount which may since the date of such public notification of sale have been received by the decree-holder.”

Prior to his application to set aside the sale under the rule, the appellant paid

into court moneys sufficient to meet the payment to the purchaser prescribed by the rule and the decretal amount due to the first respondent.

In dismissing the appellant's application the learned judge of the Supreme Court who heard the matter ruled as follows:

"Apart from his previous application the debtor has also moved for an order that the sale be set aside on the grounds that he has complied with the provisions of O. XXI, r. 78, that is to say he has paid into court (a) for payment to the purchaser Shs. 5,000/-, being a sum equal to five per cent of the purchase money, and (b) for payment to the decree holder Shs. 32,866/29 the amount specified in the notification of sale as that for the recovery of which the sale was ordered.

"The only issue is whether this rule applies to mortgage suits. Mr. Mandla for the purchasers submits that it does not. In the first place he has instanced the difference in procedure by which a sale pursuant to a decree is effected under the Civil Procedure (Revised) Rules, 1948, and the Rules of Court (Mortgage Suits Consolidation), (Vol. V. Laws of Kenya 310). He has then submitted that although r. 78 is in the same terms as O. 21, r. 89 of the Indian Code of Civil Procedure the latter rule applies to mortgage suits purely by the transfer into the Indian Code (O. 34) of the sections of the Transfer of Property Act, 1882, and in particular of the present r. 5 of that order which was substituted for the old r. 5 by the Transfer of Property (Amendment) Supplementary Act, 1929. *Kedar Nath Raut v. Kali Churn Ram and Khubi Lal* (1898), 25 Cal. 703 is authority for the statement that s. 310A of the Indian Civil Procedure Code (now O. 21, r. 89 and the equivalent of our O. 21, r. 78) did not apply to sales of mortgaged property under the Transfer of Property Act. Finally, he submitted that this mortgage suit is governed by the Rules of Court (Mortgage Suits Consolidation) and not by the Civil Procedure (Revised) Rules, 1948, and those rules of necessity exclude the application of O. 21, r. 78.

"Mr. Sampson first argued that the Civil Procedure (Revised) Rules, 1948, being subsequent to the Rules of Court (Mortgage Suits Consolidation) must be taken to apply to mortgage suits. This argument has no validity since the present r. 78 appears in identical form as O. XIX, r. 82 in the Civil Procedure Rules, 1927, prior to the enactment of the Rules of Court (Mortgage Suits Consolidation). His second argument was that the two sets of rules are not mutually exclusive and that the mortgage suit rules should be read subject to the further provisions of O. XXI, r. 78. With that I cannot agree.

"In India s. 85 to s. 90, s. 92, s. 93, s. 94, s. 96, s. 97 and s. 100 of the Transfer of Property Act, 1882, with some alteration were re-enacted as O. 34 of the Code of Civil Procedure under the title 'Suits relating to Mortgages of Immovable Property'. Even then it was not until a further amendment was enacted in 1929 that mortgage suits came within the orbit of O. 21, r. 89 of that code. In Kenya suits for foreclosure sale or redemption are still governed by the original sections of the Transfer of Property Act, 1882. There has not been imported into the Civil Procedure Rules, or the revised rules, any procedure the equivalent of O. 24 of the Indian Code. In place of that by virtue of the provisions of s. 104 of the Indian Transfer of Property Act, 1882, the Supreme Court has made rules, consistent with that Act, the Rules of Court (Mortgage Suits Consolidation) for carrying out the provisions in that chapter to the Act. The procedure and type of decree are entirely different under the two systems.

"As MacLean, C.J., said in the *Kedar Nath Raut*'s case:

'Under s. 89 of the Transfer of Property Act if an order for an

absolute sale be passed, the mortgagor's right to redeem and the security are extinguished and the proceeds of sale are to be applied according to the provisions of s. 88 of the same Act. These are the mortgagee's rights under that Act. But if O. 21, r. 89 of the Code is to apply to such a case the mortgagee's rights are materially affected as are those of the purchaser, since after the sale has been made, the mortgagor on certain terms may yet redeem his property. In other words the period of redemption is substantially extended.'

"I would apply the reasoning and judgment of Banerjee, J., in the same case. Order XXI, r. 78, as its language shows, applies by its own force only to sales of immovable property under the chapter of the Civil Procedure Revised Rules, 1948, in which it is included. Now the sale in this case was not one under the Civil Procedure (Revised) Rules, 1948, but under the Transfer of Property Act; that is under the Rules made by this court under s. 104 of that Act; and neither by these Rules, nor by any other rule of law, has O. XXI, r. 78, been extended to such a sale. That rule cannot, therefore, apply to the sale in question."

Before us Mr. Shroff for the appellant argued that the learned judge was wrong to rely on *Kedar Nath Raut v. Kali Churn Ram and Khubi Lal* (1) (1898), 25 Cal. 703, that the Calcutta High Court was the only High Court in India which held that s. 310A of the Indian Code of Civil Procedure (which, as the learned judge has said, was the equivalent in India of O. XXI, r. 78 of the 1948 Procedure Rules until it was replaced in India by O. XXI, r. 89 of the Indian Rules of Civil Procedure) was not applicable to sales under mortgage decrees; that the reasoning applied in the cases decided in the Indian High Courts other than Calcutta should be applied in Kenya; that the Mortgage Suits Rules are to be read with the 1948 Procedure Rules, which provide *inter alia* for the commencement of mortgage proceedings by way of originating summons (O. XXXVI, r. 3A) and prescribe forms to be used in mortgage suits (Appendix C, Forms 3 to 11 inclusive); that there is nothing in the Mortgage Suits Rules to exclude the application of O. XXI, r. 78; and that accordingly that rule applies to sales in execution of a mortgage decree.

Numerous Indian authorities were referred to in the course of argument but, with the exception of *Mallikarjunadu Setti v. Lingamurti Pantulu* (2) (1902), 25 Mad. 244, on which Mr. Shroff principally relied, I do not think it necessary to refer to them in detail. The legislation in Kenya does not parallel that in India, and it is on the legislation in force in Kenya that the matter must be decided. I think it is sufficient to note that until the matter was set at rest by legislation (which does not apply in Kenya) there was a conflict of judicial opinion in India as to whether or not s. 310A of the Code of Civil Procedure applied to mortgage suits.

The Transfer of Property Act, as amended up to November 27, 1907, is in force in Kenya by virtue of the Indian Acts (Amendments) Ordinance (Cap. 2), and, as applied in Kenya, includes s. 85 to s. 90 which, in India, have been repealed and incorporated in the Indian Civil Procedure Rules in O. 34. Section 104 of the Transfer of Property Act enables the Supreme Court to make rules consistent with the Act for carrying out the provisions of that Chapter of the Act, that is, the chapter which includes s. 85 to s. 90.

The Kenya Civil Procedure Ordinance, now Cap. 5 of the 1948 edition of the Laws of Kenya, was enacted in 1924. It provides *inter alia* that "it shall extend to proceedings in the Supreme Court" . . . (s. 1 (2)), and, by s. 3:

"In the absence of any specific provision to the contrary nothing in this Ordinance shall be deemed to limit or otherwise affect any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force."

The rule-making power is contained in s. 81, and enables the Rules Committee:

“to make rules not inconsistent with the provisions of this Ordinance and, subject thereto, to provide for any matters relating to the procedure of civil courts.”

It follows from the provisions I have cited that rules applicable to mortgage suits may be made under the Civil Procedure Ordinance but that, in the absence of specific provision to the contrary, such rules are subject to the provisions of the Transfer of Property Act and any rules made thereunder. I am not aware of any specific provision to the contrary in the Civil Procedure Ordinance. No method is prescribed by the Transfer of Property Act or the rules made thereunder for the commencement of a suit for foreclosure or sale of mortgaged property, and it follows that the general provisions of the rules made under the Civil Procedure Ordinance apply, and also the special provision in O. XXXVI, r. 3A referred to above, which provides for the commencement of mortgage suits by way of originating summons. Express provision is, however, made in s. 86, s. 88 and s. 89 of the Transfer of Property Act with regard to decrees in mortgage suits, and in the Mortgage Suits Rules with regard to the procedure to be followed in sales in execution of mortgage decrees, and these provisions must prevail over anything contained in rules made under the Civil Procedure Ordinance.

There is an apparent conflict between the provisions of s. 89 of the Transfer of Property Act, which provides that on the making of the “order absolute” for sale,

“thereupon the defendant’s right to redeem and the security shall both be extinguished”

and O. XXI, r. 78 of the 1948 Procedure Rules, which, in effect, confers a final opportunity for redemption. In some of the Indian decisions this apparent conflict was resolved on the basis that s. 310A of the Indian Code of Civil Procedure was (as was the fact) the later enactment and that therefore in case of conflict the latter must prevail. I do not think this argument is applicable in Kenya where the provisions corresponding to s. 310A are merely contained in a rule made under the Civil Procedure Ordinance. In *Setti v. Pantulu* (2), it was held that there was no conflict. At p. 254 Sir Arnold White, C.J. says:

“Apparently, the scheme of the Legislature in framing the mortgage chapter of the Transfer of Property Act was that substantive right should be dealt with in the Act, and that the procedure for giving effect to these rights should be governed by rules made under the authority of the Act. In my opinion, however, it was not the intention of the Legislature that the Code of rules contemplated by s. 104 should be an exhaustive and self-contained Code. I think it was intended that the special rules should be supplementary to the existing general rules of procedure which were applicable to the subject-matter dealt with in Chapter IV, and it seems to me that if the Legislature had intended that the Code of rules which they contemplated for the purposes of the Transfer of Property Act should oust the provisions of the Code of Civil Procedure, the rules would have found a place in the body of the Act. A rule which went beyond the powers conferred by s. 104 would, of course, as a rule made under these powers, be *ultra vires*, and it may also be that a rule which was within the powers conferred by the section, but inconsistent with some general provisions of the Code, would also be *ultra vires*, but this question does not now directly arise.”

To pause here, this reasoning in my view is not applicable in Kenya. There is here no question of the provisions of rules under the Transfer of Property Act

ousting the provisions of a substantive enactment such as the Code of Civil Procedure. While I agree with the general conclusion that rules under the Transfer of Property Act are to be regarded as supplementary to the general rules of procedure, I have no doubt that in Kenya special rules under the Transfer of Property Act oust the general rules under the Civil Procedure Ordinance, should they be framed to do so.

Sir Arnold White CJ: continues, at p. 255 of the report in *Setti v. Pantulu* (2):

“The test to apply is,—are the general provisions of s. 310-A consistent, and can they be read together, with the special provisions of the enactment which deals with the special subject-matter of the law of mortgage? If the general provisions of the section are inconsistent with the special provisions of the Act, then on the principle *generalia specialibus non derogant* I think the section ought not to be construed as applying to sales in execution of mortgage-decrees. After, I confess, considerable doubt, I have come to the conclusion that there is no real inconsistency and that s. 310-A was intended to apply to sales in execution of mortgage-decrees. No doubt the Transfer of Property Act by special enactment regulates the rights of the party whose property the court has ordered shall be sold in default of compliance with the orders of the court with regard to payment. Under the foreclosure sections of the Act (s. 86 and s. 87) the court is empowered to postpone the day appointed for payment by the mortgagor. Under the corresponding redemption sections (s. 92 and s. 93) the court is empowered to extend the time for payment. Under s. 88 and s. 89, which deal with suits for sale, no such power is given. It would seem, therefore, that the legislature advisedly refrained from giving to the court a power to extend time for payment where, in a suit for sale, the court had ordered that, in default of payment in pursuance of the order of the court, the property should be sold. Now, no doubt, s. 310-A confers rights which are outside and beyond any rights given by the Transfer of Property Act, but I do not think the section can be said to confer any further right to redeem. Section 89 and s. 93 provide that, on the making of an order absolute under either of these sections, the right to redeem and the security shall both be extinguished. The sections say in effect that on the making of the order absolute the relation of mortgagor and mortgagee shall come to an end . . . Section 310-A does not, as it seems to me, have the effect of extending the time for redemption, because, at the time the section comes into operation, the right to redeem no longer exists and the parties are no longer in the relation of mortgagor and mortgagee. Their position is that of judgment-debtor and judgment-creditor, and their rights are governed by the provisions of the Code which relate to parties in that position.

“It seems to me, therefore, that both s. 291, which empowers the court to adjourn a sale in execution of a decree, and s. 310-A, which requires the court to re-open a sale which has actually taken place, on the requirements of the section being complied with, are consistent with the special provisions of the Transfer of Property Act. Section 310-A no doubt affects the rights of a purchaser, whilst s. 291 concerns only the parties to the suit, but this does not seem to be a sufficient reason for drawing a distinction between the sections. If a purchaser of immovable property which is sold in execution of a decree other than a mortgage-decree buys subject to the risk of the transaction being set aside on an application made within thirty days after the date of sale by the person whose property has been sold—and the legislature has so enacted in unmistakable terms—there seems, on principle, to be no reason why the purchaser of immovable property which is sold in execution of a decree obtained in a mortgage suit should not buy

subject to the same risk. The hardship (if any) to the purchaser is the same in both cases.”

I have set out these passages from the judgment of Sir Arnold White at length because Mr. Shroff for the appellant relied heavily on this case. I am by no means sure that even in the absence of the Mortgage Suits Rules the same reasoning would be applicable in Kenya where the provisions corresponding to s. 310A are contained in subordinate legislation, namely in rules of procedure. The position in Kenya is, however, in my view, fundamentally different from the position in India at the time *Setti v. Pantulu* (2), was decided, not merely by reason of the fact that the provisions of s. 310A are contained in rules of procedure under the Civil Procedure Ordinance, but by reason of the making in 1934 of the Mortgage Suits Rules under the powers conferred by s. 104 of the Transfer of Property Act. So far as I am aware no comparable set of rules under s. 104 of the Transfer of Property Act existed in any jurisdiction in India at the time of the various Indian decisions to which we have been, referred. The Mortgage Suits Rules appear to constitute a complete code dealing with the sale of property pursuant to a mortgage decree. They cover generally the ground covered by r. 72 to r. 85 of O. XXI, though some of the provisions are not as full as O. XXI and some are incorporated by inclusion in Form I of the Schedule to the Mortgage Suits Rules.

Mr. Shroff sought to argue that the provisions in both sets of rules are very similar, and in particular that the forms provided are almost identical, and, as I understood him, that because of this the rules amounted to no more than mere repetition, and that any additional provisions contained in O. XXI of the 1948 Kenya Rules must apply to sales under mortgage decrees. I am unable to accept this argument. In fact it seems to me that the inference to be drawn is the precise opposite. Rule 72 to r. 85 of O. XXI of the 1948 Procedure Rules were in existence at the date of the making of the Mortgage Suits Rules, being at that time r. 75 and r. 77 to r. 89 inclusive of O. XIX of the Civil Procedure Rules, 1927. The Mortgage Suits Rules made in 1934 replaced an earlier set of rules, namely the Rules of Court (Mortgage Suits), 1932. I do not know the reason for the making of the 1932 and, later, the 1934 Rules, but the fact that a separate set of rules was made covering the same ground as rules contained in the then existing Civil Procedure Rules seems to me to lead to the inference that that set of rules was intended to supplant entirely the ordinary rules of court relating to sales in execution of decrees so far as mortgage suits are concerned. As to the forms contained in Appendix C to the 1948 Procedure Rules, they appear to have been left in the Rules by oversight when the Rules were revised in 1948. They appeared as Forms Nos. 3 to 11 inclusive in Appendix C to the Civil Procedure Rules, 1927, and were clearly replaced by the forms in the Schedule to the Rules of Court (Mortgage Suits), 1932, and subsequently in 1934 by the forms in the Mortgage Suits Rules.

Apart from these matters the difference between the procedure provided by the 1948 Procedure Rules and that provided by the Mortgage Suits Rules appears to me to be fundamental and in my view is conclusive so far as the point at issue in this appeal is concerned.

The scheme by which a sale of immovable property in execution of a decree is to be made effective under the provisions of the 1948 Procedure Rules is briefly as follows:

- (a) The sale is carried out in the method prescribed.
- (b) Thereafter, under O. XXI, r. 78 (set out above) the sale may be set aside on payment of certain moneys into court.
- (c) The sale may also be set aside on application under O. XXI, r. 79 or r. 80 on the ground of fraud or material irregularity or that the judgment-debtor had no saleable interest in the property.

- (d) If no such application is made, or, if made, is unsuccessful, the court is required by O. XXI, r. 81 to:
“make an order confirming the sale and thereupon the sale shall become absolute . . .”
- (e) Under s. 48 of the Civil Procedure Ordinance:
“48. Where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time the property is sold and not from the time when the sale becomes absolute.”
- (f) Finally, under O. XXI, r. 83, the court grants a certificate evidencing the sale.

Compare this with the scheme by which a sale under the Mortgage Suits Rules becomes effective. The following extracts from the Mortgage Suits Rules suffice to make this clear.

- “Rule 6: Where a judgment or order is given or made, whether in court or in chambers, directing any immovable property . . . to be sold, unless otherwise ordered, the same shall be sold with the approbation of the judge . . . and all proper parties shall if necessary join in the sale and conveyance as the judge shall direct.”
- “Rule 12: Where a direction has been made by the judge as to the proper parties who shall join in the sale of a mortgaged property and conveyance thereof in terms of r. 6 the purchaser may prepare a draft of the conveyance which he required to complete his title, . . .”
- “Rule 13: Where a person ordered by the judge to join in a conveyance fails to undertake to execute the same when called upon in pursuance of r. 12 or having given such undertaking fails to execute the conveyance . . . when called upon the purchaser shall lodge the engrossment of the conveyance with the court for execution by the judge . . .”
- “Rule 14: The judge or such other officer as may be appointed in this behalf shall when the engrossment is filed for signature execute the document so delivered . . . and such execution shall have the same effect as the execution of the document by the party ordered to execute the same.”
- “Rule 15: The onus of registering the conveyance shall be on the purchaser.”
- “Rule 17: Where it is impracticable for the purchaser to obtain a conveyance under r. 12 and r. 13 . . . or where any necessary party is not within the jurisdiction of the court or for any other sufficient reason the purchaser may apply . . . for an order vesting in him the property the subject-matter of the suit . . .”
- “Rule 18: Where a vesting order is sought reference shall be made in the application to the provisions of s. 47 of the Trustees Ordinance, . . .”

It is evident that the scheme of procedure applicable after sale under the Mortgage Suits Rules is wholly different from that applicable under the 1948 Procedure Rules. Rule 78 of O. XXI is an integral part of the scheme provided by the 1948 Procedure Rules. It is no more a part of the scheme under the Mortgage Suits Rules than is the requirement of O. XXI, r. 81 that “the court shall make an order confirming the sale”. It may be noted that the court never did make an order confirming the sale in this case, a fact which was commented on in the ruling of Gould, J.A., on the preliminary point. That ruling was confined to the ascertainment of whether an appeal lay as of right from an order made pursuant to an application made under O. XXI, r. 78; and as, in

my opinion, that rule is not applicable at all in the circumstances, and no such order falls to be made under the provisions of the Mortgage Suits Rules, the learned judge was not in breach of any statutory requirement. Similarly I do not think that the other provisions of the 1948 Procedure Rules which are an integral part of the scheme of procedure laid down by those rules can have any application to the procedure prescribed by the Mortgage Suits Rules. The two systems are so entirely different that, as was held by the learned judge, they must be mutually exclusive. Whether or not the general rules of civil procedure applied to rules in execution of mortgage decrees before the making of the Mortgage Suits Rules, I think it clear that they ceased to apply upon the making of the Mortgage Suits Rules.

Although the learned judge adopted the reasoning in *Kedar Nath Raut v. Kali Churn Ram* (1), the principle ground for his decision was that the two sets of rules are so different as to be mutually exclusive, that the sale in this case is not one under the 1948 Procedure Rules, but under the Transfer of Property Act and the Mortgage Suits Rules made under s. 104 of that Act, and that

“neither by these Rules, nor by any other rule of law, has O. XXI, r. 78 been extended to such a sale”.

For the reasons given I would respectfully agree with this conclusion.

I think therefore that this appeal should be dismissed with costs, which should include costs attributable to that part of the appeal which was abandoned.

Gould JA: I agree.

Windham JA: I also agree.

Appeal dismissed.

For the appellant:

HB Shroff

EP Nowrojee, Nairobi

For the first interested person:

DN Khanna

DN & RN Khanna, Nairobi

For the second interested person:

SS Mandla

Nahar Singh Mandala & Co, Nairobi

For the first respondent:

Kaplan & Stratton, Nairobi

For the second respondent:

AE Hunter

Daly & Figgis, Nairobi

Ndirangu s/o Nyagu v R

[1959] 1 EA 875 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 17 December 1959
Case Number: 199/1959
Before: Sir Kenneth O'Connor P, Forbes V-P and Windham JA
Sourced by: LawAfrica
Appeal from: H.M. Supreme Court of Kenya–Farrell, J

[1] Criminal law – Murder – Trial – Assessors – Accused not asked if he objected to any assessor – Whether opportunity to object should be given.

Editor's Summary

The appellant was convicted of murder on the evidence of eye-witnesses. Throughout the trial the appellant refused on unreasonable grounds to be represented by assigned counsel, chose to remain mute and took no part whatsoever in his trial. On appeal when called upon, he said that the wife of one of the assessors at his trial was the sister of the deceased's wife and he complained that this had prejudiced him. Since there was nothing in the record to indicate either that the appellant had objected to this assessor at the time he was selected or that the learned trial judge had told the appellant that he could so object if he wished, the court inquired of the trial judge who stated that the appellant had neither objected nor had been told that he might object. The court accordingly adjourned the hearing of the appeal in order to call the assessor concerned to give evidence whether he was related to the deceased. The assessor swore that he was in no way related to the deceased or his wife.

Held – though there is no express provision in the Criminal Procedure Code requiring that an accused be given the opportunity of objecting to any of the assessors, to do so is clearly sound practice which should be followed.

Appeal dismissed.

No Cases referred to in judgment in judgment

Judgment

The following judgment was read by direction of the court: The appellant was convicted by the Supreme Court of Kenya of the murder, on July 5, 1959, of one Kamau s/o Wachira. The appellant was one of two accused charged with the murder, the second accused being acquitted.

The Crown case, founded on the evidence of eye-witnesses, was that the appellant, who was a stranger to the village where the deceased lived, came to the deceased's house in the evening, where the deceased was brewing native beer, and asked him if he had a written permit to do so. On the deceased replying that he had no written permit but that the chief had given him permission, the appellant went to the chief and, pretending that he was a police officer in plain clothes, reported that he had arrested the

deceased for illicit brewing. He had meanwhile left his confederate, the second accused, to guard the deceased and his family. On the chief's instructions he then fetched the deceased, together with the latter's wife and daughter-in-law and the second accused, and brought them to the chief. The chief then asked the appellant and his co-accused for their police credentials. Neither could produce them. The second accused ran away, and the appellant drew a knife and attacked the chief. On the deceased coming to the chief's assistance the appellant stabbed the deceased twice, first on the arm and later on the thigh. Both stabs severed arteries and the deceased died from the resulting haemorrhage.

Throughout the proceedings the appellant, who had refused on unreasonable grounds to be represented by assigned counsel, chose to remain mute, neither cross-examining the crown witnesses nor giving sworn or unsworn testimony. He had earlier made a statement to the police in which he said he had bought beer from the deceased and had then reported him to the chief not only for brewing beer but also for having refused to give him change out of a Shs. 100/- note which he had paid for the beer he bought; that he fetched a calabash of the deceased's beer and brought it to the chief; that the deceased then arrived on the scene; that the chief slapped him (the appellant) in the face and others thereupon attacked him with sticks and stones; that he snatched a knife from a woman attacker; and that he could not tell whether it was he or that woman who then stabbed the deceased.

The learned trial judge accepted the evidence of the Crown witnesses and found the appellant guilty of murder. Although the judgment was not as full as it might have been, and did not specifically deal with the question of malice afore-thought, we thought that, upon the Crown evidence, there was no room for any lesser verdict than that of murder, and we accordingly dismissed the appeal. There are, however, one or two points that emerged at the hearing of it which call for observation.

The appellant, when called upon to argue his appeal, said that the wife of one of the three assessors at his trial, one Macharia s/o Mureithi, was the sister of the deceased's wife, Wairimu w/o Kamau, who had given vital eye-witness evidence at his trial, and he complained that this fact had prejudiced him. Since there was nothing on the record to indicate that he had objected to Macharia's sitting as an assessor at the time when he was selected, or that the learned trial judge had told him that he could object to any of the assessors if he wished, we inquired of the learned trial judge, who informed us that the appellant had neither objected nor been told that he might object. We accordingly thought it proper to adjourn the hearing of the appeal in order to call the assessor Macharia to give evidence before us as to whether he was related to the deceased as alleged by the appellant or at all. This was done, and Macharia swore that he was in no way related to the deceased or to his wife; he maintained this assertion when cross-examined by the appellant. We were satisfied from his evidence that he spoke the truth on the point. The appellant thereupon resumed arguing his appeal.

The learned trial judge, in answer to our inquiries, had replied that he had not given the appellant the opportunity of objecting to any of the assessors because he was not aware of any provision in the Criminal Procedure Code, or of any practice of the court, requiring such opportunity to be given. We agree that there is no such provision in the Criminal Procedure Code nor, though many judges adopt this course, any universal practice in the courts of asking an accused person whether he objects to any assessor. Nevertheless we feel that it is clearly sound practice to give an accused person an opportunity of objecting to the assessors and one which we think ought to be followed, particularly where (as here) the accused is unrepresented. If the trial judge considered that any objection on an accused's part was made in good faith and upon a reasonable ground which was admitted to be, or which might well be, true, it would then be desirable to replace the assessor objected to by another, before the commencement of the trial. For instance, if the accused alleged, and a proposed assessor agreed, that the assessor was a close relative of the deceased, it would clearly be inappropriate that the proposed assessor should sit in that case. Justice must be seen to be done. It is clearly more appropriate that these matters should be dealt with at the commencement of a trial than in the Court of Appeal.

The second point which called for our consideration at the hearing of the appeal was the story which the appellant told us regarding what had happened on the evening of the killing. To a great extent this story was the same that he

had told in his statement to the police which was produced at his trial, but it differed as regards the particulars of the alleged assault upon the appellant by the chief and also as regards the appellant's complicity in the murder, since he said before us that he positively did not kill the deceased, whereas to the police he had said that he could not tell whether he or the woman with a knife had done so. We have no reason to think that the learned trial judge would have arrived at any different conclusion even if the appellant had told at his trial the story that he told us in arguing his appeal. In any event, it was the appellant's own fault that this story was not before the court of trial, since he chose to remain mute although informed of his right to give sworn evidence or to make an unsworn statement.

For these reasons we dismissed the appeal.

Appeal dismissed.

The appellant in person.

For the respondent:

DD Charters (Crown Counsel, Kenya)

The Attorney-General, Kenya

Ali Mohamed Rashid v Hamis Said Alawi
[1959] 1 EA 877 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of ruling:	17 November 1959
Case Number:	32/1959
Before:	Forbes Ag P, Gould Ag V-P and Windham JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika–Williams, Ag. J

[1] Mohamedan law – Will – Oral will – Oral revocation of written will alleged – Requirements of court before oral will can be propounded.

Editor's Summary

The appellant had applied for probate of the written will of his sister made in 1951 by which he was appointed executor. The respondent, deceased's son, first alleged that the deceased had died intestate but later when the application for probate was presented lodged a caveat supported by affidavit alleging that the deceased had made an oral will in 1957 whereby she had appointed him to administer her estate and had revoked the will for which probate had been applied. Subsequently the respondent presented a cross petition in which he asked for probate of the oral will of the deceased stating that no other will had been

found save the former will of 1951 which was revoked by the oral will. At the hearing when the evidence had been completed counsel for the respondent asked for probate to be granted to the respondent not of the oral will of 1957, but of the original written will of 1951. The trial judge granted the respondent the relief claimed upon an implied finding of fact never pleaded that the deceased had made an oral codicil, altering her written will of 1951 by substituting the respondent for the appellant as executor of that will. On appeal and cross-appeal.

Held –

- (i) he who would propound an oral will must satisfy three requirements as to pleading, proof and promptness; he must plead the terms or effect of the will with precision; he must prove with precision what he has pleaded; and he must put forward the alleged will with as little delay as is reasonably possible after the deceased's death.

(ii) the respondent had failed to satisfy any one of these requirements.

Appeal allowed. Cross-appeal dismissed.

Cases referred to in judgment

- (1) *Peters v. Sunday Post Ltd.*, [1958] E.A. 424 (C.A.).
- (2) *Rashida Begum v. Administrator General and Another* (1951), 18 E.A.C.A. 102.
- (3) *Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee*, 20 E.R. 241.
- (4) *Balak Ram High School v. Nanu Mal* (1930), A.I.R. Lah. 579.
- (5) *Ganesh Prasad v. Hazari Lal* (1942), A.I.R. All. 201.
- (6) *Venkat Rao v. Namdeo* (1931), A.I.R. P.C. 285.

November 17. The following judgments were read by direction of the court:

Judgment

Windham JA: On July 23, 1957, the appellant applied for probate of the will of his sister, Sada binti Mohamed, who had died on June 20, 1957. The will of which he applied for probate was a written one, dated August 4, 1951, in which, after appointing the appellant as executor, the deceased bequeathed her house, by way of wakf, to her several nephews and nieces, and then left the residue of her property, after the payment of her debts, estate duty and funeral and testamentary expenses, to be

“distributed according to Mohamedan law applicable to Sunni, to which faith I belong.”

The legal effect of the last bequest would be that the bulk of the deceased’s residuary property would go to her son, the respondent. This will was produced, and its due execution was not challenged.

On June 29, 1957, nine days after the deceased’s death, the respondent’s advocate had written to the appellant’s advocates a letter in which, after stating that he understood that the appellant was applying for letters of administration of the deceased’s estate, he continued:

“My client states that the said deceased died intestate and that he will shortly apply for letters of administration. My client will object to your client’s application for letters of administration.”

The appellant’s advocates replied to this letter on July 2, stating that the respondent’s allegation

“is totally incorrect in as much as the late Sada Binti Mohamed has left a will and has appointed Ali Mohamed Rashid as executor.”

To this letter the respondent did not reply, and his next step, after the appellant’s petition for probate dated July 23, (to which I have already referred) was to lodge a caveat on the estate on October 3, supported by an affidavit made by himself and dated October 9, of which paras. 3 and 4 are very relevant. They follow a reference to the written will dated August 4, 1951, and they read thus:

“3. That on June 15, 1957, the deceased, five days before her death, made another will whereby she appointed me to administer her estate and that such will was orally made and that she thereby revoked the will for which probate has been applied in these proceedings before this honourable court;

“4. That under the last will of the deceased made on June 15, 1957,

I was appointed to administer her estate with the required formalities of Islamic Law and that under such will I inherit all my mother's property with the exception of the portion of the estate which goes to the deceased's mother Mwema d/o Sheikh and that all the property of the deceased at the time of her death belonged to my father Saidi Hamis Alawi prior to his death in 1922 and that my mother then inherited it from him";

This affidavit, made three and a half months after the deceased's death, was the first occasion on which the respondent had himself set up any will, or alleged the revocation of the written will dated August 4, 1951, which the appellant sought to prove. The affidavit is entirely inconsistent with the respondent's advocate's letter of June 29, in which he alleged that the deceased had died intestate.

On November 4, 1957, the respondent signed a cross-petition, which he filed on November 27, in which he asked for "probate of the oral will" of the deceased, and stated that no other will had been found

"save a former will dated August 4, 1951, which was revoked by the deceased while making the said oral will."

In his affidavit dated December 20, 1957, in support of this cross-petition, the respondent said that on June 16 his mother, the deceased, between whom and himself there had admittedly been an estrangement for some time, sent for him and, before witnesses, forgave him, because of her approaching death. He went on to state that she told him that if she died her gold ornaments were to be his and were to be used for defraying her funeral expenses. The affidavit continues:

"I asked my mother if there were any other will which she has made and she replied that there was none; I thereupon asked her whether she wished to give any oral directions as to her property before the witnesses then present; my mother then said that she left all her property to me her only son and that her money was in the hands of advocate Patel; I asked her again before the witnesses whether she had any further wishes to make known before those present and she said that she had nothing further to say as she had left everything to me to do with it as I thought fit. She called upon the Liwali of Dar-es-Salaam and the others present to witness her words."

Thus far the respondent had already shifted his position more than once. He had begun, on June 29, by alleging an intestacy. He had next, after leaving the appellant's allegation of a valid written will of 1951 unchallenged for some three months, alleged the revocation of that will by an oral will in which the deceased had left everything to him. He next stated, in his affidavit of December 20, that the deceased, on her death-bed, had denied having ever made any will other than the oral one which she was now making, and that by this oral will she left everything to him. No doubt, by this bequest, she might be argued to be, by implication, appointing the respondent as her executor and revoking any previous will made by her. But in this affidavit the respondent never alleged that the deceased had in express words appointed him as her executor; and the significance of this will now appear.

On November 25, 1958, the appellant's petition and the respondent's cross-petition were heard, and the learned acting judge framed the issues as follows:

- "1. Was the written will dated 4.8.51 revoked?
- "2. Did deceased make an oral will as alleged by caveator petitioner?
- "3. Who is entitled to probate?"

A number of witnesses were heard, who had been present at the meeting round the deceased's death-bed on June 16, 1957, four days before her death. It was common ground that this meeting took place, and that at it the deceased became reconciled to her son the respondent, though there was a conflict of evidence as to whether she had sent for him and forgiven him spontaneously or whether the reconciliation was pressed upon her by the Liwali and she had forgiven him grudgingly. With regard to what (if anything) the deceased said at this meeting about her former will and her present disposition of her property, however, there was a complete conflict of evidence. The deceased's niece, sister and octogenarian mother, called by the appellant, testified that she said nothing material beyond forgiving the appellant. The appellant himself gave evidence, and called the Liwali and one other witness. All three of them said that the deceased, at this meeting, had said she wanted her son the respondent to administer her property. The Liwali, after considerable pressing, said that the actual words used by the deceased were "Hamisi will be my wasiye" which it is conceded means executor. Not one of the witnesses on either side, however said that the deceased said anything about revoking any earlier will, or that she even mentioned any such will; in fact they all stated that she did not. And as regards the dispositions effected by the oral will alleged to have been made by her at this meeting, in which the respondent had by his affidavit of December, 1957, sworn that she had left all her property to him, not a single witness stated that she had made any such disposition. The respondent himself, in evidence, performed his final volte face when he said that she made no mention of how she was disposing of her property, but that she had merely said he was to administer it. The Liwali, on whose evidence the learned trial judge principally relied in making the order which he eventually made and to which I shall presently refer, was the only witness who said that the deceased had mentioned any will at all; and his evidence, though without doubt perfectly honest, was very confused. He began by saying there had been "some talk about the will". When asked what will the talk was about, he somewhat astonishingly said it was a written will which she then and there desired him to witness, and that thereupon he read it over and she signed it, and that as regards her disposition of her estate she said that "everything was written in the will". This was the first and last that was ever heard of this supposed will, which nobody produced and no other witness mentioned. The learned trial judge in considering this part of the Liwali's evidence, was constrained to think that he must have been "referring to previous meetings with the deceased". But the Liwali, in his evidence, made it quite clear that he was referring to the one meeting which was the subject of the whole proceedings; and if he was indeed confusing this temporarily with some earlier meeting (possibly the occasion in 1951 when she undoubtedly did make a written will) then that very fact would shake considerably the reliability of his testimony in general, even admitting that it was honestly given. At a later stage in his evidence the Liwali, alone of all the witnesses, gave one answer which might suggest that the deceased made any reference to her will of 1951, when he said that she made no mention of a former will except that:

"she said there is some paper I have written before, but now I only appoint my son."

Upon the conclusion of all the evidence, learned counsel for the respondent abandoned the standpoint which he had taken up in issue No. 2 of the framed issues, namely—"did deceased make an oral will as alleged by the caveator petitioner?" The will as so alleged in the counter-petition and its supporting affidavit was, as we have seen, an oral will revoking the written will of 1951 and leaving all her property to the respondent. Learned counsel asked, instead, that probate should be granted to the respondent, not of any oral will of 1957,

but of the original written will of 1951. The learned trial judge, after reviewing the evidence and the inconsistencies in it, and the “defendants modifications of his claim as made in his petition”, granted the respondent the relief he now claimed, the following being the final paragraph of his judgment:

“In these circumstances I accept the defendant’s evidence of the meeting as substantially correct, find that it establishes an oral appointment of himself as executor and an implied revocation of the appointment of the plaintiff in the written will and, as he now otherwise admits the validity of that will for the purposes of the present case, order that he have probate of it.”

The decision of the learned trial judge was based, in effect, upon an implied finding of fact, never pleaded, that the deceased made an oral codicil, altering her written will of 1951 to the extent that she substituted the respondent for the appellant as the executor of that will. This finding was based on oral testimony, in particular that of the Liwali. In order to decide whether this court ought to interfere with that finding of fact, which there was at least some evidence to support, and whether such interference would be justified as falling within the principles laid down by this court in *Peters v. Sunday Post Ltd.* (1), [1958] E.A. 424 (C.A.), it is first necessary to examine the authorities which lay down the degree of proof necessary to set up an oral will under Mohamedan law. That a will may be made orally under Mohamedan law is not disputed; and the decision of this court in *Rashida Begum v. Administrator-General and Another* (2) (1951), 18 E.A.C.A. 102, where a properly proved oral variation of a written Mohamedan will was held to be valid, is sufficient authority, in my view, for the proposition that a codicil, as well as a will, may similarly be made by word of mouth, a proposition in consonance with the general principles of Mohamedan law regarding testamentary dispositions.

It was laid down nearly a century ago by the Privy Council, however, that in order to establish an oral will very strict proof is needed. In *Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee* (3), 20 E.R. 241, at p. 251, their lordships, in considering such a will, said:

“But if any party is bound to strictness of pleading, it is he who sets up a nuncupative will. He who rests his title on so uncertain a foundation as the spoken words of a man, since deceased, is bound to allege, as well as to prove, with the utmost precision, the words on which he relies, with every circumstance of time and place.”

That judgment has been consistently followed. Among other cases in which nuncupative wills have been held to be not established because not proved in accordance with those strict requirements are *Balak Ram High School v. Nanu Mal* (4) (1930), A.I.R. Lah. 579, and *Ganesh Prasad v. Hazari Lal* (5) (1942), A.I.R. All. 201: in the latter case, at p. 219, the will was held insufficiently proved by the defendants

“although the witnesses produced by the defendants in this connection may not be speaking the untruth . . .”

In *Venkat Rao v. Namdeo* (6) (1931), A.I.R. P.C. 285, a further very necessary requirement in the proof of oral Mohamedan wills was emphasized by their lordships of the Privy Council, at p. 289, namely that

“in the case of disputed wills it is always material to see when the alleged will was first put forward”;

and mainly on the ground that the oral will in that case was not propounded until about a month after the deceased’s death their lordships held it to have

been not proved with the necessary strictness and circumstance. This requirement is but a particular application of the general rule of sound sense, applicable in civil and criminal matters alike, that a tale told at an early stage and adhered to is (in the absence of acceptable explanation) more likely to be true than one not told until an unnecessarily late stage when there has been ample opportunity for fabrication.

In short, to epitomize the effect of the decisions which I have cited, he who would propound an oral will must satisfy three requirements as to pleading, proof and promptness. He must plead the terms or the effect of the will with precision; he must prove with precision what he has pleaded; and he must have put the alleged will forward with as little delay as is reasonably possible after the deceased's death. In the present case, in my view, the respondent failed to satisfy any one of these three requirements. As to pleading, he began, as we have seen, by alleging an intestacy, while in his counter petition, which at his counsel's request was treated by the learned trial judge as if it were a written statement of defence, he asked for probate of an oral will of 1957 in which (in his supporting affidavit) he alleged that the deceased had left him all her property, an allegation which he was later forced to abandon by reason of his own admissions in evidence. It is hard to conceive anything further removed than this from "pleading with precision". As to proof, leaving aside for the moment the fact that what the learned judge held to be proved was not what had been pleaded, it is true that the Liwali, on whose evidence he relied, did say that the deceased had announced that the respondent should be her wasiye or executor, though what dispositions he was to put into effect as such she did not mention. But in my view the discrepancies and contradictions in the evidence as a whole, the lapse of time (the witnesses were testifying to words spoken by the deceased nearly eighteen months before), and the confusion in the Liwali's own evidence, even accepting that the latter was due to forgetfulness, were such that no court, having in mind the strict requirements of proof laid down by the Privy Council, could reasonably have held that what the deceased said had been proved "with the utmost precision". In fact, not one of those decisions laying down the strict requirements appears to have been cited to the learned trial judge, who was in consequence satisfied to find for the respondent merely on the ground that he accepted "the defendant's evidence of the meeting as substantially correct". Such was not a sufficiently high degree of proof; and I feel no doubt at all that, had the learned trial judge been aware of those decisions, he would have found the evidence adduced for the respondent insufficient to establish an oral revocation of the appointment of the appellant as executor under the written will of 1951. Lastly, as regards delay in first putting forward the alleged oral will of 1951, the facts speak for themselves. There was a delay of three and a half months after the deceased's death before the respondent first sought to propound any kind of oral will, and this included a period of two and a half months of inaction after the appellant had filed his petition for probate and given the date of the written will which he sought to propound. Only after those two and a half months did the respondent allege the revocation of that written will by the oral will which he himself sought to set up.

For these reasons I would allow the appeal with costs, set aside the judgment and decree of the court below, and order that the appellant be granted probate of the written will of August 4, 1951, as prayed for. The respondent has cross-appealed, urging that the court below should have allowed him his costs of the trial on the ground that the appellant had

"been aware of the appointment of the defendant [respondent] as executor by the testator at an early date."

In the event, this cross-appeal is without merit and I would dismiss it with costs,

and would order that the appellant have his costs in the courts below.

Forbes Ag P: I agree and have nothing to add. There will be an order in the terms proposed by the learned Justice of Appeal.

Gould Ag V-P: I also agree.

Appeal allowed. Cross-appeal dismissed.

For the appellant:

KA Master QC, HK Patel and KL Jhaveri

For the respondent:

OT Hamlyn

For the appellant/cross-respondent:

Desai, Jhaveri & Co, Dar-es-Salaam

For the respondent/cross-appellant:

OT Hamlyn, Dar-es-Salaam

Ali Omar Mote v Ali Siraj, as Attorney
[1959] 1 EA 883 (CAM)

Division:	Court of Appeal at Mombasa
Date of judgment:	3 December 1959
Case Number:	47/1959
Before:	Forbes V-P, Gould JA and Windham JA
Sourced by:	LawAfrica
Appeal from	H.M. Supreme Court of Kenya–Edmonds, J

[1] *Mohamedan law – Divorce – Divorce by “Khoola” – Onus of proof of divorce – Non-registration of divorce – Jurisdiction of Cadi’s Court – Mohamedan Marriage and Registration Ordinance (Cap. 147), s. 9 and s. 24 (K.) – Civil Procedure (Revised) Rules, 1948, O. XVII, r. 6 (K.).*

Editor’s Summary

The appellant applied for administration of the estate of a woman, of whom he claimed he was the husband. This claim was contested by the respondent, a niece of the deceased, who alleged that the appellant and the deceased were divorced some time prior to the deceased’s death. The trial judge held

that the onus of proving the divorce was on the respondent, who had discharged that onus. On appeal from dismissal of his application, the appellant appeared in person and submitted a written argument to the effect that a marriage certificate having been produced, it was to be presumed that the marriage subsisted until the respondent proved a lawful divorce, and that it was not proved that the divorce was effected according to the rules of Mohamedan law.

Held –

- (i) the trial judge correctly held that the onus of proving the divorce was on the respondent and that onus would be discharged by proof of a divorce ceremony which was *prima facie* in accordance with Mohamedan law.
- (ii) the trial judge was justified upon the evidence in finding that the appellant and the deceased had been divorced many years prior to the death of the latter.
- (iii) as both parties were represented by advocates in the Supreme Court, and in the absence of any note on the record, it was to be assumed that the provisions of O. XVII, r. 6, requiring the evidence, when completed, to be interpreted to each witness in the language in which it was given, were waived.
- (iv) the jurisdiction of the Supreme Court having been invoked by the appellant, it was not necessary to consider whether the jurisdiction of the Cadi's court, which is constituted as a subordinate court and includes matters of inheritance among Mohamedan Arabs, includes concurrently probate and

administration.

Appeal dismissed.

Cases referred to in judgment

(1) *Moonshee Bazul-ul-Raheem v. Lutteefut-oon-Nissa*, 19 E.R. 574.

(2) *Masood bin Said and Another v. Said bin Salim Mohamed Ghulam* (1947), 14 E.A.C.A. 32.

December 3. The following judgments were read by direction of the court:

Judgment

Gould JA: This is an appeal from a judgment and decree of the Supreme Court of Kenya at Mombasa in a Probate and Administration Cause in which the appellant's application for Letters of Administration in the estate of Mwana Ali binti Sheikh Walli, deceased, was dismissed. The appellant claimed to have been the husband of the deceased at the date of her death but this claim was contested by the respondent, a niece of the deceased. Two issues were framed:

- (1) Whether the plaintiff (appellant) and the deceased were married and
- (2) if so, whether the marriage still subsisted at the date of the wife's decease.

The learned judge said in his judgment that it was established, and was not disputed by the respondent, that the appellant and the deceased were married in 1933, and that the principal evidence revolved round the question whether that marriage still subsisted at the date of death. It was alleged for the respondent that the parties were divorced some fourteen or fifteen years ago, and the learned judge held that the onus of proving the divorce was upon the respondent.

Certain relevant law is contained in the Mohamedan Marriage and Divorce Registration Ordinance (Cap. 147) of which s. 9 reads as follows:

- "9. The parties to a marriage or divorce recognised by Mohamedan law or if the man or the woman or both be minors their respective lawful guardians shall register such marriage or divorce with a registrar within seven days from the celebration of such marriage or the pronouncement of such divorce, as the case may be."

Section 24, however (in part), provides:—

- "24. Nothing in this Ordinance contained shall be construed to—
- (i) render invalid, merely by reason of its not having been registered, any Mohamedan marriage or divorce which would otherwise be valid.
 - (ii) render valid, by reason of its having been registered, any Mohamedan marriage or divorce which would otherwise be invalid;"

The alleged divorce in the present case had not been registered but it is clear that, if it were proved to have taken place, that fact would not affect its validity. The learned judge held on the facts that the respondent had established that the appellant and the deceased were divorced. The appeal, however, is directed to a passage in his judgment which reads as follows:

- "...and it was finally submitted by Mr. Bhandari that the defence had failed to establish that the divorce proceedings were carried out in full accordance with the demands of Mohamedan law. However, this matter

was not put in issue by Mr. Bhandari in cross-examination, and I think

I must accept that if the witnesses have told the truth and have said that they were witnesses to a divorce, that such proceedings were carried out according to Mohamedan law. There was no suggestion by Mr. Bhandari until he addressed the court at the close of the evidence that the ceremony had not been proved to have been in accordance with that law.”

With relation to this passage the memorandum of appeal reads:

“The learned judge erred in his finding. In view of the marriage certificate which was produced by me the presumption always remained that I was validly married to Mwana Ali binti Walli and that my said marriage subsisted when she died until this presumption was set aside by the defence by proving that I lawfully divorced her during her lifetime. The burden of proving that that I (sic) was on the defendant and the defence failed to discharge it by establishing that I divorced her according to rules of Mohamedan law.”

The appellant was not legally represented at the hearing of the appeal but appeared in person and handed up a written argument in support of the ground of appeal set out above.

In my opinion, the learned judge made no mistake as to the onus of proof, which he accepted at the outset as being upon the respondent. That onus would be discharged by proof of a divorce ceremony which was *prima facie* in accordance with Mohamedan law, and I think that all the learned judge was saying in the passage of his judgment complained of, was that this had been done, and that, if Mr. Bhandari had considered that some essential was lacking, he should have cross-examined upon it. He did not do so, nor did he state in his closing address in what respect (if at all) he suggested that the evidence fell short of proving a valid divorce according to Mohamedan law. His chief concern had been to contest that a divorce ceremony had taken place at all.

The form of divorce which is relied upon by the respondent in the present case is known as “Khoola”. It was described by the Privy Council in *Moonshee Bazul-ul-Raheem v. Lutteefut-oon-Nissa*, (1) 19 E.R. 574 at 580 as follows:

“A divorce by Khoola is a divorce with the consent, and at the instance of the wife, in which she gives or agrees to give a consideration to the husband for her release from the marriage tie. In such a case the terms of the bargain are matter of arrangement between the husband and wife, and the wife may, as the consideration, release her dyn-mohr and other rights, or make any other agreement for the benefit of the husband.”

Later in the judgment of their lordships (at p. 581) it is said:

“The divorce is the sole act of the husband, though granted at the instance of the wife and purchased by her. The Khoolanamah is a deed securing to the husband the stipulated consideration, but it does not constitute the divorce. It assumes it, and is founded upon it. The divorce is created by the husband’s repudiation of the wife, and the consequent separation. The law might have provided that non-payment of the consideration should invalidate the divorce, but it is clear, as well from the opinion of the law officers of the Indian courts, as from the authorities cited at our Bar, that the law is otherwise.”

Such divorces are stated by Mulla (13th Edn.) at p. 272, Manek (5th Edn.) at p. 56 and Wilson (6th Edn.) at p. 146 in their respective works on Mohamedan law, to be irrevocable.

Two witnesses as to the act of divorce were called by the respondent. The first, Said Bin Tahii, said;

“They quarrelled, because they did not want each other. She wanted divorce. They were divorced. I was called as a witness . . . The deceased agreed to renounce her dowry—that is known as Khula . . .”.

The second, Ali Maka, said:

“She said ‘I renounce my dowry of Shs. 240/- in order to buy divorce’. . . . Then plaintiff said ‘I divorce you. You are not my wife’.”

There was also evidence that the parties had lived apart for many years. In my opinion there was no misdirection and as the judge accepted this evidence he was quite justified in finding it established that the appellant and the deceased had been divorced many years prior to the death of the latter.

The appellant, when invited to reply to the argument of counsel for the respondent, introduced a certain amount of new matter which no doubt had not commended itself to his former legal advisers. He complained that the evidence of the witnesses had not been read over to them by the learned judge and also referred to some proceedings which he claimed to have taken in the court of the Cadi. As to the first point I do not know whether the appellant was suggesting that Mohamedan law required the evidence to be read over, but if so, it is only necessary to refer to the decision of this court in *Masood bin Said and Another v. Said bin Salim bin Mohamed Ghulum* (2) (1947), 14 E.A.C.A. 32, in which it was held that since the application of the Indian Evidence Act to Kenya the rules of evidence governing proceedings in the Kathi’s court are no longer Mohamedan rules of evidence, but those contained in the Indian Evidence Act. (The word “Kathi” I understand to be another spelling of the word “Cadi”, the latter being the spelling adopted in the Courts Ordinance (Cap. 3)). Order XVII, r. 6 of the Civil Procedure (Revised) Rules, 1948, provides:

“6. Where the evidence is taken down in a language different from that in which it is given, and the witness does not understand the language in which it is taken down, the evidence as taken down in writing shall when completed be interpreted to him in the language in which it was given:

“Provided that in any case the application of this rule may be waived by consent of both parties or their advocates, if any.”

In the instant case both parties were represented by advocates in the court below, and in the absence of any note on the record it is to be assumed that application of the rule was waived. In the actual law of succession of course the substantial principles of Mohamedan law are applied in accordance with s. 4 of the Mohamedan Marriage, Divorce and Succession Ordinance (Cap. 148).

I understood from the appellant’s reference to proceedings in the Cadi’s court that he was suggesting that this matter should have been dealt with in that court. The appellant himself, however, through his advocate, invoked the jurisdiction of the Supreme Court by filing therein an application for letters of administration. The jurisdiction of the Supreme Court in matters of probate and administration arises from the Indian Probate and Administration Act, 1881 and the Indian Succession Act, 1865, both in force (except for s. 331 of the latter) in Kenya, read in conjunction with art. 4 of the Kenya Colony Order-in-Council, 1921, and art. XII of the Kenya Protectorate Order-in-Council, 1920. The jurisdiction of the Supreme Court having been invoked by the appellant, it is not necessary to consider whether the jurisdiction of the Cadi’s court, which is constituted as a subordinate court by the Courts Ordinance (Cap. 3) and which includes matters of inheritance among Mohamedan Arabs, includes concurrently probate and administration.

For the reasons given above I would dismiss the appeal with costs.

Forbes V-P: I agree. The appeal is dismissed with costs.

Windham JA: I also agree.

Appeal dismissed.

The appellant in person.

For the respondent:

SR Gautama

SR Goutama, Mombasa

Chimanlal Rugnath Thakkar v R
[1959] 1 EA 887 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	27 November 1959
Case Number:	155/1959
Before:	Sir Kenneth O'Connor P, Forbes V-P and Gould JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya–Rudd, Ag. C.J and Harley, J

[1] *Criminal law – Corruption – Search warrant endorsed for execution by one police inspector but executed by another – Car radio seized different to that authorised by search warrant – Bribe offered to release the radio seized – Whether offence committed – Prevention of Corruption Ordinance, 1956, s. 3. (2) (K.).*

Editor's Summary

A police inspector who had a search warrant not endorsed over to him for execution searched the appellant's premises for a car radio of a particular make and number. The inspector was investigating an alleged offence of obtaining money by false pretences. The inspector there found a radio of the same make but with a number different from that mentioned in the search warrant. The inspector said he would take the radio to the police station for a further check whereupon the appellant offered the inspector £500 to take instead another radio of the same make. The inspector affected to agree but subsequently refused to take the second radio, and insisted on taking the first one which he said he would not return until the £500 was paid. A police trap having been laid for the appellant the £500 was paid. The appellant was later tried and convicted of official corruption and his appeal to the Supreme Court was dismissed. On further appeal it was submitted for the appellant that since the search warrant was not endorsed to the inspector executing it, he could not be acting in execution of his duty in removing the radio and

therefore, its removal was not a matter with which the police were lawfully concerned within s. 3 (2) of the Prevention of Corruption Ordinance, 1956. It was further submitted that there was no offence under the Prevention of Corruption Ordinance, 1956, unless, at the time offer was made, a public body was concerned.

Held –

- (i) the inspector took the radio in the course of his investigation into a case of obtaining money by false pretences and because it was material to the offence of corruption.
- (ii) the inspector might be liable to an action for damages for trespass, but that did not affect the conviction of the appellant of the offence of official corruption.
- (iii) the removal of the radio was a matter with which the police were lawfully concerned within s. 3 (2) of the Prevention of Corruption Ordinance, 1956. *Chimanlal Rugnath v. R.*, [1959] E.A. 610 (K.) affirmed.

Appeal dismissed.

Cases referred to in judgment

- (1) *Harji Ramji Shah v. R.*, Kenya Supreme Court Criminal Case No. 90 of 1951 (unreported).
- (2) *Warioba s/o Feja v. R.* (1949), 1 T.L.R. (R.) 330.

Judgment

Sir Kenneth O'Connor P: read the following judgment of the court: This is a second appeal from the conviction on June 20, 1959, by the resident magistrate, Nakuru, of the appellant on two charges of official corruption contrary to s. 3 (2) of the Prevention of Corruption Ordinance, 1956. Those charges read:

- “Count 1. Corruption contrary to s. 3 (2) of the Prevention of Corruption Ordinance, 1956.
- “Count 1. Chimanlal Rugnath Thakkar on the 8th day of May, 1959, at Nakuru in the Rift Valley Province, corruptly gave Shs. 5,000/- to George William Allan, an inspector in the Kenya Police Force stationed at Nakuru, to induce the said George William Allan to return to him a Blaupunkt car radio No. 138136 which the said George William Allan had taken possession of in the course of investigating an alleged offence of obtaining money by false pretences.”
- “Count 2. Corruption contrary to s. 3 (2) of the Prevention of Corruption Ordinance, 1956.
- “Count 2: Chimanlal Rugnath Thakkar on the 9th day of May, 1959, at Nakuru in the Rift Valley Province corruptly gave Shs. 5,000/- to George William Allan an inspector in the Kenya Police Force stationed at Nakuru, as a reward for the said George William Allan having returned to him on the 8th day of May, 1959, a Blaupunkt car radio No. 138136 which the said George William Allan had taken possession of in the course of investigating an alleged offence of obtaining money by false pretences.”

The facts are fully set out in the judgment of the learned magistrate. For purposes of this appeal it is only necessary to summarise them very briefly.

In May, 1959, the Nakuru Police were investigating an alleged offence of obtaining money by false pretences and in this connection were looking for a Blaupunkt car radio of a particular number. On May 8, a search warrant in favour of the officer commanding the Nakuru Police Station was obtained from the senior resident magistrate, Nakuru for the purpose of searching the house and car of the appellant where, it was stated, there was reason to believe that the radio might be deposited. The number of the radio was mentioned in the search warrant. The search warrant was endorsed to Inspector Roberts; but was in fact executed by Inspector Allan. Having (by invitation of an employee) searched the appellant's shop, Allan went to his house which he searched, relying on the warrant. There Allan found, in a cardboard box in a drawer of a cabinet, a radio of the same make as that for which he was searching, but with a number which differed from that mentioned in the warrant. The appellant (who had previously said that he had no car radio) was present when the radio was found. Blaupunkt car radio numbers are printed on paper glued to the side of the radio. Realising that such a number could easily have been changed, Allan said that he decided to take the radio which he had found to the police station for a further check; he then thought that a number might be found inside, perhaps on the metal work. He continued to

search and went into a bedroom. The appellant followed him and, after some preliminary overtures, offered him £500 not to take that radio to the police station. Allan affected to agree to this proposition and the appellant's brother was despatched to find a substitute radio which Allan could take to the police station instead of that found in the appellant's house. Allan surreptitiously despatched an African policeman to the police station to say that he was being bribed and to bring an European police officer. The appellant's brother produced a second radio, but Allan then refused to take it, insisting on taking the first one which he said he would not return until the £500 was paid. The £500 was thereafter paid in two instalments of Shs. 5,000/- each, on May 8 and 9, a police trap having been laid on each occasion. The radio was returned by Allan. The appellant was arrested and was charged and convicted of official corruption as mentioned above.

The facts are not really denied. There are no merits in the appeal. The defence is legal and is based upon the wording of s. 3 (2) of the Prevention of Corruption Ordinance, 1956, under which the appellant was charged. That section reads:

“(2) Any person who shall by himself, or by or in conjunction with any other person, corruptly give, promise or offer any gift, loan, fee, reward, consideration, or advantage whatever, to any person, whether for the benefit of that person or of another person, as an inducement to or reward for, or otherwise on account of, any member, officer, or servant of any public body doing or forbearing to do, or having done or forborne to do, anything in respect of any matter or transaction whatsoever, actual or proposed or likely to take place, in which the said public body is concerned, shall be guilty of a felony.”

“Public body” is defined by s. 2 of the Ordinance to include *inter alia* any department of the Government of the Colony and would include the Kenya Police.

The appellant's case in this court was put as follows:

By reason of the fact that the search warrant was not endorsed to Inspector Allan, he committed a civil wrong (trespass) in searching for, and removing the radio. The object of the appellant's offer to pay him £500 was to dissuade Allan from removing a radio which he had no right to remove. The object of the first payment (of £250) was to induce Allan to return a radio which he had no right to retain. The object of the second payment (£250) was to reward Allan for having returned a radio which he had no right to retain. “Concerned” in s. 3 (2) of the Ordinance means “lawfully concerned”. Allan cannot be said to have been acting in the execution of his duty in removing that radio. Therefore, the removal of the radio was not a matter in which the police were lawfully concerned. Accordingly, the removal of the radio was not a matter in which the police were concerned within s. 3 (2) of the Ordinance. Mr. O'Donovan, who appeared for the appellant, cited in support of the above argument *Hirji Ramji Shah v. R.* (1), Kenya Supreme Court Criminal Case No. 90 of 1951 (unreported). This was a case based on different facts and on s. 93 of the Penal Code of Kenya which has now been repealed. That section was worded very differently from the section of the Prevention of Corruption Ordinance now under consideration and, in our view, *Hirji Ramji Shah's* case (1) is of no assistance in deciding the present case. Similarly the Tanganyika case of *Warioba s/o Feja v. R.* (2) (1949), 1 T.L.R. (R.) 330, which is a decision on s. 91 (1) of the Tanganyika Penal Code, is not of assistance.

Mr. O'Donovan further submitted that there is no offence under the Prevention of Corruption Ordinance unless, at the time the offer is made, the public body is concerned, and that the conviction could not be justified on the

ground (relied on in part by the Supreme Court) that the police were concerned with the radio once a corrupt offer relating to it had been made, because no prosecution on that ground had been sanctioned by the attorney-general. Mr. O'Donovan pointed out a passage at the end of Allan's evidence where he said:

"On May 8 I came to the conclusion at accused's house it was not the wireless I was seeking. When I handed it back to accused I was still under the impression it was not the wireless I was interested in on the warrant. That was still my impression on the 9th when I was paid the money in the bag of sweets.

"I only took the set because accused thought it was the one I was interested in and in order to bring to completion the payment of the £500." But Inspector Allan had previously said, *inter alia*:

"I checked the number of the wireless against the number on the warrant exhibit 1. I found it was not the one I was looking for. However, in the circumstances, I decided I would take this radio with me to the police station for a second check. The numbers on a Blaupunkt car radio are printed on a piece of paper which is glued on to the side of the radio. Obviously this is movable and I thought perhaps the number might be duplicated inside on perhaps the metal work. I now know that this is not so. I said to accused that he had told me he did not have a car radio."

.....

"I could not quite understand because accused obviously thought or knew that the radio which I had found was the one I was looking for, whereas as far as I was concerned, the one I was looking for was the one detailed on exhibit 1. I told accused 'whilst there may or may not be trouble I am taking the wireless in to the police station to be checked.' Accused then said: (Refers to notebook. Notes made shortly after). 'If you leave without this radio, the balance of your car will be paid off'."

.....

"At accused's flat I found a Blaupunkt radio. It was not the one I was looking for. It was of interest. It subsequently transpired it was the right radio and the number the insurance company had given us was a mistake. I had a warrant to search for a particular radio No. 982584 and no other radio was specified. I was investigating an offence of obtaining by false pretences wireless No. 982584."

.....

"I was interested in a radio which belonged to a car which had been recovered from the Menengai Crater and in respect of which the accused's brother had made a claim against the insurance company. In so far as the number is concerned, I knew it was not the wireless. I still had a doubt in my mind. I did not express it in my statement—it is not a comprehensive statement. Accused told me that the wireless was the one in respect of which his brother had made a claim. Accused was telling me that this was the wireless I wanted. But it did not tie up with the warrant."

There are concurrent findings of fact in both courts below that Inspector Allan originally decided to take the radio to the police station for a further check of the number, and there was evidence to support those findings. Inspector Allan thought that it was not the radio which he was after; but he intended to have this checked. Suspicions that it might be the radio in question were strongly aroused by the conduct of the appellant in offering him £500 not

to take it. In our opinion, Inspector Allan took the radio in the course of his investigation into the case of obtaining money by false pretences and because it was material to the offence of corruption.

The learned magistrate, in the course of an admirably lucid judgment, said:

“It seems to me that the ‘matter of transaction’ in this case was not at all the seizure, lawful or otherwise of a wireless set, whether the right one or the wrong one. I hold that the ‘matter or transaction’ here was the investigation by I/P Allan and others of an alleged offence of obtaining money by false pretences, and that in the course of that investigation in which he played only a small part, I/P Allan went to search accused’s premises and there found a wireless set which, though it was clearly not the one described by number in the search warrant, might still have been (and, for all I know still prove to be) the one which was being sought in connection with that investigation. To say that a police officer who enters premises under a warrant not endorsed to him, or even without a warrant at all, and perhaps in an excess of zeal removes an article from those premises had automatically branded the whole case with such illegality as to make it one in which the police as a public body is no longer concerned is, I am convinced, neither good sense nor good law.”

We endorse this passage. We think that there is no substance in the appellant’s argument under s. 3 (2). Inspector Allan may or may not be liable to an action for damages for trespass, but that does not affect the conviction of the appellant of official corruption. The appellant was rightly convicted and the appeal is dismissed. Inspector Allan deserves commendation.

Appeal dismissed.

For the appellant:

*Bryan O’Donovan QC, SC Gautama and BD Bhatt
BD Bhatt, Nairobi*

For the respondent:

*JP Webber
The Attorney-General, Kenya*

Anwarali Rajabali Shivji v R [1959] 1 EA 892 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	2 November 1959
Case Number:	145/1959
Before:	Forbes Ag P, Gould Ag V-P and Windham JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court for Tanganyika–Crawshaw, J

Passages from deposition put to witness in cross-examination without putting deposition in evidence – Correct procedure to adopt – Indian Evidence Act, 1872, s. 145 and s. 155 – Prevention of Corruption Ordinance, s. 3 (2) (T.).

Editor's Summary

At the trial of the appellant on a charge of corruption, passages from their depositions were put to the two main witnesses in cross-examination, but the depositions were not put in evidence. On appeal against conviction counsel for the appellant obtained leave for the depositions at the preliminary inquiry to be produced to enable comparison to be made between the depositions of the two main witnesses and their evidence at the trial. The grounds of appeal were concerned exclusively with questions of fact but the court commented on the procedure adopted at the trial relative to the depositions.

Held –

- (i) if it is desired at a trial to challenge the evidence of a witness his deposition should be tendered and admitted in evidence for the purpose of contradicting him under s. 145 and s. 155 of the Indian Evidence Act.
- (ii) if there is a practice in Tanganyika of treating the depositions as being automatically in evidence this practice has no justification in law.

Appeal dismissed.

Cases referred to in judgment

- (1) *Benmax v. Austin Motor Co. Ltd.*, [1955] 1 All E.R. 326.
- (2) *R. v. Mashimba bin Shipemba* (1938), 5 E.A.C.A. 139.
- (3) *R. v. Ziyaya* (1936), 3 E.A.C.A. 31.
- (4) *R. v. Wilbald* (1948), 15 E.A.C.A. 111.
- (5) *R. v. Magoti* (1953), 20 E.A.C.A. 232.

November 2. The following judgment was read by direction of the court:

Judgment

The appellant was convicted after trial before the High Court of Tanganyika upon a charge of corruptly giving money to an agent, as an inducement to forbear from investigating allegations made against him contrary to s. 3 (2) of the Prevention of Corruption Ordinance. The assessors at the trial were in favour of acquittal but the learned trial judge, having dealt with the evidence in a detailed judgment, came to the conclusion that the charge had been proved and convicted the appellant.

A broad outline of the facts and the issue raised by the defence is contained in the following passage from the judgment:

“It is not in dispute that on November 16, last, the accused was at his shop weighing maize which had been brought to him for sale by certain Africans, when two other Africans in civilian clothes came up to him and accused him of cheating the sellers by giving false weight. These two

were in fact Corporal Pepe and P.C. Elias, plain clothes detectives. Corporal Pepe took possession of the book which was by the weighing machine, and in which the accused entered the weights, and the accused then took Pepe into the yard at the back of the shop, and Elias accompanied them. When there the accused gave Pepe a Shs. 100/- note and they then returned to the front premises. Pepe showed the note to those present, including the maize sellers, and told the accused that he would be charged with bribery.

“There can be no doubt on the evidence that the accused gave Pepe the Shs. 100/-, and that had he known when he did so that Pepe was a policeman it was inducement within the meaning of s. 3 (2) of the Ordinance. This leaves the question, did the accused know or believe that the men were policemen? The accused’s defence is that he did not, not at least until after the handing over of the money when Pepe told him he was a policeman and he would be charged. Up till then he says he thought they were representatives of some African association who were interfering on behalf of African sellers and were trying to make things difficult for him, and perhaps might arrange a boycott, and that he paid them to leave him alone.”

Before proceeding further we will deal with a suggestion made by counsel that this court should take judicial notice of a state of affairs in Tanganyika which would enhance the inherent probability of the appellant’s version of what he believed at the relevant time. This is not a suggestion, however, to which we can accede to any greater extent than did the learned trial judge when he said:

“Might it be that this is what he did believe? If there is any doubt as to this it must of course be resolved in favour of the accused. There is certainly nationalism in the air, and boycotting, I believe in Uganda. There is no evidence that there has been any trouble of the sort in these parts or that any other merchants here have had to pay protection money, if such it can (be) called, although the accused did make some vague reference to having paid money to leading personalities before, without giving any particulars. Without these I find it difficult to place any significance on them if in fact what he says is true.”

The grounds of appeal, as argued before this court, relate exclusively to questions of fact, though counsel for the appellant submitted that errors had arisen in the evaluation of facts rather than in their perception, the distinction referred to in *Benmax v. Austin Motor Co. Ltd.* (1), [1955] 1 All E.R. 326. Counsel were agreed that the learned judge based his decision upon considerations arising from two broad aspects of the evidence. One relates to what was alleged to have been said by the appellant at the relevant time, and the other to the inferences to be drawn from the conduct of the appellant. The primary facts touching the second of these aspects are very little in dispute and we will deal with it first.

What appears to us to be the strongest point in favour of the Crown arising out of the conduct of the appellant, was his failure to make any inquiry of the two policemen as to their identity before handing over the Shs. 100/- note. We fully endorse the learned judge’s view expressed in the following passage of the judgment:

“The significant thing to my mind is that the accused should pay Shs. 100/- to them without even inquiring who they were, where they came from, what they represented or why they were harassing him. In answer to my question why he had not, he replied, ‘A normal person would want time to think whether he should ask such persons who they were. I felt sure they would be leaders of some association.’ I find this explanation

most unconvincing. Giving full recognition to nationalism and what the accused alleges is the attitude of Africans these days to Indian merchants, I do not believe that he would have failed to make any inquiry at all. His failure to do so is consistent with the rest of his conduct that he knew or believed them to be constables.”

Counsel for the appellant argued that the learned judge had not appreciated that the appellant was trying to be conciliatory but, if that were so, we would have expected the appellant to have attempted to ascertain whom he was conciliating and whether he had any reason for doing so. It would not have been necessary for him to have adopted an aggressive attitude for that purpose.

The next fact relied upon is that when the two constables and the appellant returned to the shop there were two police inspectors, both known to the appellant, on the verandah; Corporal Pepe told them the appellant had given him money and later told the appellant that he would be charged. The learned judge drew an inference adverse to the appellant from his failure to explain his error at that stage. He said:

“It seems incredible to me that had he committed no corrupt offence, and finding out his mistake, he would not at once have explained it and what is more, have demanded back his Shs. 100/-. When asked why he did not, he was unable to give any explanation.”

Whether or not the appellant could have been expected to demand his money back in the circumstances, it does appear to us that he would naturally have been anxious to explain that he had been the victim of an error, in assuming that the person to whom he had paid money was a leader of some association. It does not appear to us, as counsel for the appellant argued, that to draw an adverse inference in these circumstances is tantamount to requiring an accused person to announce his defence. While appreciating to the full that the silence of an accused person when he is formally charged with an offence is not an admission in any way, we do not think that the circumstances disclosed by the evidence are parallel to that position. The appellant was not charged, though he was told that he would be; but even before that stage was reached it must have been apparent to him that the person informing the police inspector of the money payment was not (as he claims to have thought) a representative of some association, and that he was being accused of a crime. The unexpectedness of the accusation as well as the making of it would surely evoke protest and explanation from an honest man.

The third matter relating to the conduct of the appellant relates to a book which he was using in connection with his weighing of the maize. The appellant said that the corporal and constable pulled it from him, and in cross-examination said:

“Not a violent struggle for book. When I saw they would take it, I gave it. There was some violence. I was holding it and they pulled it from me. Book not damaged. The maize sellers who have given evidence may not have seen what happened. When the police constables first came into shop I thought they might be leaders of some growers association or other association. Had I known they were police I would have given it willingly, as otherwise they would have taken me to police station.”

The learned judge accepted evidence, including that of two bystanders that the book was handed over on request; he therefore regarded the evidence of the appellant that he would have given the book willingly to police officers as being against himself. We think there is very little in this episode and the learned judge described it as “not very important perhaps in itself”.

There is no doubt that the learned judge attached great importance to the circumstances discussed above and there are passages in his judgment which

suggest that he regarded them as sufficient in themselves to warrant conviction, even apart from what he held the appellant to have said. The first passage is:

“What he said leads to an irresistible conclusion in my mind that he knew Pepe and Elias were constables, and in my opinion, quite apart from what he said, his conduct also leads to that conclusion.”

At the end of the judgment is the following:

“To sum up, the accused’s conduct points conclusively to my mind to his knowing or believing the men to be constables, and what, according to Pepe, the accused said in the yard fits in perfectly reasonably with that knowledge or belief.”

Although, as appears from these passages, the learned judge attached weight to the circumstances as discussed above, the two broad aspects of the evidence must be regarded as complementary and it is necessary to consider the submission made on the finding of the learned judge on the question of what the appellant said at the relevant time.

The important time was the moment when the appellant (admittedly) handed Corporal Pepe the Shs. 100/- note. The learned judge examined the evidence in detail and said:

“I thought Pepe and Elias were honest witnesses, and that what Pepe says the accused said to him in the yard is reliable and the truth.”

What was accepted appears in the following passage:

“Pepe told this court that when he was given the money the accused said, ‘Help me’. On being then asked by counsel what his actual words were he said, ‘please help me, I have done wrong; if you want more money I can give you more. Do not continue with your investigations about maize.’ This method of giving evidence by Africans is in my experience, very typical. Had he not been asked for a complete narrative, all that would have been before this court would have been the words ‘Help me’.”

Counsel for the appellant attacked this evidence by submitting that the two main witnesses, Corporal Pepe and P.C. Elias, reached for the first time at the trial a full measure of agreement in their versions of what was said and done. He said that it was remarkable that this similarity appeared for the first time at the trial, and that it would require great credulity to believe that they had not collaborated. This, with respect, appears a little inconsistent with counsel’s later statement that he did not differ from the judge when he found these witnesses to be honest. A comparison was then made with the record of the evidence given at the preliminary inquiry. We shall have something to say later in this judgment as to the procedure adopted at the trial relative to these depositions, but for the present it is sufficient to say that, though they were not incorporated in the Record of Appeal we granted an application that they should be produced, as they had been made use of in the court below. Counsel listed the following points on which he said the witnesses had agreed for the first time in the High Court:

- (a) That Elias had said to the appellant that he was not weighing the maize properly and was cheating people.
- (b) That at the outset Pepe had informed the appellant they were policemen.
- (c) That appellant asked Pepe to go inside the shop with him.
- (d) That in the yard when appellant produced the Shs. 100/- note, he took it from his right pocket.
- (e) That the appellant said “Please I have done wrong—please help me”.

- (f) That back on the verandah Pepe showed the Shs. 100/- to three men and said he had been given it not to charge the appellant.
- (g) That the appellant had then said something about not investigating the case or “please to leave him alone”.

We will comment briefly upon these suggestions in sequence. As to (a) we think the criticism is hardly justified as at the preliminary inquiry Elias said that he asked the appellant, “how he weighed the maize”, and Pepe’s version of what Elias said was “How are you measuring the maize. You are not measuring correctly”. The fact that the appellant was accused of cheating at that stage is confirmed by the two independent witnesses and admitted by the appellant. There is nothing in this. As to (b) the suggestion in this instance is correct but the matter of what the witness has said in this respect was dealt with by the learned judge and fully considered by him. As to (c)—this criticism is not justified. At the preliminary inquiry both Pepe and Elias said that the appellant asked (or called) Pepe to go into the shop. As to (d)—at the preliminary inquiry Elias said that the appellant took the note “from his pocket” and Pepe did not say where he produced it from. The record of Pepe’s examination at the preliminary inquiry (when he was the last witness called) comprises some twenty-two lines as against fifty-seven in the High Court, where he was the first; it can hardly be doubted that he was being more pressed for a full account in the latter. There is, of course, no challenge to the fact that the note was handed over by the appellant and the matter has no materiality except as touching the credibility of Elias and Pepe. It is not, in this respect, in our view, of any significance.

As to (e)—at the preliminary inquiry Pepe said that the words of the appellant were “I admit my offence” and “Help me. I have made a mistake.” In the High Court his version was “Help me” which on being asked for the accused’s words be enlarged to—

“Please help me. I have done wrong; if you want more money I can give you more. Do not continue your investigations about maize.”

Elias said, at the preliminary inquiry:—

“Take this money and let me free for this case for which you came to arrest me.”

In the High Court:—

“Please I have done wrong. Please leave me alone for the wrong I have done.”

Also “If you want more money I can give you more”. The learned judge dealt at some length with this aspect of the evidence and the passage of his judgment last above quoted relates thereto. We agree with the learned judge’s view then expressed and with his further comments:

“It is not necessarily a reflection I think on the honesty or reliability of a witness because in the lower court he gives a less full account than at the trial. It is of course only a preliminary inquiry, and the prosecution is not always in the hands of a qualified or experienced officer. In the absence of questioning, statements to a police officer may be even less complete without necessarily arousing suspicion. In the lower court, Pepe’s evidence was very brief indeed.”

Counsel for the appellant criticised strongly the foregoing passage as, according to the deposition of Pepe at the preliminary inquiry he was asked a question by the court itself, upon the completion of his evidence, and said:

“Apart from what I have already told the court, accused said nothing to me.”

We do not think that this detracts in any material measure from the applicability of the learned judge's observations. The witness no doubt considered at that stage, that he had given the gist of the conversation and would not necessarily realise that he should, if he could, expand what he had already said. The prosecution was in fact not conducted by an advocate. Having regard to the nature of these witnesses we do not see anything necessarily detrimental to their credibility in the variation of their versions of the conversation in question, and have no reason to disagree with the view of the learned judge.

As to (f)—the two witnesses were always in accord that the note was shown by Pepe to the other people on the verandah. At the preliminary inquiry Elias also said that when he showed it Pepe said "Look, this man has corrupted me". The fact that Pepe did not at the preliminary inquiry say that he had used those words, appears to us of no great moment. He would be unlikely in the circumstances to have shown it without saying something about the episode. As to (g)—it is correct that neither witness at the preliminary inquiry said that the appellant said anything incriminating when the note was shown to others on the verandah. The independent witness Lunyamacho did however say that the appellant at that time said "Please help me."

We do not accept that the considerations which have been discussed under heads (a) to (g) have, in their totality, any serious detrimental effect upon the credibility of the two witnesses in question. The learned judge did not overlook the discrepancies in the evidence, and, after taking them into account, accepted the witnesses as honest witnesses. We certainly cannot say he was wrong to do so.

Counsel's next criticism was that in his submission the learned judge, in considering the evidence of what was said in the yard at about the time the Shs. 100/- note was handed over, placed weight upon a particular form of words having been used by Pepe—namely the sentence "Do not continue with your investigation about maize", which forms part of a passage quoted above. Counsel submitted that, having regard to the whole of the evidence it was inescapable that the two police witnesses were trying to give their idea of the sense of what they understood. We think that this argument rather overstates the position regarding the learned judge's approach. Though he mentions the sentence in question in the relevant portion of his judgment, he does not indicate that he relies particularly upon it. He preceded his discussion of this aspect of the evidence by saying—

"If Pepe and Elias are to be believed, it is clear, as I think counsel conceded, that the accused knew they were constables at the time he gave the money."

The learned judge then discussed the evidence, indicated that he thought that Elias's evidence might be less reliable than that of Pepe and concluded with words quoted earlier in this judgment:

"I thought Pepe and Elias were honest witnesses, and that what Pepe says the accused said to him in the yard is reliable and the truth. What he said leads to an irresistible conclusion in my mind that he knew Pepe and Elias were constables, and in my opinion, quite apart from what he said, his conduct also leads to that conclusion."

Counsel criticised the learned judge's reasoning in preferring Pepe's evidence because he was nearer to the appellant. We think there is nothing material in this. He also said that the learned judge's reason for considering unlikely, certain words attributed to the appellant by Elias at the preliminary inquiry, applied with equal force to Pepe's version given in the High Court. The learned judge's reason referred to was that

“they may have been Elias’s own, if unnecessary addition to show what was meant.”

This is, we think, a matter of opinion which must necessarily be based on an estimation of the quality of the particular witnesses. This is peculiarly the function of the trial judge, and it would not be right for this court to say that he should have rejected this or that phrase of a particular witness’ evidence, unless it were impelled thereto by strong logical considerations which are not present here.

We do not see anything in this aspect of the argument which would incline us to allow the appeal. Though in fact the learned judge preferred Pepe’s evidence it does not follow that had he accepted that of Elias he would have acquitted the appellant. We do not consider this to be at all the case. Elias’s evidence was very little less incriminatory than Pepe’s. The learned judge found both to be honest witnesses. That being so, having regard to his opinion on the other aspects of the case, he was amply justified in finding that the logical inference to be drawn from their evidence was adverse to the appellant. Reading his judgment as a whole we think that this was his approach. Had the conviction been based solely on the alleged use of a particular phrase on which there was a conflict of evidence, the position might have been different. But that was not the case. For the foregoing reasons we dismiss the appeal.

There is a further point which requires brief mention. It is obvious from the judgment and the record of the proceedings, that free use was made during the trial, of the depositions taken at the preliminary inquiry. Some passages from his deposition were put to Pepe in cross-examination and were admitted by him. This is of course correct procedure, and no further proof is required of the passages so admitted. Two questions were put to Elias concerning what he had said at the preliminary inquiry; in the first case he denied saying the words which had been put to him and in the second he could not remember if had said them. If it was desired to challenge his evidence the deposition should have been then tendered and admitted for the purpose of contradicting the witness under s. 145 and s. 155 of the Indian Evidence Act. Neither deposition was put in and indeed there was no basis shown in the case of Pepe, who admitted what was put to him. Elias’s deposition was treated by the learned judge as being in evidence and counsel for the appellant proposed to found arguments upon comparisons of both depositions with the evidence given in the High Court.

In *R. v. Mashimba bin Shipemba* (2) (1938), 5 E.A.C.A. 139 it was said as part of the judgment of the court:

“There are two matters we should like to refer to: one is that where counsel for the defence attacks the prosecution case by drawing attention to such discrepancies as we have referred to, he should have the depositions put in as evidence.”

In *R. v. Ziyaya* (3) (1936), 3 E.A.C.A. 31 in the judgment of the court at p. 32 is the following:

“The appellant’s counsel did not attempt to put in the deposition in contradiction of the witness’ evidence and the learned trial judge does not appear to have referred to the discrepancies. In the appellant’s written arguments, we are requested to take the discrepancies into consideration and we now have to decide whether in the absence of formal proof of them in the court below it is proper to accede to the appellant’s request.”

The court considered that the case had unusual features and said:

“We are therefore of the opinion that if we permit the failure of the defence to comply with what is nothing more than the mere formality of

proving a deposition to stand in the way of our comparing the two portions of the record in question, we may sanction a miscarriage of justice.”

R. v. Ziyaya (3) was followed on this point in *R. v. Wilbald* (4) (1948), 15 E.A.C.A. 111. In *R. v. Magoti* (5) (1953), 20 E.A.C.A. 232 it was held that it is better practice for defending counsel to put the deposition in evidence immediately after the witness concerned has given evidence, so that it can be read to the judge and assessors while the impugned evidence is fresh in their minds. In the same report, at pp. 233–234 is the following passage—

“We would further observe that it was unnecessary to call the clerk from the magistrate’s court to prove the deposition. The original depositions are transferred to the High Court under s. 236 of the Criminal Procedure Code and form part of the record in the High Court. They are signed by the committing magistrate under s. 219 (4) as well as by the witness and may generally be put in evidence without further proof (s. 80 Indian Evidence Act). It is only in the rare case where some objection is made to the signatures or to the accuracy of the record that further proof is required.”

This passage relates of course to the method of proving a deposition as evidence and does not in any way indicate that it is not necessary to put a deposition in at all. We call attention to this only as we were informed from the bar that there was a practice in Tanganyika of regarding depositions as being automatically in evidence. If there is such a practice it is one for which we see no justification in law.

Appeal dismissed.

For the appellant:

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For the respondent:

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Kagoye s/o Bundala v R **[1959] 1 EA 900 (CAN)**

Division:	Court of Appeal at Nairobi
Date of judgment:	6 October 1959
Case Number:	122/1959
Before:	Forbes Ag P, Windham JA and Sir Owen Corrie Ag JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika—Simmons, J

Effect of non-compliance – Whether if record contains sufficient material appellate court will consider and decide appeal on merits – Criminal Procedure Code, s. 171 (1) (T.).

Editor's Summary

The appellant was convicted of the murder of his son. The judgment merely adopted the trial judge's summing up to the assessors and then recorded the concurrence of the judge with the opinions of the assessors that the accused was guilty. The main ground of appeal was that the judge failed to deliver judgment according to the provisions of s. 171 (1) of the Criminal Procedure Code.

Held –

- (i) the judgment did not comply with s. 171 (1) of the Criminal Procedure Code, but since the conviction was not necessarily thereby invalidated, the court had to decide whether the record contained sufficient material for determination of the appeal on its merits.
- (ii) the evidence on the record was not such as to enable the court to say that if the trial judge had evaluated it and embodied his findings in a considered judgment, he would have inevitably found the appellant guilty of murder or would have acquitted the appellant; accordingly the court could not determine the appeal on its merits.

Appeal allowed. Conviction set aside. Order for a re-trial.

Case referred to in judgment

(1) *Willy John v. R.* (1953), 23 E.A.C.A. 509.

Judgment

Sir Owen Corrie Ag JA: read the following judgment of the court:

On July 4, 1959, the appellant, Kagoye s/o Bundala, was found guilty in the High Court of Tanganyika sitting at Tabora, of the murder of his son Maganga alias Bundala s/o Kagoye, and sentence of death was passed upon him.

On September 3, 1959, the appellant's appeal was heard in this court. The judgment of the High Court of Tanganyika was set aside and the case was remitted to that court for re-trial, this court stating that it would give reasons for its judgment.

These reasons we now give.

The first ground of appeal in the memorandum of appeal is that the learned judge failed to deliver judgment according to the provisions of s. 171 (1) of the Criminal Procedure Code.

Section 171 (1) of the Tanganyika Criminal Procedure Code, as amended by s. 3 of the Criminal Procedure Code (Amendment) (No. 2) Ordinance, 1952, is as follows:

“(1) Every judgment under the provisions of s.170 shall except as otherwise expressly provided by this Code, be written by, or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by such presiding officer as of the date on which it is pronounced in open court.”

Judgment was passed upon the accused in the following terms:

“The accused is charged with the murder of Maganga his son, on April 8, 1959, contrary to s. 196 of the Penal Code. I have summarised the evidence in my charge to the assessors and there is no need to repeat it. They are both of the opinion that he is guilty and I fully agree. He is accordingly convicted.”

Clearly the judgment did not comply with the requirements of s. 171 (1) of the Code. The section is not satisfied by the judgment containing a mere reference to, and adoption of, the court’s summing-up to the assessors. In the instant case, indeed, there was no adequate note of the summing-up to the assessors on the record. A non-compliance with s. 171 (1) does not, however, necessarily invalidate a conviction, and this court, therefore, had to decide whether the conviction was invalidated or whether it could hear and determine the appeal on its merits.

A similar question has come before this court on a number of occasions, but we think that it will be sufficient if we refer to the most recent reported decision, *Willy John v. R.* (1) (1953), 23 E.A.C.A. 509, in which the principle to be applied is clearly stated. That was an appeal from the Supreme Court of Seychelles, and in its judgment this court said at p. 510:

“There is no doubt that the judgment does not comply with the requirements of s. 149 (1) of the Criminal Procedure Code, namely—

‘Every such judgment shall, except as otherwise expressly provided by this Code, be written “by the presiding officer of the Court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it”.’

“The failure to date and sign the judgment is a mere irregularity which can be cured by the application of s. 304 of the Criminal Procedure Code since the whole of the record of the proceedings is in the hand of the trial judge and there was no prejudice to the appellant. But the failure to comply with the other requirements of the section is fatal to the conviction. In *Desiderio Kawunya v. Regina*, 20 E.A.C.A. 281, this court held that failure to comply with the provisions of s.169 (1) of the Seychelles Criminal Procedure Code will not necessarily invalidate a conviction if there is sufficient material on the record to enable the Appeal Court to consider the appeal on the merits. In this case there is clearly insufficient material on the record to enable us to consider the appeal on the merits.”

We have therefore to decide whether in the instant appeal there was or was not sufficient material on the record to enable us to determine the appeal on its merits.

The case for the prosecution rested mainly upon the evidence of two witnesses, Ndagula d/o Maganga and Mboje s/o Ngusa. Ndagula had formerly been the wife of the appellant and stated that her marriage had been dissolved according

to native law and that she was then married to and was living with Dondoma s/o Ngusa. She was the mother of the murdered boy, Maganga. According to her evidence she and Dondoma and Mboje and two other persons, Nkuli and Hologoshi, were at Dondoma's house talking after their evening meal. She said:

"I heard accused call: Ndagula d/o Maganga, come to fetch the body of your son. I have killed him. Bury him tomorrow'. I heard nothing else; nothing about a marriage. I recognised accused's voice. Voice came from near distance."

The witness Mboje said:

"At Dondoma's after evening meal. Heard voice: 'Ndagula d/o Maganga, here is your dead body of your son. Get better married now to Dondoma.' We raised an alarm. Voice of accused. Sure. I knew when I heard it. I followed the voice. Saw body of Maganga. Neck cut off."

The witnesses Dondoma and Mbuli each testified that he had heard a voice using the same words, but neither was able to recognise the voice. They searched and found Maganga's body, with the head nearly cut off, at a spot which Mr. Cairns, the Officer i/c the police, Nzega, estimated to be at a distance of 326 feet from Dondoma's house. Obviously an identification based on the statements of two witnesses, one of whom, Ndagula, was clearly hostile to the appellant, that they recognised the appellant's voice, but did not see him, is one that must be regarded with considerable suspicion; and it follows that the court would look for corroborative evidence.

Two articles were put in evidence with a view to furnishing corroboration, a cloth and a blood-stained stick. The cloth (exhibit 3) was identified by Ndagula and by Dondoma, Mboje and Mbuli as having been worn by the appellant in the morning on the day the boy was killed. It was found the next day by the witness Ngusa s/o Manda. But there is no evidence as to where it was found, and it thus has no value as evidence connecting the appellant with the crime.

As regards the stick (exhibit 4) two questions have to be determined: did it belong to the appellant; and where was it found.

The connection of the stick with the appellant rests upon Ndagula's statement that he came to her house in the afternoon of the day of the murder and that:

"As he arrived he chased me with a panga and exhibit 4. I ran faster than he."

She was not asked how, in the circumstances, she was able to identify the stick: no one else was present except the boy Maganga. No other witness testified to having seen the stick in the appellant's possession.

As to the second point, the assistant headman, Masanja s/o Kanijo, said that on the next morning

"I saw cloth and stick. Cloth was in the house. Stick was at the place where the boy was killed. P3 and P4. Saw blood on the stick and on ground at three places."

On the other hand, Ng'ola s/o Diochi stated—

"Next day I looked round and I found a stick. P4. Took it and gave it to European Police Officer. Later showed him where I had found it."

The police officer, Mr. Cairns, made a sketch plan of the locality on which he marked the spot shown to him as that in which the stick was found (J) and the place where the boy's body lay (D). The plan is not to scale, but from the distances given in evidence by Mr. Cairns, e.g. that from J to the point marked

F on the plan is 327 feet, it is clear that the spot where the witness Ng'ola states that the stick was found is at a considerable distance from the place where the body lay: in which case it clearly is of less value as evidence.

There is no evidence as to the nature of the stains on the stick which the witness Masanja described as blood; and there is nothing to connect the blood on the ground with the appellant.

Taking all these points into consideration, we came to the conclusion that the evidence on the record was not such as to enable us to say that if the learned trial judge had evaluated it and embodied his findings in a considered judgment, he must inevitably have found the appellant guilty of murder, or, for that matter, must have acquitted the appellant. We were accordingly unable to determine the appeal on the merits, and we therefore set aside the judgment of the court of trial and remitted the case for re-hearing.

Nothing in this judgment is to be taken as expressing any opinion on our part regarding the guilt or innocence of the appellant or as fettering in any way the discretion of the judge at the re-trial in forming an independent view upon the evidence to be adduced before him.

Appeal allowed. Conviction set aside. Order for re-trial.

The appellant did not appear and was not represented.

For the respondent:

AE Taylor (Crown Counsel, Tanganyika)

The Attorney-General, Tanganyika

Vallabbhai P Patel v Central African Commercial Agency [1959] 1 EA 903 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	30 October 1959
Case Number:	75/1959
Before:	Forbes Ag P, Gould Ag V-P and Windham JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika—Simmons, J

[1] *Guarantee – Plaintiff – Claim based on guarantee of promissory notes – No consideration for guarantee expressly pleaded – Whether plaintiff with promissory notes attached raises presumption of consideration sufficient to disclose cause of action – Indian Code of Civil Procedure 1908, O. 6, r. 1 and O. 7, r. 11 – Indian Contract Act 1872, s. 10 and s. 127 – Indian Evidence Act 1872, s. 114 – Bills of Exchange Ordinance (Cap. 215), s. 30 (1) (T).*

Editor's Summary

The respondent had sued the appellant on two promissory notes of which the appellant was guarantor. The appellant before filing a defence applied to the court to have the plaint rejected under O. VII, r. 11, of the Indian Code of Civil Procedure, on the ground that it disclosed no cause of action, in that it failed to plead the consideration for the guarantee. The magistrate accepted this submission and rejected the plaint. The respondent's appeal to the High Court was allowed on the ground that, whether or not it was necessary to plead consideration, the plaint to which the promissory notes themselves were annexed alleged facts showing consideration. On further appeal the appellant sought to have the judgment of the magistrate restored.

Held –

- (i) in an action against the guarantor of a promissory note consideration should be pleaded or shown in the plaint.
- (ii) the plaint with the attached promissory notes raised a presumption of consideration, namely a request by the guarantor appellant, sufficient to disclose a cause of action against him.

Appeal dismissed.

Cases referred to in judgment

- (1) *Cooke v. Rickman*, [1911] 2 K.B. 1125.
- (2) *Om Parkash v. Abdul Rahim* (1929), A.I.R. Lah. 511.
- (3) *Caballero v. Slater*, 139 E.R. 123.

October 30. The following judgments were read:

Judgment

Windham JA: The respondent sued the appellant in the district court of Dar-es-Salaam on two promissory notes for Shs 1,000/- and Shs. 4,000/- of which the appellant was guarantor. Before filing a defence the appellant applied to have the plaint rejected under O. 7, r. 11, of the Indian Code of Civil Procedure, on the ground that it disclosed no cause of action, in that it failed to plead the consideration for the guarantee. The learned senior resident magistrate accepted this submission and accordingly rejected the plaint. The respondent appealed, and the High Court of Tanganyika allowed the appeal, holding that, whether or not it was necessary to plead consideration, the plaint, together with the promissory notes themselves which were annexed to it, did allege facts showing consideration. From that judgment the appellant now appeals.

This case had an earlier history. On precisely the same plaint as is the subject of the present proceedings the respondent had first sued the appellant as long ago as October, 1953. The appellant filed a defence on merits. The case went to trial and the magistrate found for the respondent. The appellant appealed, and the High Court allowed the appeal and remitted the case for re-trial by another magistrate, ordering (*inter alia*) that

“the issues between the parties as shown in this judgment to have been raised and such other issues as may be raised by the parties be considered and adjudicated upon”.

Upon remission, as we have seen, the appellant raised on the original plaint the contention that it disclosed no cause of action. At no time during the earlier proceedings had this point been pleaded or argued by him.

On appeal before us the appellant seeks to restore the judgment of the learned magistrate, arguing that the plaint ought to have alleged consideration and that it did not do so. Against this the respondent advances three contentions: first, that it was not necessary to allege consideration; secondly that, even if it was the fact alleged in the plaint and disclosed in the annexed promissory notes imply or raise a presumption that the appellant received consideration for his guarantee; thirdly that by reason of the appellant not having raised the point of the defectiveness of the plaint in the earlier proceedings he is estopped from doing so now.

The only relevant paragraph in the plaint is para. 3, non-payment of the notes, notice of dishonour to the appellant, and protesting, having been duly pleaded. Paragraph 3 reads as follows:

- “3. The defendant is indebted to the plaintiff in the sum of shillings five thousand as guarantor of two promissory notes numbers G. 30146 and D. 78625 both dated 8th April, 1953, and payable after sixty days. Both notes were dishonoured by non-payment on presentation on their respective due dates, of

which promissory notes the plaintiff is the payee. The said promissory notes are annexed hereto and marked 'A' and 'B' respectively."

The two promissory notes for Shs. 1,000/- and Shs. 4,000/- annexed to the plaint are identical save for their respective amounts and numbers. They are in the ordinary form, dated April 8, 1953, and payable after sixty days to the respondent by the maker “for value received”. At the back of each of them is an endorsement—“Payment guaranteed”, signed by the appellant. The endorsements are undated.

Clearly, neither in the plaint nor in the promissory notes themselves is there any express allegation of the appellant having received consideration for guaranteeing the notes; and the first point for decision is whether it was necessary that such consideration need be expressly or impliedly pleaded at all in the plaint (read together with the annexed promissory notes) in order to disclose a cause of action. The High Court, on first appeal, expressed doubts on the first point, but found it, in the event, unnecessary to decide it. Learned counsel for the respondent contended, though not I think very strenuously, that consideration, in an action against a guarantor, need not be pleaded or shown in the plaint. That, however, is not so. Order 6, r. 1 (f) of the Indian Code of Civil Procedure requires a plaint to contain the “facts constituting the cause of action”, and, as the learned magistrate rightly observed, a cause of action means:

“every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court.”

Consideration is such a fact, in an action on a simple contract, unless it is to be implied by law; for s. 10 of the Indian Contract Act provides that an agreement, in order to be a contract (and, as such, actionable) must have been made for a lawful consideration. The necessity for pleading consideration, in a suit upon a simple contract, was pointed out in *Cooke v. Rickman* (1), [1911] 2 K.B. 1125, a case relied on by the counsel for respondent in his alternative argument founded on estoppel, Bankes, J., observing, at p. 1130, that:

“if an agreement were set up in a statement of claim without saying what was the consideration, the defendant would be entitled to apply to strike it out or to apply for particulars of the consideration.”

It was rightly conceded by the respondent, and held by the High Court on first appeal, that the presumption in s. 30 (1) of the Bills of Exchange Ordinance (Cap. 215) that

“every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value”,

does not avail a guarantor who, as such, has signed a promissory note, since his liability is conditional only and he is not a “party” to the instrument for the purpose of the ordinance.

The next question to consider, then, is whether an allegation of consideration was contained in the plaint, together with the promissory notes annexed to it, by implication although not in express words. The High Court, reversing the ruling of the court below on the point, held that the answer was afforded by s. 127 of the Indian Contract Act, which provides that:

“Anything done, or any promise made, for the benefit of the principal debtor may be sufficient consideration to the surety for giving the guarantee.”

From this the learned judge, having in mind presumably the words “for value received” appearing on the face of the promissory notes, concluded that

“the value alleged to have been given to the principal debtor was therefore the consideration alleged to have moved to the respondent in return for giving the guarantee.”

I do not think the matter is as simple as that. Such might have been the position if the words in s. 127 had been. “shall be a sufficient consideration” and not “may be sufficient consideration”, Something more was required to show that the benefit to the principal debtor was, or could be presumed to be, the consideration for the guarantee, for the purpose of s. 127, or alternatively that the guarantor. (the appellant) impliedly derived some benefit from giving the guarantee. Nevertheless, in the present case I consider that the plaint, with the attached promissory notes, did on the face of them raise a presumption of consideration, and that it was for the appellant to traverse this presumption by alleging lack of consideration in his written statement of defence, if he so desired. The plaint alleged that the

“defendant is indebted to the plaintiff . . . as guarantor of two promissory notes . . .”

These notes were dated, on the face of them, April 8. The appellant’s endorsements “payment guaranteed” bore no date. From this it can, in my view, be presumed that the appellant endorsed them on that same date, and that all parties signed at the same time, though, of course, such a presumption would be rebuttable. The presumption may, I think, properly be made under s. 114 of the Indian Evidence Act; and see *Om Parkash v. Abdul Rahim* (2) (1929), A.I.R. Lah. 511, where a postscript to a document bore no date, and it was held that

“in the absence of an entry or other evidence showing that it was written on some other date, it should be presumed that the two portions of the document were written on one and the same date.”

From this it may again fairly be presumed, I think, that the advance to the maker of the notes by the respondent, secured by the promissory notes, was made at the request of the appellant, the whole transaction being a tripartite one. There is little direct authority on the point; but the case of *Caballero v. Slater*, (3) 139 E.R. 123, is of some guidance. In that case the plaintiff agreed in writing to let premises to one Thompson, and in the same agreement the defendant did

“agree and undertake to see the rent paid quarterly by the said David Thompson, or otherwise doth agree to pay the said rent quarterly for the said David Thompson”.

There was no averment of consideration in respect of the defendant Slater’s guarantee to see that the rent was paid, other than what appeared from the under taking itself, as above set out, and the fact of its being embodied in the written agreement to let. In an action by the plaintiff on the guarantee, and upon demurrer that the agreement (whose terms were set out in the claim) showed no consideration, it was held by Jervis, C. J., that

“the agreement shows that Slater was a party, and the consideration for his undertaking was the letting of the premises to Thompson”.

The facts in that case were similar in essentials to those in the present one, and it was decided in a day when pleading was a matter of greater strictness than it is today. A similar process of reasoning justifies, I think, the conclusion at which I have arrived, that the plaint and the promissory notes in the present case raise a presumption of consideration, namely a request by the guarantor appellant, sufficient to disclose a cause of action against him.

It accordingly becomes unnecessary to consider the respondent’s alternative ground for resisting this appeal, based on the estoppel of the appellant by reason of his not having raised the question of the plaint disclosing no cause of action in the earlier proceedings between the parties upon the same plaint.

For the reasons that I have given, I would dismiss the appeal with costs and uphold the order of the High Court.

Forbes Ag V-P: I agree. The appeal is dismissed with costs.

Gould JA: I also agree.

Appeal dismissed.

For the appellant:

KA Master QC and NS Patel

Atkinsons & Master, Dar-es-Salaam

For the respondent:

W Dharsee and OT Hamlyn

OT Hamlyn, Dar-es-Salaam

Shivabhai Nathabhai Patel v Manibhai Hathibhai Patel

[1959] 1 EA 907 (HCU)

Division: HM High Court of Uganda at Kampala

Date of judgment: 7 November 1959

Case Number: 773/1959

Before: Lyon J

Sourced by: LawAfrica

[1] Practice – Preservation of property in issue – Claim based on cheques and promissory notes – Order of court directing bank to retain proceeds of cheque pending further order – Application to rescind order – Civil Procedure Rules, O. 37, r. 7 (1) (a) (U.).

Editor's Summary

The plaintiff claimed from the defendant Shs. 125,000/- based on two cheques and several promissory notes. It was alleged that the sum was due in payment for certain shares sold by the defendant on behalf of the plaintiff to third parties. The defendant's son had paid a cheque into a bank for collection and the court ordered the bank to retain until further order of the court the proceeds of the cheque. The defendant later applied to have the order rescinded and submitted that the order was an injunction.

Held –

- (i) the order was not an injunction but an interlocutory order made under the provisions of O. 37, r. 7 (1) (a) of the Civil Procedure Rules.

- (ii) it is not only right that the court should attempt to preserve property which may be in issue, but it is the clear duty of the court to do so.

Application dismissed.

Case referred to in judgment

(1) *Polini v. Gray* (1879), 12 Ch.D. 438.

Judgment

Lyon J: This is an application asking that the order made by this court on September 30, 1959, should be rescinded. In the action the plaintiff claims from the defendant Shs. 125,000/- and bases the claim on two cheques and several promissory notes. It is alleged that that sum is due in payment for certain shares sold by the defendant on behalf of the plaintiff to third parties.

I am concerned here with one cheque drawn in favour of one, Ramanbhai Patel and endorsed first by Ramanbhai Patel and secondly by Madhoobhai M. Patel, who is the son of the defendant. There are conflicting affidavits as

to what happened to the cheque, but it is not disputed that it was in fact presented at the Standard Bank of South Africa Ltd., in Kampala by Madhoobhai who, it is now not in dispute, is no longer a party to any of these proceedings. The Order made on September 30 was:

- “1. That the Manager, Standard Bank of South Africa Limited, Burton Street, Kampala, do retain until further orders of this court the proceeds of cheque No. 19277 dated 25/9/59 drawn by Auto Dealers and Hardwares Limited, Nairobi, for Shs. 15,000/- on Standard Bank of South Africa Limited, Nairobi, and drawn in favour of Ramanbhai Ashabhai Patel which was deposited for collection by Madhoobhai Manibhai Patel, son of the defendant, in his personal banking account entitled ‘Madhoobhai Manibhai Patel’.”

It is that order that the applicant asks should be rescinded. Nearly the whole of Mr. Manubhai Patel’s argument was based on the submission that that order was an injunction. I do not take that view. I am of opinion that that order was an interlocutory order and as Mr. Phadke has pointed out, it seems that this court then acted under O. 37, r. 7 (1) (a):

- “7. (1) The court may, on the application of any party to a suit, and on such terms as it thinks fit:
- (a) make an order for the detention, preservation, or inspection of any property which is the subject-matter of such suit, or as to which any question may arise therein;”

I attach particular importance to the words “or as to which any question may arise”. Counsel have informed me that, although there appears to have been a clear obligation on the defendant to pay by instalments Shs. 125,000/-, plaintiff has so far received nothing. It may be that the case of *Polini v. Gray* (1) (1879), 12 Ch.D. 438 might be distinguished from the present situation, but the general rule is clear. In my opinion it is not only right that the court should attempt to preserve property which may be in issue, but it is the clear duty of the court to do so. If plaintiff succeeds in this suit (and part of his claim is based on this cheque) there might be a barren result; and that it is the duty of the court to try to avoid. Mr. Manubhai Patel has referred to the balance of inconvenience. The pleadings in this action are closed and it is probable that the case will be listed either next month or in January; and therefore, even if it is established that Madhoobhai was in lawful possession of the cheque, he will be prevented from obtaining the proceeds for only two or three months.

In my opinion O. 37, r. 7(1) (a) includes the circumstances of this application. In the circumstances the application is dismissed with costs. Leave to appeal granted, if necessary.

Application dismissed.

For the plaintiff:

YV Phadke and SV Pandit

YV Phadke, Kampala

For the defendant:

ML Patel

Manubhai Patel & Son, Kampala

Division: Court of Appeal at Nairobi
Date of judgment: 7 October 1959
Case Number: 48/1959
Before: Forbes Ag P, Windham JA and Sir Owen Corrie Ag JA
Sourced by: LawAfrica
Appeal from: H.M. Supreme Court of Kenya–Mayers, J

[1] Divorce – Stay of proceedings – Petition presented in Kenya by husband – petition presented by wife in England – Petition in Kenya adjourned sine die – Whether concurrent proceedings can lead to inconsistent decrees – Matrimonial Causes Ordinance (Cap. 145), s. 3 (K.) – Matrimonial Causes Rules, r. 4(1)(f)(k.).

Editor's Summary

In November, 1958, the husband petitioned in Kenya for a divorce alleging desertion by his wife. His petition included a paragraph that there had been no previous proceedings with reference to the marriage, with the exception of a petition for divorce presented by the wife to the High Court of Justice in England in August, 1958. The husband's petition was served upon the wife, who filed no answer. The husband's petition was adjourned sine die by order of the court until the proceedings in England should be determined, on the ground that inconsistent decrees might otherwise be made in Kenya and England. On appeal.

Held –there was no danger of inconsistent decrees being made since, if either court decreed the dissolution of the marriage, the proceedings in the other jurisdiction would be brought to an end, on the ground that the marriage had already been dissolved.

Appeal allowed. Order for the petition to be re-listed in the Supreme Court of Kenya.

Cases referred to in judgment

- (1) *Sealey v. Callan*, [1953] P. 135; [1953] 1 All E.R. 972.
- (2) *Manning v. Manning*, [1958] P. 112; [1958] 1 All E.R. 291.

Judgment

Sir Owen Corrie Ag JA: read the following judgment of the court: On November 11, 1958, the appellant, James Owens, presented a petition in the Supreme Court of Kenya for the dissolution of his marriage to the respondent, Margaret Owens, on the ground of her desertion.

The petition was served upon the respondent in California, U.S.A. No answer has been filed.

On May 7, 1959, the petition was heard in the Supreme Court, and on June 4, 1959, Mayers, J., delivered his ruling and made an order that the petition be adjourned sine die with liberty for the petitioner to apply for it to be re-listed.

The appellant, having appealed against this order, his appeal was heard by this court on September 23, 1959. The appeal was allowed, the court set aside the order of the Supreme Court given on June 4, 1959, and ordered the petition to be re-listed in that court. The court made no order as to the costs of the appeal but stated that it would give reasons for its judgment.

The parties were married on August 1, 1953, in England. By his petition the appellant states that from July 22, 1954, the parties lived together in Kenya until July 18, 1955, when the respondent, contrary to the wishes of the appellant, left Kenya and has not since returned to him.

In para. 3 of his petition the appellant alleges that he is domiciled in the Colony of Kenya and by para. 4 he alleges that the respondent is also domiciled in the Colony.

Paragraph 6 of the petition is in the following terms:

- “6. That there have been no previous proceedings with regard to the said marriage brought by or on behalf of either party, either in the Supreme Court of Kenya or any court subordinate thereto, or in any other court, with the exception of a petition for divorce dated the 5th day of August, 1958, presented by the respondent in the High Court of Justice, Probate, Divorce and Admiralty Division in England.”

Rule 4(1) (f) of the Matrimonial Causes Rules requires that the petition in a matrimonial cause shall state:

- “(f) whether there have been in the court or a subordinate court any, and if so what, previous proceedings with reference to the marriage by or on behalf of either of the parties to the marriage, the date and effect of any decree or order made in such proceedings, and whether there has been any resumption of cohabitation since the making thereof;”

The court is not defined in the rules, but from s. 3 of the Matrimonial Causes Ordinance (Cap. 145) it is clear that the court means the Supreme Court. Thus the rule does not require a petitioner to mention in his petition matrimonial proceedings in any court elsewhere than in this Colony, but we are of opinion that it was proper that the court should be informed of the proceedings which had already been commenced in England.

In his ruling, Mayers, J., said:

“There can be no doubt that a decree of divorce granted by the High Court of Justice, England, upon the ground of desertion at the instance of a wife who although domiciled in Kenya was ordinarily resident in England and had been so resident for three years prior to the presentation of the petition would be recognised by this court as a valid decree of divorce.

“It is not inconceivable, therefore, that were the present proceedings to result in the granting of a decree of divorce to the husband, at some subsequent time the wife might obtain a decree from the English courts dissolving her marriage upon the ground that her husband had deserted her, and the courts of this Colony would have to recognise the decree of that court although that decree was not consonant with the decree of this court granting a divorce to the husband upon the ground that his wife had deserted him. Moreover, it is not inconceivable that were the wife to obtain a decree of divorce from the English court that court might make an order for her maintenance by her husband and that order might to be enforced by the courts of this Colony against a husband who, in the eyes of the courts of this Colony, had in fact not deserted his wife but had been deserted by her.

“In these circumstances, it appears, it to me that it would be most undesirable for these proceedings to continue further unless and until such time as the proceedings before the High Court of Justice, England, have been determined.”

We are satisfied, however, that no possibility can arise of inconsistent decrees being made by this court and by the High Court of Justice in England. In *Sealey v. Callan* (1), [1953] P. 135 the facts, as stated in the head-note, were as follows:

“A wife resident in England filed a petition in the High Court for divorce, relying, in so far as jurisdiction was concerned, upon the provisions of

s. 18 (1) (b) of the Matrimonial Causes Act, 1950. The husband, who was resident and domiciled within the jurisdiction of the South African courts, entered an appearance to the petition under protest, and after doing so, commenced proceedings for divorce in those courts. Each party alleged desertion by the other in 1944; the husband also alleged adultery, and there was evidence of a bigamous marriage by the wife in 1946 and the birth to her of a child of that union. Upon an application by the husband to stay the English proceedings until the trial and determination of his action for divorce . . .”

the court refused the husband’s application. Davies, J., in his judgment said at p. 149:

“In my judgment on the authorities it requires a very strong case to persuade this court to prevent a party from proceeding, whether it be with an action at common law or a petition in this court, when this court has beyond question jurisdiction in the matter, on the ground that the defendant or the respondent in this court has either previously, as in some of the case, or subsequently, as in the present case, started what for convenience I may call a cross-action or cross-petition in a foreign jurisdiction.”

In *Manning v. Manning* (2), [1958] P. 112 the head-note reads:

“A wife domiciled in England obtained in Norway a Norwegian decree of divorce based upon a period of separation. The jurisdiction of the Norwegian tribunal was founded upon the fact that the last common residence of the parties had been in Norway, although the wife, a Norwegian by birth, had in fact been ordinarily resident in Norway for considerably more than three years before the decree. Upon a petition presented by the husband (who remained domiciled in England) for a declaration that the Norwegian decree was valid and the marriage thereby dissolved or, in the alternative, for a decree of divorce on the ground of desertion:

- “**Held:** (i) that a petitioner cannot in such circumstances elect between seeking a declaration or a decree of divorce: the court must first determine whether the marriage is still in existence.
- “(ii) that as the wife had in fact been ordinarily resident in Norway for a period of more than three years before her application for a divorce the marriage should be recognised upon a basis of reciprocity as having been validly dissolved by the Norwegian decree.
-
- “(iv) as the Norwegian court had accordingly had jurisdiction there was no jurisdiction in the English court to consider the husband’s alternative plea for a divorce in this country, for the marriage had already been dissolved.”

From this judgment it follows that if the Supreme Court of Kenya should issue a decree dissolving the marriage between the parties while proceedings before the High Court in England are still pending, that court will not proceed further as in its eyes the marriage will already have been dissolved.

Under s. 3 of the Matrimonial Causes Ordinance the jurisdiction of the Supreme Court shall, subject to the provisions of that Ordinance, be exercised in accordance with the law applied in matrimonial proceedings in the High Court of Justice in England. It follows that if the English court makes a decree for the dissolution of the marriage while the proceedings on the appellant’s petition to the Supreme Court of Kenya are still pending, such proceedings

will be brought to an end on the ground that the marriage has already been dissolved. Thus there is no possibility of conflicting decrees being issued by the High Court of Justice in England and the Supreme Court of Kenya.

On these grounds we have set aside the order of the Supreme Court and have ordered that the petition be re-listed.

Appeal allowed. Order for the petition to be re-listed in the Supreme Court of Kenya.

For the petitioner:

RDC Wilcock

For the appellant:

Archer & Wilcock, Nairobi

Nathu Ruda Solanki v S J N Kiruka
[1959] 1 EA 912 (HCT)

Division:	HM High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	15 December 1959
Case Number:	82/1959
Before:	Biron Ag J
Sourced by:	LawAfrica

[1] Contract – Unenforceable transaction – Credit to an African – Claim by building contractor for work done and materials supplied – Whether work done constituted “services of a professional nature” – Credit to Natives (Restriction) Ordinance (Cap. 75) (T.).

Editor’s Summary

The plaintiff, an Asian building contractor, claimed from the defendant, an African, the balance of the price for constructing a building for the defendant. The defendant submitted that the claim was for “services of a professional nature” and by virtue of the provisions of s. 3 of the Credit to Natives (Restriction) Ordinance the sum was not recoverable.

Held –the plaintiff’s claim was for the value of work done and materials supplied and the work done constituted “services of a professional nature” within the meaning of s. 3 of the Credit to Natives (Restriction) Ordinance and was not recoverable. *Ladha Singh v. Gitagano Falla* (1942), 1 T.L.R. (R) 407, distinguished.

Action dismissed.

Cases referred to in judgment

- (1) *Ladha Singh v. Gitagano Falla* (1942), 1 T.L.R. (R) 407
- (2) *Rajabali Ganji & Sons v. Salim Hemedi*, Tanganyika High Court Civil Appeal No. 49 of 1956 (unreported).
- (3) *Saleh Mohamed Sultani v. Mashaka Bin Chuma* (1955), 2 T.L.R. (R) 207.
- (4) *Currie v. Commissioners of Inland Revenue*, [1921] 2 K.B. 332.

Judgment

Biron Ag J: The plaintiff, who describes himself in the plaint as “an Indian building contractor”, is claiming from the defendant, whom he describes in the plaint as “an African Liwali”, Shs. 22,326/- being the balance of the contractual price plus interest, for the construction of a building

by the plaintiff for the defendant. The contractual price for the construction amounted in the aggregate to Shs. 65,880/- as set out in the plaint, against which the plaintiff avers the defendant has paid Shs. 45,180/-.

The defendant has raised as a preliminary point, as so pleaded in para. 1 of his written statement of defence, that:

“The plaint does not disclose any cause of action under the Credit to Natives (Restriction) Ordinance (Cap. 75 of the Laws of Tanganyika 1947) and therefore the defendant who is a native, respectfully submits that the plaintiff’s claim be dismissed with costs”.

Section 3 of the Credit to Natives (Restriction) Ordinance reads:

“Subject to the exceptions specified in s. 4, no debt for money lent, goods supplied or services of a professional nature rendered, by a non-native shall be recoverable from a native, unless either—

- (a) the transaction creating the debt is in writing and approved in writing by an administrative officer; or
- (b) the native holds a permit in writing from an administrative officer to contract such debts without the approval of an administrative officer. Such approval or permit may be made subject to conditions and shall not be effective unless they are fulfilled.”

It is submitted by the defendant that the claim is for “services of a professional nature” and therefore the plaintiff is barred by the Ordinance from recovering on such claim. Mr. Patel for the plaintiff submits that the claim is not for “services of a professional nature” and cites as an authority in support the case of *Ladha Singh v. Gitagano Falla* (1) (1942), 1 T.L.R. (R) 407. The headnote to that case reads:

“**Held:** that the work performed by a small building contractor in erecting a native house for Shs. 1,800/- could not properly be regarded as falling within the scope of the expression ‘services of a professional nature’ in s. 3 of the Credit to Natives (Restriction) Ordinance, 1931.”

Mr. Kitabwalla for the defendant submits that that case can be distinguished from the present, as in the former the plaintiff was “a small building contractor” whereas in this case the plaintiff is a building contractor who has contracted to erect a substantial building calling for a high degree of skill, and therefore such work should be regarded as “services of a professional nature”. As Wilson, J. (as he then was), stated in the case cited, “The point is not by any means without difficult”.

The court has been referred to the several definitions of “profession” and “professional” in various dictionaries and authorities, but such definitions are not really of any great assistance, as they range from the narrow interpretation of a profession as applied to “the three learned professions of divinity, law, and medicine” to the wider definition of “any calling or occupation by which a person habitually earns his living”.

I have also been referred to another case of this court, *Rajabali Gangji & Sons v. Salimu Hemedi* (2), Tanganyika High Court Civil Appeal No. 49 of 1956 (unreported) where the plaintiffs, non-natives, claimed from the defendant, a native, the cost of repairs to premises. In that case the Credit to Natives Ordinance was invoked as a defence as such defence was rejected, apparently on the authority of the *Ladha Singh* case (1). On the case coming before Law, J., on appeal he referred to the judgment of Wilson, J., and said:

“In other words the learned judge laid down that a claim for money owing in respect of work done which is not of a professional nature cannot possibly be regarded as a debt for money lent or for goods supplied. I

respectfully agree whether the work done is of a professional nature or not, and hold that nothing in the Credit to Natives (Restriction) Ordinance operates to prevent the plaintiffs in this case from recovering from the defendant the cost of works of a non-professional nature done on his behalf.”

and the appeal was dismissed. However, to my mind that case is of little assistance and very easily distinguishable from this instant case. In that case the plaintiffs described themselves in the plaint as “a firm of merchants”. It could hardly therefore be contended that their claim was for “services of a professional nature”.

Reference was also made to another case of this court, that of *Saleh Mohamed Sultani v. Mashaka bin Chuma* (3) (1955), 2 T.L.R. (R.) 207, in which the plaintiff sought to recover from the defendant Shs. 31,256/55 which (quoting from the judgment of Lowe, J. (as he then was)),

“he alleges he was compelled to pay to one D. R. Dharani who, it is agreed, is an Asian, in fulfilment of a guarantee which the plaintiff had given orally to Dharani for a building which the latter had erected”.

In that case the submission that the plaint disclosed no cause of action on the grounds that the provisions of the Credit to Natives (Restriction) Ordinance applied was upheld. Lowe, J., stated:

“I do not think it can be disputed that the services rendered by Dharani were services of a professional nature in that he holds himself out as a professional contractor; all of the legal dictionaries I have seen, and, indeed, dictionaries of a non-legal nature, support the view that the word ‘professional’ must be taken in its widest meaning.”

The definition of “profession” was considered by Scrutton, L.J., in *Currie v. Commissioners of Inland Revenue* (4), [1921] 2 K. B. 332. The learned Lord Justice stated at p. 340:

“In my view it is impossible to lay down any strict legal definition of what is a profession because persons carry on such indefinite varieties of trades and businesses that it is a question of degree in nearly every case whether a firm or business that a particular person carries on is, or is not, a profession.”

The learned Lord Justice went on to say that:

“All these cases which involve questions of degree seem to me to be eminently questions of fact” etc.

It is further submitted by Mr. Kitabwalla that the dictum of Wilson, J., was obiter as the ratio decidendi was based on the impropriety of the manner in which the magistrate dismissed the suit, as stated in the judgment:

“The dismissal of the suit and the entering of judgment for the defendant in this summary fashion is, of course, entirely improper.”

Whether or not the dictum of Wilson, J., is obiter, applying the standard of degree as laid down by Scrutton, L.J., this case is also easily distinguishable from that of Wilson, J. In that case the plaintiff was described as a builder. In his judgment Wilson, J., stated:

“Nine people out of ten would probably never think of regarding a Sikh building contractor in a small way of business in a backward district like Mbulu as being ‘a professional man’ or his work of building houses as being ‘a profession’,”

and again:

“I think it is clear from all the pointers above that a small building

contractor like the plaintiff, whose personal qualifications (if any) are probably merely those of an artisan, cannot properly be regarded as practising a profession when he engages in the building of a native house for a couple of thousand shillings or less.”

In this case the plaintiff is described in the plaint as “a building contractor”. In the plaint it is further set out in para. 5:

“In consideration of the plaintiff constructing and erecting the said new building for the defendant on the said plot as aforesaid, according to drawings and specifications as referred to in the said agreement, the defendant agreed to pay to the plaintiff the sum of Shs. 68,300/- inclusive of Shs. 3,000/- for electrical installations and Shs. 1,000/- for contingencies or additions in work to be used in whole or in part as instructed by the said architect.”

It is a far cry from:

“a Sikh building contractor in a small way of business in a backward district like Mbulu”

constructing a native hut, to the construction of the building in this instant case, which was to be a building

“comprising lock-up shops on the ground floor with residential flat on the first floor, complete with electrical installations”.

A high degree of skill is required to construct a building of this nature according to architectural design, drawings and specifications. It is not clear from the judgment in *Saleh Mohamed Sultani v. Mashaka bin Chuma* (3), what the nature of the building was in that case beyond that the cost was Shs. 31,256/51. There is therefore no material on which this case could be distinguished from that one, in so far as the application of the Credit to Natives (Restriction) Ordinance is concerned. In fact, if the price of the work is any criterion, it could well be argued that a fortiori should this claim be considered as being for “services of a professional nature”.

There is a further point for consideration in that in this case we are not concerned with a claim for work alone. Mr. Patel submitted that the claim is based on a contract for the work of constructing this building and not for goods or materials, etc. But the plaint specifically avers at para. 5 (a):

“That the plaintiff shall be entitled to monthly interim certificates from the said architect in respect of the work done and the amount due to the plaintiff from the defendant and after the issue of the said certificates, the plaintiff shall be entitled to payment within fourteen days on presentation of the same to the defendant.”

and:

“B. That the amount due on the said certificates shall be the total value of the works duly executed and of the materials and of the goods delivered upon site for the use in erection works up to and including a date not more than seven days prior to the date of the said certificates less ten per cent of the instalments previously paid under this clause. Provided that such certificates shall only include the value of the said materials and of the goods as and from such time as they are reasonably and prematurely not brought upon the site and then only if adequately stored and/or protected against the weather or other casualties.”

The architect’s certificates are annexed to the plaint, thus forming part of the plaint, and in each it is set out “Value of works completed (including materials on site)”. It is thus abundantly clear, and I have no hesitation in so finding, that this is a claim for work done and materials supplied by the plaintiff. There can be

no doubt whatsoever, nor was any attempt made to argue the contrary, that the Ordinance would effectively bar the claim for the materials supplied. Mr. Patel in answer to the court said that it would be impossible to ascertain and apportion the contract price between the work done and the materials supplied, as the plaintiff kept no record of the materials supplied.

To revert to the question whether the work done constitutes “services of a professional nature”, the case of *Saleh Mohamed Sultani v. Mashaka bin Chuma* (3), is the only authority which is really analogous to this case in so far as the application of the Ordinance is concerned. In that case Lowe, J., was not only definite that the Ordinance applied but stated:

“I do not think it can be disputed that the services rendered by Dharani were services of a professional nature in that he holds himself out as a professional contractor.”

It would thus appear that that point was never at issue, as there is nothing in the judgment to suggest that it was contended or questioned that such services were not of a professional nature. It is hardly likely, in fact it is inconceivable, that neither the court nor the parties were aware of the judgment of Wilson, J., in the case of *Ladha Singh v. Gitagano Falla* (1). Even apart from the impossibility of distinguishing between the price of the work done and the materials supplied and apportioning the claim between such heads, I see no reason for coming to a different conclusion from that of Lowe, J., which, although not binding on this court, is at lowest of great persuasive authority.

Accordingly, and I may add, most reluctantly, I consider myself bound in law to uphold the submission of the defendant that the plaint discloses no cause of action, and therefore reject it.

It is to be regretted that during the short adjournment granted for such purposes the parties were unable, even at such late stage, to agree to refer this dispute to arbitration as specifically provided for in the contract, and so allow the case to be decided on its merits.

In previous cases I have had occasion to consider the operation of the Credit to Natives (Restriction) Ordinance and whether in this present age it is not open to the same criticism as that levelled against the Statute of Frauds, which was enacted to prevent fraud and was animadverted on by high judicial authority that it was being used as “an engine of fraud”. This case, particularly having regard to the status and appointment of the defendant, who as already noted is described in the plaint as a Liwali, and I am informed by his learned counsel that he is now a Hakimu, again raises the question as to whether in its present form the Ordinance is not really an anachronism in this present stage of the advancement and development of this Territory and its inhabitants.

The plaint is accordingly dismissed with costs to the defendant.

Action dismissed.

For the plaintiff:

NP Patel

NP Patel, Dar-es-Salaam

For the defendant:

SMA Kitabwalla

SMA Kitabwalla, Dar-es-Salaam.

Re Zainab Abdulsultan Nathoo—an Infant
[1959] 1 EA 917 (HCT)

Division: HM High Court of Tanganyika at Dar-Es-Salaam
Date of judgment: 5 October 1959
Case Number: 63/1959
Before: Spry Ag J
Sourced by: LawAfrica

[1] Mohamedan law – Infant – Custody – Parents both Muslims of different sects – Whether law of either religious community applicable – Whether anyone has absolute right to custody of infant.

Editor's Summary

The applicant, an Ismaili Khoja, and Shia Muslim sought an order giving him the custody of his infant child after the death of his wife who was a Sunni Muslim. The maternal grandmother and uncle of the child who were Sunnis also claimed custody. The point in issue was the law to be applied to determine who was to have the custody of the child.

Held –

- (i) for the purposes of the proceedings the parties were members of different religious communities and therefore the principle requiring the court to apply the law of a religious community between members of that community was not applicable.
- (ii) in law no one has an absolute right to the custody of a child; the court has a discretion in the exercise of which the welfare of the child is the paramount consideration and the English principle that the claims of the father must prevail (unless the court is judicially satisfied that the welfare of his child requires that the parental right should be superseded) should be applied in Tanganyika.

Order that the child be delivered to the custody of the father.

Cases referred to in judgment

- (1) *Maleksultan w/o Sherali Jeraj d/o Allarakhia Dhalla v. Sherali Jeraj* (1955), 22 E.A.C.A. 142.
- (2) *Aziz Bano v. Muhammad Ibrahim Husain* (1925), 47 All. 823.
- (3) *Salim-Un-Nissa v. Saadat Husain* (1914), 36 All. 466.
- (4) *In re Thain*, [1926] Ch. 676.
- (5) *Suleman Ali Doongersi v. Sheroo binti Kanji* (1908), 1 Z.L.R. 251.
- (6) *Re Collins*, [1950] 1 All E.R. 1057.

Judgment

Spry Ag J: These proceedings are to determine who is to have the custody of a child who is about three months old. I would stress that it is custody of the person of the child and not guardianship that is sought. The applicant, who is the father of the child, applied for and was granted directions in the nature of habeas corpus to which the respondents, who are the maternal grandmother and uncle of the child, duly made a return.

The applicant is an Ismaili Khoja Indian who in 1956 married a woman half Indian and half African by race and a Sunni Muslim by religion, and it was of that union that the child was born who is the subject of these proceedings. The applicant had been previously married to a woman who is an Ismaili Khoja and that marriage is still subsisting. It is not in dispute that the marriage between the applicant and the mother of the child was a lawful marriage according to Muslim law and that the child is legitimate. It is agreed by all parties that the child is to be brought up as an Indian and not as an African.

The first question to be determined concerns the law governing the matter.

It was accepted by counsel for both parties that the relevant law was Muslim law, and the only dispute between them was whether the Sunni or the Shia interpretation should be followed. I am not satisfied that this view is correct.

There are two statutes which expressly recognise the operation of Muslim law in the Territory, the Marriage, Divorce and Succession (Non-Christian Asiatics) Ordinance (Cap. 112) and the Land (Law of Property and Conveyancing) Ordinance (Cap. 114) and neither is relevant to these proceedings. It is therefore necessary to look to the source of jurisdiction of this court. The Tanganyika Orders in Council 1920 to 1955 provide that where any matter is not governed by local Ordinance or applied Act the court shall apply

“the substance of the common law, the doctrines of equity and the statutes of general application in force in England at the date of this Order”,

subject to the proviso

“that the said common law, doctrines of equity and statutes of general application shall be in force in the territory so far only as the circumstances of the territory and its inhabitants . . . permit and subject to such qualifications as local circumstances may render necessary”.

So far as I am aware no local Ordinance or applied Act is relevant to the present application. English law has therefore to be applied unless it can be shown that it is excluded by the proviso quoted above. In the case of *Maleksultan w/o Sherali Jeraj d/o Allarakhia Dhalla v. Sherali Jeraj* (1) (1955), 22 E.A.C.A. 142, the learned President said at p. 146:

“The regulation of the marriage state between members of the same religious community is so inter-twined with the practice of religion that I am fully persuaded that the obligations imposed upon the administering authority under art. 13 of the Trusteeship Agreement must be taken to include recognition of the customary religious law of the community in respect of marriage so far as the same is not inconsistent with the requirements of public order and morality,”

and he went on to say that since the same principle was recognised under the previous mandatory system, the Marriage, Divorce and Succession (Non-Christian Asiatics) Ordinance was

“nothing more than declaratory of the obligation resting on the then mandatory power to recognise the personal law of non-Christian Asiatic communities . . .”.

And, again, later he said that

“from the inception of British rule in Tanganyika it has been recognised quite apart from statute that the marriage and divorce of persons belonging to a recognised religious community were matters proper to be governed by the religious and personal law of the community concerned . . .”.

It is quite clear from the judgments in that case that not only the validity of marriages will be determined according to the religious law of the community but also all issues between the parties arising directly out of the marriage. Briggs, J.A., in the same case went further when he said

“it is clear that any person may seek the aid of the High Court to enforce what is looked upon by that person and others of that person’s community as matters binding and operative between them so long as those matters are not repugnant to natural justice, equity and good conscience, nor incompatible with any statute law for the time being in force”.

If the question of custody of a child arise between the father and the mother it is

clearly an issue directly resulting from the marriage and would therefore, subject to the qualifications stated, be governed by the personal law of the community. I am doubtful whether disputes as to the custody of a child otherwise than between the parents can be said to spring directly from the marriage or to be inter-twined with the practice of religion, but they would, I think, come within the wider class of cases contemplated by Briggs, J.A.

It appears to me that this personal or religious law is really a quasi contractual relationship, that it is based on a free association of individuals and affects the rights of those individuals between themselves but not, except so far as it affects the status of the individual, as against others. It is necessary therefore to consider what is meant by the expression “religious community” in this context. If the expression is used in relation to the whole body of the followers of Islam, then the parties to the present proceedings may be said to belong to one community. If however, the expression is used in a more restricted sense, an Ismaili Khoja following the Shia sect is certainly of a different from a Sunni. I think that in any particular case, the interpretation which is more appropriate must be adopted. If the issues in the present case were such that they could be decided on the basis of the general body of Muslim law as laid down by the Prophet, I should be disposed so to decide it, notwithstanding the fact that the applicant is a Shia and the respondents are Sunnis, but, since the question to be decided is one on which the Shia sect and the Sunni schools differ in their interpretation, I think I must hold for the purposes of these proceedings that the parties are members of different religious communities and therefore that the principle requiring this court to apply the law of a religious community between members of that community does not apply.

Mr. Beg drew my attention to the judgment of Sulaiman, J., in the case of *Aziz Bano v. Muhammad Ibrahim Husain* (2) (1925), 47 All. 823. In a suit for restitution of conjugal rights between a Sunni and a Shia, the learned judge said:

“It would be grossly unjust to decree the claim on the strength of the personal law governing the plaintiff. It is a well – settled rule that the law to be observed in the trial of suits shall, in the absence of any enactment or usage having the force of law, be *the law of the defendant* . . .”.

That decision is not, of course, binding on me and, while I have considered it with respect, I do not consider that I ought to follow it. I think the decision, which is not a reasoned one, may well have been appropriate in the legal system of India but that it does not accord with the law of Tanganyika, which only recognises personal religious law as operative between members of the same religious community.

Before turning to the general law of the Territory, I should perhaps enlarge on certain aspects of Muslim law to which I have referred briefly. In the first place, I think it is well established that a marriage between a Sunni and a Shia is lawful: this does not seem even to be doubted by the Sunnis (Minhaj Et Talibin, Book 33, Chapter II, Section 3; Fitzgerald: Muhammadan Law, Chapter VI, Part B); from the Shia viewpoint, there is an exhaustive analysis of the authorities in *Aziz Bano v. Muhammad Ibrahim Husain* (cited above), while the text books of Mulla: Principles of Mahomedan Law (14th Edn. p. 26) and Tayabji (2nd Edn. p. 138) support this view.

The general law of Islam regarding the custody of children of tender age is that in case of dispute the custody goes to the mother and not to the father. On this, I think all the authorities agree, and it will suffice to cite Tayabji (2nd Edn.), pp. 281 to 286. Unfortunately the Sunni schools and the Shia sect differ in their interpretation of the law of Islam in cases where the mother is dead. The Sunni schools hold that custody should be given to the maternal relations

of the child whereas the Shia sect give the custody to the father. This appears clearly in *Salim-un-nissa v. Saadat Husain* (3) (1914), 36 All. 466, where the writings of Ameer Ali were quoted with approval, and in Wilsons' Anglo-Muhammadan Law, (5th Edn.) at p. 437.

I should perhaps record here that I refused to hear evidence on Muslim law, as s. 8 of Cap. 112 does not apply to these proceedings and as Muslim law, being by adoption part of the law of the Territory and not foreign law, is not a proper subject for expert evidence.

It was alleged in the affidavit supporting the return made by the respondents that the applicant was a Sunni at the time of his marriage. This contention was apparently abandoned in the course of the trial and it is quite clear from the evidence that the applicant has at all times been a member of the Ismaili Khoja community, that is to say a follower of the Shia sect, and it is clear from the evidence of the Liwali, which I have no hesitation in accepting, that the applicant declared himself to be a Shia at the time of his marriage. It is not disputed that the respondents are Sunnis.

I must then consider the law of England, as applied to the Territory, and decide whether there is any reason for holding it inappropriate to the circumstances or calling for qualification. Under the applied law, no-one has an absolute right to the custody of a child: there is a discretion in the court, in the jurisdiction which devolves on the judge from the Sovereign as *parens patriae*. In the exercise of that discretion, the paramount consideration is the welfare of the child, although it is not the only consideration (In *re Thain*) (4), [1926] Ch. 676). That case was one in which the court had to decide whether to award the custody of a child to the father or to the sister of the deceased mother and the sister's husband. Eve, J., (as he then was) was satisfied that the child would be as well cared for in the one home as in the other. "In these circumstances", he said:

"according to well-settled practice, the claims of the father must prevail, unless the court is judicially satisfied that the welfare of his child requires that the parental right should be superseded".

It cannot be said that the application of this rule would be inappropriate in the circumstances of the Territory. There is authority for saying that Muslim law also attaches great weight to the welfare of the child (Ameer Ali, of whose book no copy is, unfortunately, available to me, is quoted to this effect in the Zanzibar case *Suleman Ali Doongersi v. Sheroo binti Kanji* (5) (1908), 1 Z.L.R. 251) and in effect the English law on this subject is substantially similar to Muslim law according to the Shia sect.

While dealing with English law, I should, perhaps, add one observation, which may not be irrelevant. Under English law, as prevailing at the date of its application to the Territory,

"a father was treated as having a right, which the law was bound to recognise and enforce (unless he had by misconduct of some kind forfeited the right) to dictate the religion of his child".

(I quote from the judgment of Sir Raymond Evershed, M.R., in *Re Collins* (6), [1950] 1 All E.R. at p. 1060).

Order that the child be delivered to the custody of the father.

For the applicant:

RS Thornton

Fraser-Murray, Thornton & Company, Dar-es-Salaam

For the respondents:

MS Beg

MS Beg, Dar-es-Salaam

S L Patel and another v Dhana Singh
[1959] 1 EA 921 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 20 October 1959
Case Number: 49/1959
Before: Gould Ag V-P, Windham JA and Sir Owen Corrie Ag JA
Sourced by: LawAfrica
Appeal from: H.M. Supreme Court of Kenya—Mayers, J

[1] Evidence – Agreement for sale of freehold land – Clause stating that “vendor sells and purchasers purchase” – Whether agreement effects an actual sale – Whether agreement admissible in evidence if unregistered – Crown Lands Ordinance (Cap. 155), s. 126, s. 127, s. 129 (K.) – Indian Transfer of Property Act, 1882, s. 54, s. 55, s. 117 – Indian Registration Act, 1908, s. 17, s. 49.

Editor’s Summary

Clause 1 of an agreement for sale of land stated that “The vendor sells and the purchasers purchase . . .” and subsequent clause referred to the land “hereby agreed to be sold”, and to completion taking place after a survey of the land had been made. In an action by the purchasers for specific performance the vendor’s advocate objected to the agreement being admitted in evidence, as he contended that it effected an actual sale and being unregistered was excluded by s. 127 of the Crown Lands Ordinance. The trial judge upheld the objection and dismissed the suit. On appeal by the purchasers

Held –

- (i) the agreement was an agreement for sale and purchase in the usual accepted meaning of that expression.
- (ii) evidence of an agreement for sale and purchase is not excluded by s. 127 of the Crown Lands Ordinance in an action for its specific performance, merely because it also creates a charge or tenancy which is not the subject of the action and in connection with which, without registration, the agreement could not be received in evidence; registration of the agreement might be required before the document could be received in evidence in proof of a charge or tenancy. *Edwardes v. Denning*, [1958] E.A. 628 (C.A.) followed.

Appeal allowed. Case remitted for trial.

Cases referred to in judgment

- (1) *Skinner v. Skinner* (1929), 56 I.A. 363.

- (2) *Dayal Singh v. Indar Singh* (1926), 53 I.A. 214.
- (3) *Edwardes and Another v. Denning*, [1958] E.A. 628 (C.A.).
- (4) *Adler v. Blackman*, [1953] 1 Q.B. 146; [1952] 2 All E.R. 41; [1952] 2 All E.R. 945.
- (5) *Lace v. Chantler*, [1944] 1 K.B. 368; sub-nom *Lace v. Chandler*, [1944] 1 All E.R. 305.

October 20. The following judgments were read by direction of the court:

Judgment

Gould Ag V-P: The plaint in the action from the judgment and decree in which this appeal has been brought claimed specific performance of an agreement for sale and purchase (or alternatively damages for its breach) of certain freehold land in the Ukamba Province of Kenya. It will be convenient at the outset to set out the whole of this agreement (hereinafter referred to as

“the agreement”) which was in the following terms:

“Memorandum of Agreement made the Seventh day of January One thousand Nine Hundred and fifty-four Between Dhana Singh son of Hakam Singh of Post Office Box Number 2496 Nairobi in the Colony of Kenya Contractor and Farmer (hereinafter called ‘the Vendor’ which expression shall where the context so admits include his personal Representatives and Assigns) of the one part and Somabhai Lalubhai Patel and Prabhudas Keshorebhai Patel both of Makindu in the said Colony Farmers (hereinafter called ‘the Purchasers’ which expression shall where the context so admits include their respective personal Representatives and Assigns) of the other part

“Whereas:

- (1) The Vendor is seised for an Estate in fee simple of All That piece of land situate on the Kiboko River in the Ukamba Province of the Colony of Kenya containing Four Hundred and Twenty acres or thereabouts title to which said piece or parcel of land is registered in the Crown Lands Registry at Nairobi aforesaid in Volume Number N 6 Folio 353/28
- (2) The Purchasers have lent to the Vendor on the security of the said hereditaments and premises a sum of Shillings Sixty Thousand bearing interest at the rate and upon the terms and conditions as set out in an Indenture of Mortgage of even date herewith and made between the same parties as the parties hereto
- (3) The Vendor has agreed to sell to the Purchasers a portion of the said hereditaments and premises hereinafter more particularly described comprising an area of One Hundred acres or thereabouts at the price of Shillings Three Hundred per acre upon the terms and conditions hereinafter appearing.

“Now It Is Hereby Mutually Agreed by and between the parties hereto as follows:

- “1. The Vendor sells and the Purchasers purchase All That piece or parcel of land estimated to comprise One Hundred acres or thereabouts being a portion of the said hereditaments and premises as shewn on the Rough Sketch Plan annexed hereto and thereon bordered red for an estate in fee simple free from encumbrances.
- “2. The purchase price of the said portion shall be at the rate of Shillings Three Hundred per acre and the same shall be paid and satisfied out of the said sum of Shillings Sixty Thousand so lent as aforesaid by the Purchasers to the Vendor by the Purchasers giving him credit in respect of the said area on account of the said principal sum.
- “3. The Purchasers are in possession of the said area or a portion thereof hereby agreed to be sold and accordingly until the said area has been surveyed and deed plan thereof prepared and the same has been conveyed to the Purchasers, the Purchasers shall be tenants thereof at a rental of Shillings One Hundred and Fifty per month but such rental shall be deemed to be in payment on account of part of the interest under the said Mortgage.
- “4. The Vendor shall at his own expense get the said area hereby agreed to be sold surveyed and deed plan thereof prepared and approved by the Survey Department not later than two years from the date hereof. Such survey shall include the area on which the Purchasers have dug a well.
- “5. On the survey being done and the plan thereof prepared and

approved by the Survey Department the sale shall be completed at the Offices of Messrs. Shapley, Barret, Allin and Company Advocates of Nairobi aforesaid within Twenty-Eight days of the receipt by such Advocates of the Deed Plan.

- “6. On the Purchasers giving the Vendor credit for the purchase money of the said area calculated at the rate of Shillings Three Hundred per acre on account of the said principal sum and interest then remaining due and owing to the Purchasers on the said recited Indenture of Mortgage the Vendor will execute a proper assurance of the said area hereby agreed to be sold. Such assurance shall be prepared and perfected by and at the expense of the Purchasers by the said Messrs. Shapley, Barret, Allin and Company.
- “7. Should the Vendor fail or neglect to get the said area hereby agreed to be sold surveyed within the said period of Two years from the date hereof, the Purchasers shall be entitled to get the said area surveyed by employing their own surveyor at the expense of the Vendor.
- “8. If for any reason the survey cannot be done and consequently the conveyance cannot be prepared in favour of the Purchasers then the Purchasers shall be entitled to remain in possession of the said area for a period of One year from the date of the repayment of the said mortgage as provided in the said Indenture of Mortgage but the Purchasers shall be liable to pay the said monthly sum of Shillings One Hundred and Fifty per month and credit the same on account of interest payable under the said recited Indenture of Mortgage but after the repayment of the said mortgage and during the one year following repayment rent payable to the Vendor shall be at the rate of Shilling One per annum and after the expiration of one year the Purchasers shall vacate and hand over the said area to the Vendor together with any permanent erections thereof in good and tenantable condition.”

When the first witness in the court below tendered the agreement in evidence objection was taken that it was inadmissible on the ground that, being unregistered, it was excluded by the operation of s. 127 of the Crown Lands Ordinance (Cap. 155). The fact that the land is registered under that Ordinance is not in dispute and is recited in the document itself. The learned judge, having heard argument, deferred his decision and continued to hear evidence, but before the close of the plaintiff's case he announced that he was prepared to deliver his ruling, which he then read. He ruled that the document was inadmissible in evidence. No further evidence was tendered and both counsel closed their cases without addressing the claim was therefore dismissed. It follows that the only question in this appeal is whether the learned judge was correct in deciding the question of admissibility as he did.

It will be necessary to refer to certain provisions of the Crown Lands Ordinance (Cap. 155): s. 126 and s. 127 (excluding a proviso to the latter relating to equitable mortgages) are as follows:

- “126. All transactions entered into, affecting or conferring or purporting to confer, declare, limit or extinguish any right, title, or interest, whether vested or contingent, to, in or over, land registered under this part (other than a letting for one year only or for any term not exceeding one year) and all mutations of title by succession or otherwise shall be registered under this part.
- “127. No evidence shall be receivable in any civil court:
 - (1) Of the sale, lease or other transfer inter vivos of land registered under this part, unless such sale, lease or other transfer is effected by an instrument in writing and such instrument has been

registered under this part.

- (2) Of a lien, mortgage or charge (other than such as may arise or be created in favour of the Crown or the Government under or by virtue of any Ordinance or other enactment) of or upon such land unless the mortgage or charge is created by an instrument in writing, and the instrument has been registered under this part.
- (3) Of a sale or other transfer inter vivos of a registered lien, mortgage or charge, unless such sale or other transfer is effected by an instrument in writing and such instrument has been registered under this part.”

Sub-sections (e) and (f) of s. 129 read:

“129. Nothing in the last two preceding sections shall apply to:

- (e) any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest to or in land registered under this part, but merely creating a right to obtain another document, which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest; or
- (f) a lease for one year only or for any term not exceeding one year.”

In his ruling, the learned judge held that the provisions of para. 3 of the operative part of the agreement created an agreement for a lease which, by virtue of doctrines of equity which were not set out but which he considered to apply in the circumstances, was to be treated as a lease. The ruling then proceeded:

“Mr. Mandavia further relied strongly upon the authority of *Dayal Singh v. Indar Singh*, 53 Indian Appeals 214, where it was held that as under s. 55 (6) (b) of the Indian Transfer of Property Act a receipt for earnest money in an agreement to sell which contemplates the execution of a valid conveyance operated to create a charge upon and an interest in the land the subject of the agreement, that interest excluded the agreement from the provisions of Indian legislation in identical terms with those of s. 127 of the Crown Lands Ordinance read in conjunction with s. 129 of that Ordinance. I find it quite impossible to distinguish a case in which a leasehold interest in possession is created by the express words of a clause in an agreement for the sale of land from one in which an interest in land is created by statute by the existence in the agreement for the sale of that land of a receipt for earnest money. Indeed, I should have thought that the instant case is the clearer of the two.

“I therefore rule that exhibit 1 is inadmissible in evidence.”

The learned judge did not discuss the question whether the lease so considered to be created was of a duration exceeding one year but must, in view of s. 129 (f) of the Crown Lands Ordinance have been of the opinion that it was, as I do not think that the inclusion in an agreement of provisions creating an interest in land of a kind which the Crown Lands Ordinance expressly excludes from the operation of s. 127 could in any way be thought to justify the exclusion from evidence of the remaining portion of the agreement if otherwise admissible. It must therefore have been the view of the learned judge that the agreement created a lease requiring registration and that the absence of such registration rendered the agreement as a whole inadmissible.

I will now proceed to the matters which were argued on appeal though I propose to deal with them in not quite the same order as they were argued below. The first question is whether the agreement is an agreement for sale

and purchase in the usually accepted meaning of those words or does it, as submitted by counsel for the respondent, actually effect a sale. If the former, the operation of s. 127 of the Crown Lands Ordinance is excluded by s. 129 (e); if the latter, the agreement is inadmissible in evidence. I have no doubt at all the former is the correct view. Counsel for the respondent relied upon the case of *Skinner v. Skinner* (1) (1929), 56 I.A. 363, in which the Privy Council held that a certain document required registration as it

“clearly purports to transfer George Skinner’s interest in the immovable properties”

although it contained provision for the execution of a further assurance if necessary. Their lordships did not give detailed reasons and (save to observe that cl. 8 of the document under their consideration provided that “The said vendor confirms this to be a complete and conclusive sale . . .”) I consider it would be profitless for me to attempt any analysis of that document. Obviously each case must be considered upon its individual merits.

In the present case all that can be relied upon as differentiating the agreement from the characteristic agreement for sale and purchase, is the use of the phrase “The vendor sells and the purchasers purchase . . .” in cl. 1 of the operative portion. This is more than offset by the use of the phrase, “hereby agreed to be sold” in cl. 3, cl. 4, cl. 6 and cl. 7. By cl. 5 it is provided that the “sale shall be completed” after a survey has been made and plan prepared; the purchase price is to be offset upon completion. Clause 8 is inconsistent with a completed sale for it provides that if the survey cannot be completed the purchasers are, after a certain lapse of time, to go out of possession and it is clearly implicit that all rights under the agreement would then cease. In my opinion this is an agreement for sale and purchase and that opinion is unaltered by the circumstance that the parties have chosen what is perhaps a rather unusual method of giving interim possession to the purchasers.

The next matter for consideration goes to the root of the decision of the learned judge in the court below. It is unfortunate that when the advocate for the respondent relied in argument upon the case of *Dayal Singh v. Indar Singh* (2) (1926), 53 I.A. 214 he did not also call attention to the decision of this court in *Edwardes and Another v. Denning* (3), [1958] E.A. 628 (C.A.) as, if the learned judge had considered the judgment in that case, he might well have reached a different conclusion.

Dayal Singh v. Indar Singh (2) was a case which was decided upon Indian legislation which, though similar to, is by no means identical with the provisions of the Crown Lands Ordinance. In *Edwardes v. Denning* (3) these differences were discussed and I do not propose to embark upon further discussion of them. In both cases the agreement for sale contained provision for payment of a deposit and both in India and in Kenya the effect of s. 55, sub-s. 6 (b) of the Indian Transfer of Property Act is to create a charge upon the land in favour of the purchaser for any part payment of the purchase money in anticipation of delivery. Though the Privy Council held that in India the document required registration by virtue of this charge as the agreement itself created an interest in land, it was held by this court in *Edwardes v. Denning* (3) that the existence of the charge did not render the agreement in that case inadmissible in evidence under s. 127 of the Crown Lands Ordinance. The differences between the two sets of legislation were pointed in the judgment of the learned president in the following passage at p. 635:

“It will be noticed that there are significant differences between the wording of the statutory provisions considered in *Dayal Singh’s* case and the wording of s. 126 and s. 127 of the Crown Lands Ordinance. In the first place, s. 17 of the Indian Registration Act refers to ‘documents’ and ‘instruments’ and s. 49 of the Indian Registration Act makes ‘documents’

required by s. 17 to be registered not receivable as evidence of any transaction affecting immovable property unless registered. This disqualifies the instrument per se, in so far as it is to be received as evidence of any transaction affecting immovable property. On the other hand, s. 127 of the Kenya Crown Lands Ordinance says 'No *evidence* shall be receivable in any civil court . . . of a sale, lease . . . charge etc.' What is rejected by s. 127 is not the unregistered instrument per se in so far as it is to be received as evidence of any transaction affecting immovable property, but evidence of certain specified transactions, and of those only, such, for instance as a sale, lease mortgage or charge. An instrument may effect a transaction which is required to be registered by s. 126; but might, nevertheless, not itself be excluded from evidence by s. 127, though not registered. Section 126 and s. 127 are not co-terminous, as are s. 17 and s. 49 of the Indian Registration Act, 1908, considered in *Dayal Singh's* case. In the second place, the Indian provisions disqualify instruments which purport *or operate* to create etc, an interest in land. Not only, therefore, are instruments not receivable in evidence which purport to create interests, but expressly also those which create an interest in land by operation of law, e.g. those which confer on a purchaser a charge for purchase money under s. 55 of the Indian Transfer of Property Act. Under the Indian provisions, therefore, such an instrument as the agreement in this case would not be receivable as evidence of any transaction affecting immovable property comprised therein. But, under s. 127 of the Crown Lands Ordinance, what is rejected is evidence of the sale, lease or other transfer and of a lien, mortgage, charge, etc. of registered land, unless it is effected or created by an instrument in writing and the instrument has been registered under Part XII."

Later the judgment continued:

"Notwithstanding any consideration of inconvenience we are bound to follow *Dayal Singh's* case in so far as it was decided upon an Indian Act identical in wording or in *pari materia* with the provisions of the Crown Lands Ordinance; but the effect of the differences in the legislation in the two countries must be considered. As has been pointed out above, what is rejected in Kenya is evidence of specified transactions—of the sale, lease, transfer or charge etc. of registered land. The agreement in this case was not tendered as evidence of a charge. No charge was sought to be proved, and the existence or otherwise of a charge was irrelevant to any issue in the suit. I am of opinion that the agreement was not excluded by s. 127 (2) from being received as evidence in this suit. It has not been argued that the agreement is evidence of a 'sale' under s. 127 (1) and I do not think that it is. The words 'or other transfer' in that sub-section make it plain that 'sale' in this context is a completed sale, a transfer of ownership (cf. s. 54 of the Indian Transfer of Property Act, 1882) and not an executory agreement to sell."

The opinion expressed, with which the other members of the court agreed, makes it clear that, as a matter of interpretation of s. 127, and without the necessity of considering the effect of s. 129 (*e*), evidence of an agreement for sale and purchase is not to be excluded in an action for its specific performance merely because the document also creates a charge which is not the subject of the action and in respect of which, without registration, the document could not be received in evidence. The agreement in question in the present action does not create a charge but it creates, incidentally, a tenancy; registration may or may not be required before the document could be received in evidence in proof of that tenancy, but in either event nothing in s. 127 prevents its receipt to prove the agreement for sale and purchase.

Counsel for the respondent argued further that the agreement had the effect of varying the incidents of the mortgage mentioned in the second recital. He said that the provision for rental in cl. 3 of the operative portion reduced the interest payable; with this I am unable to agree. Interest continues to be payable at the same rate but is to be set off in part against the indebtedness of the purchasers for rent. He argued also that there was a variation, in that instead of the whole mortgage debt being payable in cash a different method of payment had been agreed upon. I cannot see that, because the parties have agreed that the cash value of portion of the land is so much and that when the appropriate time comes the land will be transferred and credit given for that amount, any variation of the charge upon the land has been effected. It was further submitted that cl. 2 of the operative portion of the agreement effected a change in the date for redemption of the mortgage as to portion of the property. The mortgage was not exhibited in the court below or made part of the record before this court, which is accordingly unaware of its exact terms. Assuming however that it is unlikely that the date for completion of the agreement—uncertain as it is—would coincide with the due date of the mortgage, the agreement does not in my view accomplish any variation of that security, but, upon a proper reading of it, contemplates its variation in future. After certain things have happened the date for completion of the agreement will arrive and then another document will be required to accomplish its purposes. The assurance stipulated for in cl. 6 would suffice to extinguish by merger the equity of redemption in respect of the land conveyed while acknowledging the part payment of the mortgage moneys: the parties might prefer to accomplish the same result by a separate reconveyance by the appellants to the respondent of the land agreed to be sold followed by a conveyance thereof by the respondent to the appellants, but this is a matter of conveyancing practice which is not material. In my opinion therefore, if this aspect of the agreement would fall within s. 127 of the Crown Lands Ordinance (and I am in fact unable to see that it does) it would be removed from its scope by s. 129 (e). If there is any other statutory provision which might render the agreement inadmissible in this action by virtue of its prospective effect upon the mortgage I am unaware of it and no such enactment was called to the attention of the court by the advocate for either party.

Having regard to the foregoing considerations I am of opinion that the agreement was admissible in evidence in the court below and the appeal must be allowed. It is expedient however that I should mention briefly a further argument by counsel for the appellant, relating to the tenancy created by the agreement. He accepted for the purposes of the argument that the agreement created a present demise but submitted that it was a tenancy from month to month only and therefore, being “a lease for . . . any term not exceeding one year” it was removed from the operation of s. 127 of the Crown Lands Ordinance by s. 129 (f) thereof and was therefore, for reasons quite outside the scope of the decision in *Edwardes v. Denning* (3) admissible in evidence.

By virtue of cl. 3 and cl. 8 of the agreement a monthly rental was to be payable in respect of the land. It was argued that this monthly rental indicated a monthly tenancy and reliance was placed on the case of *Adler v. Blackman* (4), [1953] 1 Q.B. 146, which appears to me to have no relevance in the present circumstances. The duration of the tenancy is a matter of the intention of the parties to be gathered from what they have said in the agreement. Mr. Khanna was constrained to admit that the vendor (lessor) could not have terminated the letting prior to completion of the agreement by giving a month’s notice. Neither, in my opinion, could the purchasers (lessees) do so, as it is clear that the intention was that the tenancy should continue until the agreement was completed by a conveyance to the purchasers (cl. 3) or, if the survey could not be done for any reason, for one year from the date of repayment of the

mortgage (cl. 8). The term authorised by cl. 8 was perhaps at the option of the purchasers as the words used are “shall be entitled”. There was no provision for earlier termination by notice to quit given by either party.

It is common ground that the land affected by the agreement is land used for agricultural purposes and that the tenancy is also for the like purposes. The advocates for both parties do not therefore dispute that by s. 117 of the Indian Transfer of Property Act the provisions of Part V of that Act, in which many provisions relating to leases are set out, are inapplicable. If the tenancy is looked at with the principles of English law in mind it is at once apparent that the term thereof is uncertain. It might terminate before the expiration of one year if the survey were to be rapidly effected and the agreement for sale completed. On the other hand completion of the agreement for sale might be delayed well beyond one year and if the sale were not completed at all the provisions of cl. 8 would apply. If the term of the tenancy were to be regarded as regulated by cl. 3 it would avoid the lease for uncertainty within the principles accepted in *Lace v. Chantler* (5), [1944] 1 K.B. 368, though it would appear that this decision would be inapplicable if the matter were governed by s. 111 of the Transfer of Property Act which is in Part V thereof. The Master of the Rolls said, at p. 370:

“The question immediately arises whether a tenancy for the duration of the war creates a good leasehold interest. In my opinion, it does not. A term created by a leasehold tenancy agreement must be expressed either with certainty and specifically or by reference to something which can, at the time when the lease takes effect, be looked to as a certain ascertainment of what the term is meant to be.”

And, at p. 370 and p. 371:

“I do not propose to go into the authorities on the matter, but in Foa’s ‘Landlord and Tenant,’ 6th Edn., p. 115, the law is stated in this way, and, in my view, correctly: ‘The habendum in a lease must point out the period during which the enjoyment of the premises is to be had; so that the duration, as well as the commencement of the term, must be stated. The certainty of a lease as to its continuance must be ascertainable either by the express limitation of the parties at the time the lease is made, or by reference to some collateral act which may, with equal certainty, measure the continuance of it, otherwise it is void. If the term be fixed by reference to some collateral matter, such matter must either be itself certain (e.g., a demise to hold for ‘as many years as A. has in the manor of B.’) or capable before the lease takes effect of being rendered so, (e.g., for ‘as many years as C. shall name’). The important words to observe in that last phrase are the words ‘before the lease takes effect’.”

The date of completion of the sale is something which could not be rendered certain before the lease, in the present case, took effect, as it took effect in possession immediately on the signing of the agreement. In *Lace v. Chantler* (5) the Master of the Rolls then went on to consider whether the lease then in question could take effect by construing the tenancy as a lease for a long period e.g. ninety-nine years determinable on the cessation of the war. He found himself unable to do so, but in the present case it is a possible view (following the maxim *ut res magis valeat quam pereat*) that the tenancy was for a period ending one year

“from the date of repayment of the said mortgage as provided in the said Indenture of Mortgage”

(cl. 8) but subject to earlier termination if the sale were completed before that date. I read the phrase quoted from cl. 8 as indicating a date certain, that is

the date for repayment stipulated in the mortgage, rather than the date of actual repayment, which might not be in the least certain. As I have indicated, the mortgage is not included in the record, but the court was informed by counsel for the respondent that it fell due on December 1, 1958. Assuming this to be correct the lease would be for upwards of one year and would require registration. On the other hand, the fact that the term provided for by cl. 8 is apparently optional might militate against this construction and, as this aspect of the matter has not been argued before this court, which has not all of the relevant material before it, I express no concluded opinion upon the matter, except that I am unable to agree that upon a proper construction of the agreement it created a monthly tenancy.

For the reasons given in the earlier part of this judgment I would allow the appeal with costs and set aside the judgment and decree in the court below. The matter should be remitted for further hearing before the same judge or for hearing de novo before another judge, on the basis that the agreement, so far as the grounds of objection argued here and in the court below extend, is admissible in evidence. Mr. Khanna asked for an order for all costs to date in the court below but in my view the appellant should have only such costs in that court as have been occasioned or thrown away by or were otherwise incidental to the ruling as to admissibility made by the learned judge and considered in this appeal.

Windham JA: I agree.

Sir Owen Corrie Ag JA: I also agree.

Appeal allowed. Case remitted for trial.

For the appellants:

DN Khanna

DN & RN Khanna, Nairobi

For the respondent:

GR Mandavia

GR Mandavia, Nairobi

R v Petro Musigwa
[1959] 1 EA 930 (HCU)

Division:	H.M. High Court of Uganda at Kampala
Date of judgment:	30 December 1959
Case Number:	188/1959
Before:	Lyon J
Sourced by:	LawAfrica

[1] *Criminal law – Evidence – Admissibility – Deposition not available to give evidence at trial –*

Admissibility of deposition – Whether deposition is included in the words “testimony of a witness” in Evidence Ordinance (Cap. 9), s. 155 (U.).

Editor’s Summary

The main witness for the prosecution who had given evidence at the preliminary inquiry could not be produced to give evidence at the trial but his deposition was available. Another prosecution witness had spoken with the main witness at the scene of the crime, and the Crown submitted that evidence of this conversation was admissible under s. 155 of the Evidence Ordinance. Counsel for the accused objected that s. 155 did not apply because the conversation, if admitted “would not corroborate the testimony of a witness”.

Held – the conversation was admissible as it would confirm the contents of the deposition and the deposition of the deponent was also admissible because the word “testimony of a witness” in s. 155 of the Evidence Ordinance includes evidence sworn before a magistrate at a preliminary inquiry.

Order accordingly.

No Cases referred to in judgment in judgment

Judgment

Lyon J: At this stage in the trial it has been discovered that Paulo Madaragule who gave evidence at the preliminary inquiry and was cross-examined by the accused person, cannot be found. I suggested to Crown counsel that I should try that issue first, that is to say, whether the court is satisfied that that witness cannot be found—see s. 275 of the Criminal Procedure Code. Mr. Maloney was in a position to call the Muluka chief of the area where this alleged offence was committed, but although he has ordered many people to search for this witness, that search has been unsuccessful. Mr. Maloney has also called the police officer who was in charge of the investigation. This officer testified in detail where the search had been made. This witness was the main prosecution witness; he is a Congolese; and I accept the evidence of the police officer that members of that tribe who come into the Protectorate often move about to different jobs and are therefore often very difficult to trace.

It has become necessary for me at this stage to rule whether I will allow the deposition of that deponent to be read, because a prosecution witness who was on the scene of the crime very shortly after it was committed, had been asked what this deponent had said to him at that time. Mr. Maloney submitted that the conversation is admissible under s. 155 of the Evidence Ordinance. On the other hand, Mr. Jobanputra has submitted that s. 155 of the Evidence Ordinance does not apply because this conversation, if admitted, would not “corroborate the testimony of a witness”. The conversation, if admitted, would confirm the contents of the deposition and therefore as far as s. 155 is concerned, I hold that the deposition is admissible because I hold that the words “testimony of a witness” includes evidence sworn before a magistrate at a preliminary inquiry.

Order accordingly.

For the Crown:

MT Maloney (Crown Counsel, Uganda)

The Attorney-General, Uganda

For the accused:
MV Jobanputra
MV Jobanputra, Kampala

Charles Daki s/o Daki v R
[1959] 1 EA 931 (CAK)

Division: Court of Appeal at Kampala
Date of judgment: 30 December 1959
Case Number: 166/1959
Before: Sir Kenneth O'Connor P, Forbes V-P and Gould JA
Sourced by: LawAfrica
Appeal from: H.M. High Court of Uganda–Lyon, J

[1] Criminal law – Murder – Misdirection and non-direction – Ambiguous dying declarations – No direction as to absence of opportunity for cross-examination of statements – Reference in judgment to depositions which were not put in evidence – Evidence Ordinance (Cap. 9), s. 30 (U.).

Editor's Summary

The appellant was convicted of the murder of the deceased by gun-shot. The principal evidence against the appellant was a series of statements made by the deceased after being shot, in which he named the appellant as having shot him. There was also evidence of ill-feeling between the deceased and the appellant, of threats uttered by the appellant to shoot the deceased and evidence that earlier in the evening the appellant had been seen by the deceased and other persons carrying a shot-gun. The trial judge treated the statements of the deceased as dying declarations that the deceased had seen and recognised his assailant. The judge did not direct himself nor the assessors that these statements had not been subject to cross-examination and in his judgments referred to evidence which only appeared in the depositions which were not put in evidence. On appeal it was contended for the appellant that the dying statements were ambiguous and that their proper construction was that the deceased merely came to the conclusion that the appellant had shot him because he had earlier seen the appellant with a gun.

Held –

- (i) the proper interpretation of the deceased's statements was that the deceased came to the conclusion that the appellant had shot him because he had earlier seen the appellant with a gun and not that the deceased had seen and recognised his assailant.
- (ii) the judge should have directed the assessors that the dying statements had not been subject to cross-examination more particularly in view of the ambiguities therein.
- (iii) a trial judge is not entitled to refer to passages in the depositions unless the depositions have been put in evidence or a witness has admitted making some statement which has been put to the

witness from the depositions; accordingly there was no justification for referring to the depositions and the reference constituted a serious misdirection.

Appeal allowed. Conviction quashed. Order for a retrial.

Cases referred to in judgment

- (1) *Cyril Waugh v. R.*, [1950] A.C. 203.
- (2) *R. v. Lute s/o Luzala* (1934), 1 E.A.C.A. 106.
- (3) *Bharat v. R.*, [1959] 3 W.L.R. 406; [1959] 3 All E.R. 292.

December 30. The following judgment was read by direction of the court.

Judgment

The appellant was convicted of murder by the High Court of Uganda and was sentenced to death. He has appealed to this court.

The deceased died as the result of a gun-shot wound in the left side of the abdomen, which was inflicted on him with a shot-gun at close range at about 8 p.m. on April 7, 1959, as he was walking along the road in the vicinity of the appellant's house. He was not killed immediately but died in hospital about thirty hours later. During the interval before his death, or at least for part of it, he was conscious and able to talk, and made a series of statements which will be referred to later.

It appeared that the deceased had two wives (Roza Kakanwanga and Maria Namugembe) who were living in different houses which were approximately seven hundred yards apart by the road. Intersecting roads ran past two houses, and the appellant's house was situated roughly halfway between and thirty-five yards back from one road. The roads were bordered on each side by coffee shambas. On the evening in question at about 7 p.m. the deceased had been at the house of his wife Roza, in company with one Makabugo. From there the deceased had driven in his car to the house of his wife Maria, where he put the car in the garage. He then set out to walk back by the road to his wife Roza's house, and it was while he was on his way to Roza's that he was shot. The spot where he was shot was about sixty yards in a direct line from the appellant's house, and was five feet from the verge of the road on the deceased's left-hand side.

There was evidence, which was accepted by the learned trial judge and by at least one of the assessors, that the deceased was involved in a dispute over land between the appellant and one Mutuba, and that as a consequence there was ill-feeling between the deceased and the appellant; that the appellant had, not long before been heard to utter threats to shoot the deceased; that on the evening in question when the deceased was at Roza's house the appellant had ridden past on a motor-cycle with a shot-gun in a case strapped on his back; that the appellant did not normally possess a shot-gun and that none was found in his house after the shooting; and that when the fatal shot was fired the appellant was not, as might have been expected, the first on the scene, though he did, indeed, come there later.

There were discrepancies and contradictions in the evidence upon which these findings of fact were based which were stressed during the hearing of the appeal. It is not necessary to go into them in this judgment except to remark that they were not such as to justify interference by this court with the findings of fact if the court was satisfied that the discrepancies had been duly considered by the learned judge. For the purposes of this judgment we assume that the facts mentioned were duly established.

The facts mentioned, if accepted, taken with the appellant's denial of having had a gun in his possession that evening, or, indeed, of having ridden past Roza's house on a motor-cycle at all that evening, no doubt raise very grave suspicion against the appellant, and might have been sufficient to support a conviction had the case been considered on the basis of those facts. That, however, was not the basis of conviction, those facts being merely taken into accounts as corroboration of statements made by the deceased, after he had been shot, naming the appellant as his assailant.

The statements in question and the interpretation to be placed on them are of considerable importance and we therefore set them out in full as given by the various witnesses. They were admitted in evidence under s. 30 of the Evidence Ordinance (Cap. 9) and are as follows:

Maria Namugemba (one of the first person on the scene after the shot):

"Deceased said to me 'I am dead. Although I am dead it is Charles [i.e. the appellant] who has killed me. I met him when I was with Yozefu Makabugo Charles had a gun'."

Mutuba s/o Kapilago (who also went to the scene in answer to the alarm):

“Deceased said ‘It is Charles who has shot me’”.

Appolonari Kanyoni (who also went to the scene):

“I heard him [i.e. deceased] say ‘I am dead, although I am dead, it is Charles who has shot me. I have seen him’. Later when people came he repeated ‘I am dead, although I am dead, it is Charles who has shot me’.”

Angelina Nakito (also at the scene, who was submitted by the prosecution for cross-examination):

“Deceased did say it was Charles who had shot him . . . Deceased did say ‘It was Charles who shot me’ . . . Deceased said ‘I saw Charles before today in my courtyard with Makabugo and Roza. It is he who has killed me’ . . . Karoli also said accused had a gun and was on a motor-cycle.”

Tadeyo Kayundo (who attended deceased in hospital and was submitted for cross-examination):

“On 8.4.59. at 9 a.m. Karoli said to me ‘Brother, although I am dead, it is Charles who shot me. If I die it is he who has killed me’.”

Finally, S/I. Butt saw the deceased at the hospital at 10.25 p.m. on April 7 and questioned him through an interpreter. The note of the interview (which was produced in evidence at the request of the defence counsel) reads as follows:

“7.4.59. Masaka Hosp. 22.25.

“Who shot you?”

“Charles Daki has killed me. He had shot me with a gun. I saw him with a gun; he was on a motor-cycle. Yozefu Makabugo had visited me, and I went to my garage with him.”

“22.25. At Masaka Hospital, asked through No. 4965 P.C. Maremu. Luganda–English–Swahili. Patient went unconscious and was left alone, as Dr. Tizzard also suggested to leave him alone.

(Sgd.) A. S. Butt, S/I.

(Sgd.) L. Maremu.”

In dealing with the statements made by the deceased the learned judge said, in the course of his judgment:

“One of the planks of the prosecution case is that as the assailant was very close to deceased when deceased was shot, deceased had every opportunity of identifying his assailant, even if it was dark. This is, of course, of great importance, because there are several dying statements upon which the prosecution places reliance

.....

I shall deal with the ‘dying statement’ later, but I comment in passing that in all of them deceased nominated accused as his assailant and never mentioned anybody else as his assailant.

.....

And later Maremu [i.e. Const. Maremu who interpreted at the interview between S/I. Butt and the deceased] testified: ‘S/I. Butt is not wrong if he said that Karoli said “Yozefu Makabugo had visited me. Charles came on a motor-cycle. He was on the motor-cycle when he shot me”.’

“That last sentence is, in my opinion, obviously wrong; no one would go on a motor-cycle to shoot another person. I am satisfied that whoever

did shoot deceased was not on a motor-cycle, because no single witness heard any sound of a motor-cycle being driven away after the shot was fired. I prefer to rely only on the statement made by deceased which was carefully recorded at the time and, as far as that statement goes, it quite clearly means by 'He was on a motor-cycle' that he was on a motor-cycle when he visited Roza's house at 6 p.m. At any rate, the essential part of the statement 'Charles Daki has killed me. He has shot me with a gun' was made at a time, I repeat, when deceased had the settled expectation of death. I can think of no reason why deceased should have named accused as his assailant, unless it is the truth. Deceased was, I gather, a wealthy man of good character

.....

In one of his statements deceased said that his assailant (Charles) was so close that he could have speared him."

It is clear from these comments that the learned trial judge treated the dying statements as declarations by the deceased that he (the deceased) had seen and recognised his assailant as Charles, the appellant. The assessor who expressed an opinion in favour of conviction, and who gave a reasoned written opinion which was referred to by the learned judge at length in the judgment, also drew the same inference from the deceased's statements. Indeed it would not seem that defence counsel at the trial submitted that the statement were susceptible of any other interpretation. And yet, as it seems to us, if regard is had to all the statements of which evidence was given in the High Court they are consistent with the interpretation that the deceased was saying that because he had earlier, when in company with Makabugo, seen Charles with a gun, he (the deceased) concluded that it was Charles who had shot him. Certainly in not one of the statements does the deceased expressly state that he saw his assailant at the time of the shooting.

In this connection it must be remarked that where in the judgment the learned judge says:

"In one of his statements deceased said that his assailant (Charles) was so close that he could have speared him"

the learned judge was, it seems, referring to something which appeared in the depositions. Certainly no such evidence appeared in the record of the trial. A trial judge is, of course, not entitled to refer to passage in the depositions unless the depositions have been put in evidence or a witness has admitted making some statement which has been put to the witness from the deposition. In the instant case there was no justification whatever for referring to the deposition and the reference constitutes a serious misdirection.

In support of the alternative interpretation of the deceased's statements, Mr. Wilkinson, for the appellant, argued that the learned judge made an unjustifiable assumption in another passage in his judgment where he concludes from the medical evidence "that the fatal shot was fired within one yard of the deceased". Mr. Wilkinson drew our attention to a passage in Taylor's Principles and Practice of Medical Jurisprudence (11th Edn.) Vol. 1 at p. 384, from which it would seem that the wound described by the doctor was more consistent with the shot having been fired from a range of not less than two yards, and possibly from considerably further, depending on the degree of choke in the particular weapon used. The medical evidence was that the shot was fired at an upward angle, and Mr. Wilkinson argued that the probability was that the assailant was lying in between the coffee bushes at the edge of the road and could not have been seen and identified by the deceased, particularly in the shock of the moment when the shot was fired.

There is force in Mr. Wilkinson's argument when considered in conjunction with the ambiguous nature of the statements made by the deceased. Had the deceased stated clearly that he had seen and recognised his assailant, the precise distance from which the shot was fired might not have mattered greatly, since the range was obviously not very great. But the matters stressed by Mr. Wilkinson tend to support the argument that the proper construction of the deceased's statements is that he was not alleging he had seen and recognised the appellant as his assailant.

In this connection attention must be drawn to what appears to be a non-direction by the learned trial judge. It has, of course, been said repeatedly by this court that a trial judge should warn himself as to the danger of acting upon a dying statement without corroboration, and the learned judge in the instant case duly directed himself that it was necessary to look for corroboration. The learned judge did not, however, direct himself or the assessors that the dying statements had not been subject to cross-examination. In *Cyril Waugh v. R.* (1), [1950] A.C. 203 at p. 212, the Privy Council said:

"Apart, however, from this question, their lordships are of opinion . . . that it was a further and even more serious error not to point out to the jury that it [i.e. the dying declaration] had not been subject to cross-examination."

That, indeed, referred to a trial by a jury, whereas in the instant case the trial was one by a judge with assessors. We think, however, that a similar direction should certainly be given by a judge to assessors. Owing to a regrettable practice which, notwithstanding the opinion of this court expressed as long ago as 1934 in *R. v. Lute s/o Luzala* (2)(1934), 1 E.A.C.A. 106, appears to prevail in Uganda, there is no note on the record of the points put to assessors in the summing-up, and it is therefore impossible to say whether some such direction was given in this case. The Judgment does not indicate that it was. The failure to give a proper direction to the assessors must seriously affect the value of their opinions and can affect the validity of the trial—*Bharat v. R.* (3), [1959] 3 W.L.R. 406. In the instant case a direction as to the absence of opportunity for cross-examination was particularly desirable in view of the ambiguity in the relevant statements.

As we have indicated, the conviction in the instant case was based on the assumption that the deceased had seen and recognised his assailant and had accordingly named him as the killer. It is possible that this is what the deceased intended to convey, but it is also possible that he was merely saying that he assumed the appellant to be the killer because he had seen the appellant with a gun earlier in the evening. The latter possibility, which seems to us a very real one, was never considered by the court. Had the court considered the matter on this basis, it is possible that it might still have reached the conclusion that the appellant was guilty. However, we certainly cannot say that it must inevitably have come to that conclusion, particularly having regard to the fact that one of the two assessors was left in doubt despite the interpretation of the statements accepted in the court below. In the circumstances we think it would be unsafe to let the conviction stand. The majority of the court is of opinion that this is a proper case for a retrial and we, therefore, order accordingly.

There is one further matter to which we should refer. Both in the High Court and before us it was argued that the statement of the deceased recorded by S/I. Butt was an incomplete statement and therefore inadmissible. The submission is based on a passage in *Cyril Waugh v. R.* (1), at p. 212 where their lordships say that

"the dying declaration was inadmissible because on its face it was incomplete and no one can tell what the deceased was about to add."

It is certainly arguable that the statement to S/I. Butt was incomplete and should therefore have been excluded, but we do not think that we should decide the matter. The question of the admissibility of this statement is to a great extent one of fact and will fall to be resolved by the judge at the new trial.

Appeal allowed. Conviction quashed. Order for a retrial.

For the appellant:

PJ Wilkinson and SV Pandit

Wilkinson & Hunt, Kampala

For the respondent:

MT Maloney (Crown Counsel, Uganda)

The Attorney-General, Uganda

The Commissioner of Transport v T R Gohil [1959] 1 EA 936 (HCT)

Division:	HM High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	10 November 1959
Case Number:	17/1959
Before:	Crawshaw J
Sourced by:	LawAfrica

[1] *Practice – Pleading – Complaint alleging that vehicle negligently driven by servant – No allegation that servant driving during course of employment – Whether complaint discloses cause of action – Indian Code of Civil Procedure, 1908, o. 7, r. 11(d).*

Editor's Summary

A plaintiff alleged that the defendant's motor vehicle was negligently driven by his servant or agent and damaged property belonging to the plaintiff. The defendant submitted that the plaintiff disclosed no cause of action as it was not pleaded that the servant or agent was driving at the material time during the course of his employment. The magistrate ruled that the plaintiff thus disclosed no cause of action. On appeal

Held – it is sufficient to plead that the driver was the servant of the defendant and whether the servant was or was not driving in course of his employment is a fact peculiarly within the knowledge of the defendant to be pleaded by him in his defence. *Labhuben w/o M. P. Shah and Another v. Jivraj Lavji*, Tanganyika High Court Civil Case No. 130 of 1957 (unreported), followed.

Appeal allowed. Case remitted to magistrate for hearing on its merits.

Case referred to in judgment

(1) *Labhuben w/o M. P. Shah and Another v. Jivraj Lavji*, Tanganyika High Court Civil Case No. 130 of 1957 (unreported).

Judgment

Crawshaw J: This is an appeal by the original plaintiff, the Commissioner for Transport, against an order of the lower court rejecting his plaint as failing to show a cause of action.

The plaint alleged that a motor vehicle belonging to the respondent and negligently driven by the respondent's servant or agent collided with a boom owned and operated by the appellant. The boom had been lawfully placed across the road to prevent traffic passing over a railway crossing in order to allow the passage of a railway engine. Damages in a sum of Shs. 1,851/50 were claimed.

The respondent in his written statement submitted that the plaintiff disclosed no cause of action

“as it is not pleaded that the servant or agent was at any material time driving the vehicle during the course of his employment”.

This was taken as a preliminary point by the learned magistrate who said,

“In my opinion it is essential that there should appear that allegation claimed by the defendant to make the plaintiff effective. Accordingly I rule that the plaintiff is defective in that it discloses no cause of action under O.7, r. 11 (d) and reject the plaintiff with costs”.

In ground 2 of his memorandum of appeal, the appellant says:

“The learned resident magistrate erred in not ruling the facts alleged in the said plaintiff contain either expressly or by implication, all the constituent elements of a cause of action in tort”.

Mr. Troup for the appellant concedes that the plaintiff does not expressly say that the servant was driving in the course of his employment or as an agent, but submits that it was not necessary so to do. He relies largely on a decision of Mahon, J., (as he then was) in *Labhuben w/o M. P. Shah and Another v. Jivraj Layji* (1), Tanganyika High Court Civil Case No. 130 of 1957 (unreported). In that case the plaintiff claimed damages for injuries received as a result of the alleged negligent driving of a motor vehicle by the defendant’s servant. The defendant in his written statement maintained that the plaintiff disclosed no cause of action in that (a) it did not plead that, if driven by his servant, it was being used in the course of his employment, or (b) if driven by his agent, it was being used on the defendant’s business. The plaintiff in fact went no further than to allege that the driver was a servant or agent the defendant. The learned judge posed the question,

“Whether it is necessary for the plaintiff to plead, as has been submitted, that the vehicle belonged to the defendant or that the driver was driving in the course of his employment”.

He then considered the wording of form 430 on p. 538 of the 11th edition of Bullen and Leake’s Precedents of Pleadings and an earlier form on p. 396 of the 10th edition, in neither of which was it alleged that the driver was driving during the course of his employment, but merely that he was the servant or agent of the defendant. Similarly in form 30 of Appendix A to the Indian Civil Procedure Code, to which the learned judge also referred. Bearing in mind O. 6, r. 2, which provides that all material facts shall be pleaded, the learned judge said:

“Cause of action, to quote Mulla, means every fact which if traversed it would be necessary for the plaintiff to prove in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact but every fact which is necessary to be proved to entitle the plaintiff to a decree. In my view it is sufficient to plead, as has been done here, that the driver was a servant of the defendant. The presumption then arises that the defendant is responsible for any negligence on the part of his servant. If the servant was not driving in the course of his employment, this would absolve the defendant from liability, but this fact must surely be pleaded by the defendant as a ground of defence? It would be a matter peculiarly within the knowledge of the defendant and one that it might be very difficult if not impossible for a plaintiff to establish”.

An appeal to the Court of Appeal of Eastern Africa was dismissed, the appeal court adopting the reasoning of the learned judge.

Mr. Davda for the respondent has referred me to two Indian Precedents of Pleadings in which the words “in the course of his employment” appear. This does not necessarily mean, however, that the words must appear. More relevant than either the English or the Indian precedents is form 30 in the Civil Procedure Code itself which expressly applies to this territory, and which is covered by O. 6, r. 3, which reads:

“The forms in Appendix A when applicable, and where they are not applicable forms of a like character, as nearly as may be, shall be used for all pleading”.

The learned magistrate gave his decision only about one month after the decision of Mahon, J., and his attention was not it seems drawn to the latter; had it been he would no doubt have followed it. I allow the appeal with costs to the appellant. The ruling of the learned magistrate is therefore set aside, including his order as to costs. The costs to date in the lower court to be costs in the cause except in so far as they relate to the preliminary when they must be paid by the respondent. The record will be returned to the lower court for the suit to be heard on its merits.

Appeal allowed. Case remitted to magistrate for hearing on its merits.

For the appellant:

AM Troup (Crown Counsel, Tanganyika)

The Legal Secretary, East Africa High Commission, Nairobi

For the respondent:

CJ Davda

CJ Davda, Dar-es-Salaam

Hassan Mohamed Omar v R **[1959] 1 EA 939 (CAN)**

Division:	Court of Appeal at Nairobi
Date of judgment:	30 November 1959
Case Number:	180/1959
Before:	Forbes V-P, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya—Rudd, Ag CJ and Mayers, J

[1] *Street traffic – Causing death by an obstruction – Whether proof required that obstruction was the only substantial cause of death – Whether liability absolute or only if negligence proved – Traffic*

Ordinance, 1953, s. 44A (K.).

Editor's Summary

The appellant parked his lorry after dark on the correct side of the road with the nearside wheels on the grass verge and the rest of the vehicle on the tarmac. A car ran into the back of the lorry whereby two of the occupants were killed. The appellant was charged with causing death by an obstruction. The magistrate on convicting the appellant found that the rear light of the lorry was not functioning and that this defect coupled with the position of the lorry on the road caused the accident and deaths. The appellant's first appeal having been dismissed as being without merits he appealed again on grounds of alleged misdirection.

Held –

- (i) the magistrate was entitled to consider the position as well as the condition of the lorry since the former was one of the circumstances which must be considered in determining whether the position resulted in danger to the public;
- (ii) the judgment read as a whole did not indicate that the magistrate had misdirected herself as to the onus of proof;
- (iii) it was for the jury or the judge to decide a question upon which witnesses for the Crown have differed in their evidence and the appellant was not prejudiced by the way the magistrate dealt with the evidence;
- (iv) in s. 44A of the Traffic Ordinance, the words "... who causes the death of another by ... leaving any vehicle on a road ..." create an absolute liability if the other conditions of the section are fulfilled; the words are not limited to cases where the person concerned was negligent;
- (v) it is not the law that the act of an accused must have been the only substantial cause of death to support a conviction for causing death; obviously there can be more than one substantial cause of an accident and of a subsequent death.

Appeal dismissed.

Cases referred to in judgment

- (1) *Zaverchand Dhanji Shah v. R.* (1956), 23 E.A.C.A. 410.
- (2) *Julius Matendeche v. R.* (1956), 23 E.A.C.A. 443.
- (3) *R. v. Dora Harris*, [1972] 2 K.B. 587.
- (4) *Adel Muhammed El Dabbah v. Attorney-General of Palestine*, [1944] 2 All E.R. 139.
- (5) *Andrews v. Director of Public Prosecution*, [1937] A.C. 576; [1937] 2 All E.R. 552.
- (6) *Hill v. Baxter*, [1958] 1 All E.R. 193.
- (7) *Simpson v. Peat*, [1952] 2 Q.B. 24.
- (8) *R. v. Curphey*, 41 Cr. App. R. 78.
- (9) *R. v. Swindall and Osborne* (1846), 2 Car. & Kir. 230; 175 E.R. 95.
- (10) *R. v. Smith*, [1959] 2 Q.B. 35.

- (11) *Minister of Pensions v. Chennel*, [1946] 2 All E.R. 719; [1974] K.B. 250.
- (12) *Greenfield v. London and N.E. Railway Co.*, [1945] K.B. 89; [1944] 1 All E.R.696; [1944] 2 All E.R. 438.
- (13) *Adams v. Naylor*, [1946] A.C. 543; [1944] 2 All E.R. 21; [1946] 2 All E.R. 241.
- (14) *Howgate v. Bagnall*, [1951] 1 K.B. 265.
- (15) *R. v. Curley*, 2 Cr. App. R. 96.
- (16) *R. v. Beech* (1912), 107 L.T. 461.

Judgment

Gould JA: read the following judgment of the court: This is a second appeal from the conviction of the appellant by a resident magistrate upon a charge of causing death by obstruction contrary to s. 44A of the Traffic Ordinance, 1953, which section was enacted by s. 5 of the Traffic (Amendment) Ordinance, 1958, and is in the following terms:

“44A. Any person who causes the death of another by driving a motor vehicle on a road recklessly or at a speed or in a manner which is dangerous to the public, or by leaving any vehicle on a road in such a position or manner or in such a condition as to be dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road and the amount of traffic which is actually at the time or which might reasonably be expected to be on the road, shall be guilty of an offence and shall be liable on conviction therefor to imprisonment for a period not exceeding five years.”

This section follows s.8 of the Road Traffic Act, 1956, in England, except in that the Kenya section contains the additional words:

“or by leaving any vehicle on a road in such a position or manner or in such a condition as to be dangerous to the public”,

which are not in the English section. There is one other minor and, at least in this case, immaterial difference between the two sections. The appellant appealed to the Supreme Court against his conviction but the learned judges there dismissed the appeal as being “without merits”; we do not therefore have the advantage of knowing their approach to the issues involved. The appeal to this court lies upon a matter of law only—not upon a matter of fact.

The circumstances are indicated in the opening paragraphs of the resident magistrate’s judgment:

“There is no dispute that during the hours of darkness on October 20 last the accused parked his large Albion lorry on his correct side of the main Nairobi/Nakuru road with all its near-side wheels on the grass verge and the remainder of the vehicle on the tarmac.

“There is equally no dispute that an Opel Caravan car driven by A. M. Patel (P.W.2) ran into the back of this lorry, as a result of which all the occupants were injured and two of them, Ashabhai Chaturbhai Patel and Manibhai Vaghjibhai Patel, were killed.”

Having referred to the charge the resident magistrate said:

“It is clear from the evidence led by the prosecution that the two factors on which they are relying to prove the case against the accused are: (1) the absence of any rear light on the lorry; and (2) the fact that about five feet of the lorry was protruding onto tarmac road.”

We would remark at this point that the relevant particulars of the charge include only an allegation that the appellant left his vehicle “in such a condition

as to be dangerous to the public” and do not refer to “position”, which is one of the three possible elements of danger mentioned in the section. Counsel took no point on this and we think that the resident magistrate was, in the circumstances, correct in considering both position and condition, for the former is one of the circumstances which must necessarily be considered in determining whether the latter (in this case the absence of a tail light) resulted in a danger to the public. That this was the basis of the resident magistrate’s approach appears from a passage in her judgment where, after finding as a fact that there was room for the lorry to have been taken “off the road on to the verge” she said:

“However, although this point is without doubt material, its importance to the prosecution case is obviously only of real significance when coupled with the first factor mentioned above, namely the absence of rear lights.”

Having found that the lorry was protruding some five feet onto the tarmac and that it could have been taken on to the verge, the resident magistrate considered the evidence, which was conflicting, as to whether the tail light was on at the relevant time, or not. She resolved this question against the appellant. These facts are sufficient to permit discussion of the first two points which were argued before this court by counsel for the appellant.

His first ground was that the resident magistrate had misdirected herself on the question of the onus of proof. The following passage of the judgment, which is the one to which objection is taken, contains the only direct reference to this question:

“When two sets of completely contradictory evidence exists, as it does in this case, the court can only endeavour to arrive at a conclusion by assessing the probabilities in the light of all the evidence, including the demeanour of the several witnesses and the circumstances of the case and, of course, with due regard to the fact that the onus of proof lies with the prosecution.”

Counsel submitted that this passage showed that the resident magistrate had decided the case as a matter of probability and not as a matter of proof beyond all reasonable doubt. This is undoubtedly a passage which could have been better expressed but, when it is read with a passage occurring later in the judgment, in which the resident magistrate gives her final conclusion upon the same issue (the question of the tail light) it does not appear to us that counsel’s interpretation should be accepted. A similar question was adverted to in the case of *Zaverchand Dhanji Shah v. R.* (1) (1956), 23 E.A.C.A. 410, in which at p. 415 and p. 416 of the judgment of this court, is the following passage:

“Of course, no one would suggest for one moment that the question of the onus of proof in a criminal trial could ever be irrelevant. But, whereas the absence of a sufficient, specific direction on the point will usually result in the quashing of a jury verdict, the consequences of the absence of a specific direction in a judgment written by a judge or a magistrate may well be different. An appellate court will not readily assume that an experienced, trained judge or magistrate has failed to address his mind to such a fundamental element in a criminal trial. It is with these considerations in mind that we approach Mr. Dingle Foot’s submissions on this ground of appeal.

“The magistrate in the present case wrote a very careful and lengthy judgment, running to twenty-six pages of typescript in the record, in which he reviews all the evidence, weighs it and states his conclusions. But nowhere does he expressly direct himself generally as to where the burden of proof lies in a criminal prosecution.

“In these circumstances, although we would not readily assume a misdirection, or non-direction, it is natural to look through the judgment for indications that the magistrate did have the proper rule in mind.”

In that case the court found strong indications that the magistrate had misdirected himself on the question of onus, but that is not the case here. The concluding passage of the judgment, so far as it touches the ascertainment of whether the tail light was on or otherwise, is in these words:

“... though I have considered all the points mentioned above which could be said to be in the accused’s favour, carefully, I have no doubt at all on the evidence as a whole that the rear light of the lorry was not functioning at the time of the impact.”

These words indicate with certainty that the resident magistrate regarded this question, which constituted the major subject of controversy, as having been resolved beyond reasonable doubt. Having regard to it, we do not think that the resident magistrate intended to say, in the passage earlier quoted, that the onus of proof lies with the prosecution and that it is an onus to be discharged upon the balance of probabilities. Without clear indication, it is difficult to accept that, in a criminal matter, an experienced magistrate should fall into such error, and we think that all she intended to say here, was that the probabilities, the demeanour of the witnesses and the circumstances of the case were all matters to be considered in deciding whether the well known onus of proof beyond reasonable doubt had been discharged. This ground of appeal must therefore fail.

Counsel’s next submission, which does not appear to be included in the grounds set out in the memorandum of appeal, was that, in arriving at her finding of fact that the tail light was not alight at the time of the collision, the resident magistrate acted upon a wrong principle. He did not specifically formulate the principle to which he referred, but, in substance, the complaint was that the resident magistrate had divided the witnesses who gave direct evidence concerning the tail light into two categories—those who said it was on, and those who said the opposite—and thereby treated one of the witnesses for the prosecution, who was in the former category, as if he were a witness for the defence. The relevant passage of the judgment is as follows:

“On this point there is a direct conflict of testimonial evidence. On the one hand the driver of the car, P.W. 2, states definitely that the lorry had no rear light and his testimony is supported by two independent witnesses, B. H. Patel (P.W. 7) and Tara Singh (P.W. 9). On the other hand the accused, his passenger and his turnboy maintain that the rear light was in working order at the time of the crash.”

The turn-boy referred to in this passage was Daud Shinga, who gave evidence for the prosecution. Counsel referred to *Julius Matendeche v. R.* (2) (1956), 23 E.A.C.A. 443 in which two quite different versions of the facts were given by Crown witnesses. The court said, at p. 444:

“In his judgment the learned trial judge did not, as it seems to us, appreciate that the prosecution’s case involved two alternative possible views of the facts, one of which would lead to a verdict of murder and the other to a verdict of manslaughter. He set out the two accounts of the facts as being the contentions of prosecution and defence respectively, and as regards Dinah he said that, although she was called by the Crown, since here evidence so strongly supported the accused he would ‘consider her evidence as being evidence for the defence’. We think that this was not merely an oversimplification, but an erroneous approach to the prosecution’s evidence as a whole, and Crown counsel felt obliged to concede that, if

the learned trial judge had kept in mind the essentially alternative character of the prosecution's case, it was at least possible that he might have decided that it was not safe to convict of murder, and that nothing more grave than manslaughter had been established. Accepting that view, we considered that the conviction for murder could not stand."

This appears to us to be quite different from a mere mention by the resident magistrate of the name of a Crown witness as one of those who said that the tail light was off, in juxtaposition to the names of the defence witnesses. It has never been the law, and we do not think counsel is suggesting the contrary, that because one Crown witness' version of an incident agrees with that of defence witnesses that other Crown witnesses must be disbelieved. It is merely a question of fact for the jury or judge. In the case of *R. v. Dora Harris* (3), [1927] 2 K.B. 587, at 590 Lord Hewart, C.J., said:

"... but in criminal cases the prosecution is bound to call all the material witnesses before the court, even though they give inconsistent accounts, in order that the whole of the facts may be before the jury."

Although in *Adel v. Attorney-General of Palestine* (4), [1944] 2 All E.R. 139 their Lordships in the Privy Council said (at p. 144) that the Lord Chief Justice could not have intended to negative the long established right of the prosecutor to exercise his discretion to determine who the material witnesses are, the implication remains that if the witnesses who are in fact called by the Crown differ upon a particular point the question is one for the jury to decide. This being so we are unable to see any particular significance, or any detriment to the appellant, in the way the resident magistrate dealt with the witnesses in the present case.

Counsel's next ground of appeal was expressed in the memorandum as follows:

- "(1) The learned magistrate and the learned judges were wrong in law in dismissing the appeal and the learned judges were wrong in confirming the decision of the magistrate of Naivasha in her interpretation of s. 44(A) of the Ordinance in the following respects:
- (a) The learned magistrate and the learned judges held that the term 'caused the death' appearing in s. 44(A) of the Ordinance means 'the immediate and direct cause' whereas on the authorities and on the true interpretation the meaning of the term in the said section is 'the substantial cause of death'.
 - (b) The learned magistrate and the learned judges erred in considering that 'causing the death' within the meaning of s. 44 (A) of the Ordinance may mean one of several causes which did in fact cause death.
 - (c) The learned magistrate and the learned judges erred in law in not considering the evidence which was before them and which established the existence of other factors causing the death with which the appellant was charged.
 - (d) Even if the learned magistrate and learned judges were right in holding that the correct interpretation of s. 44 (A) of the Ordinance is 'the direct cause of death' they erred in law on the evidence before them in coming to the conclusion that it was the appellant's act which was 'the direct cause of death'."

This ground raises the question of the meaning of the phrase, "cause the death", in s. 44 (A) of the Traffic Ordinance, 1953, and of the correctness of the resident magistrate's direction to herself upon the matter. Before considering

the question in detail, however, it will be convenient to refer to one of the arguments of counsel for the appellant on the subject, to which we are unable to accede, and which tends in our view to obscure the true issue. In counsel's submission the offence which may be charged under s. 44 (A) is one of causing death by an unlawful act; that such an offence is equivalent to manslaughter and that therefore, in order to secure a conviction under the section, the prosecution must prove negligence in the accused of the same high degree as is necessary to prove manslaughter at common law or under s. 198 of the Penal Code. (See *Andrews v. Director of Public Prosecutions* (5), [1937] A.C. 576). It would appear, however, that a number of offences arising under sections of the English legislation concerning road traffic have been held to be offences of absolute liability. For example in *Hill v. Baxter* (6), [1958] 1 All E.R. 193, informations were preferred under s. 11(1) and s. 49(b) of the Road Traffic Act, 1930, the former for dangerous driving and the latter for failing to conform to a halt sign. Section 11 (1) is in similar terms to s. 45 (1) of the Traffic Ordinance, 1953, and these sections are basically the same as s. 8 of the Road Traffic Act, 1956, and s. 44 (A) of the Traffic Ordinance, 1953, except that in these sections it is causing death by reckless or dangerous driving which constitutes the offence. The defence in *Hill v. Baxter* (6) was that the accused was in a state of automation and a special case was stated by the justices. In his judgment, at p. 195, Lord Goddard, C.J., said:

"The first thing to be remembered is that the statute contains an absolute prohibition against driving dangerously or ignoring halt signs. No question of mens rea enters into the offence; it is no answer to a charge under those sections to say 'I did not mean to drive dangerously' or 'I did not notice the halt sign'. The justices' finding, that the respondent was not capable of forming any intention as to the manner of driving, is really immaterial."

The two other members of the divisional court appear impliedly to have agreed with this approach. In Russell on Crime (11th Edn.) Vol. 1 at p. 66 there is this passage:

"A man who, knowing that the brakes of his motor-car are useless, drives that car on the highway, intentionally, not negligently, commits an offence. He would be guilty even if he had not thought about the condition of his brakes and so had acted inadvertently (negligently); and equally guilty if he had believed that the brakes were in order; for the offence is established by the evidence that he was driving and that the brakes were not efficient. It would therefore be equally inappropriate (and equally misleading) to call this offence a 'crime of intention' or a 'crime of accident' as to call it a 'crime of negligence'. Even if the driver were prosecuted, under s. 12 of the Act, for driving without due care and attention the same objection would apply since that section has been interpreted in the 'strict' sense."

In *Simpson v. Peat* (7), [1952] 2 Q.B. 24 Lord Goddard, C.J., giving the judgment of a court of five judges, said at p. 28:

"It is, in our opinion, undesirable to complicate these cases which raise only a simple question of fact by such loose and vague expressions as 'error of judgment'. Whether the charge is under s. 11 or s. 12, the offence can be committed although no accident takes place; equally because an accident does occur it does not follow that a particular person has driven either dangerously or without due care and attention: but if he has, it matters not why he did so. Suppose a driver is confronted with a sudden emergency through no fault of his own; in an endeavour to avert a collision

he swerves to his right—it is shown that had he swerved to the left the accident would not have happened: that is being wise after the event and, if the driver was in fact exercising the degree of care and attention which a reasonably prudent driver would exercise, he ought not to be convicted, even though another and perhaps more highly skilled driver would have acted differently.”

Certain of these offences are of course associated with the usually accepted idea of negligence as the last portion of the quotation from *Simpson v. Peat* (7) shows. That is no doubt because they are described in the statute in terms which import negligence—to drive recklessly or to drive without due care and attention, are cases in point. The prohibition is none the less absolute, and in the offences not so described no question of negligence arises at all. If a vehicle is driven past a “halt” sign, or driven with defective brakes, it does not matter whether the driver committed the act innocently, intentionally or negligently. In our opinion the particular offence now under consideration, on a plain reading of the section falls into the last mentioned category. The words “. . . who causes the death of another by . . . leaving any vehicle on a road . . .” create an absolute liability if the other conditions of the section are fulfilled, and are not limited to cases in which the person concerned was negligent. That is a question which would be relevant only on the question of penalty.

We now turn to counsel’s argument upon causation, and for that purpose it will be necessary to consider the evidence as to what factors (if any) other than the presence on the road of the lorry without a tail light, might be said to have contributed to the death of the deceased person. Counsel has submitted that Patel, the driver of the car, was guilty of negligence upon his own evidence. He said that he was travelling at about 45 m.p.h. at the relevant time—there was a car coming in the opposite direction—he dimmed his lights (counsel before this court were agreed that “dimmed” should be read as “dipped”) but the oncoming car did not do so—he was dazzled—he was watching the verge and the oncoming car—he could at that stage only see five feet or six feet ahead—he did not slow down because he did not see the lorry. On this topic the resident magistrate said:

“It is no doubt unfortunate that the oncoming car did not dip its headlights and dazzled the car driver at a critical moment but this is unfortunately an all too frequent hazard of the road—an unlighted protruding stationary lorry on the road is not. It might have been desirable if the car driver had slowed down but this is a matter of opinion not of law—many prefer to keep an even speed well on the correct side of the road and this is evidently what the driver of the car did. It is neither essential nor usual to stop or even slow down on a clear stretch of road because of the headlights of an oncoming car. Finally, there is little real evidence to show that the car’s light were not up to standard strength but, even if they were not, there is no evidence at all to suggest that the driver could have seen an unlighted lorry on a dark night in time to avoid it, even had his own lights been perfect.”

We are, with respect, unable to agree with all that is contained in this passage. The statement that it is neither essential nor usual to stop or even slow down on a clear stretch of road because of the headlights of an oncoming car is a generality which cannot apply in the circumstances of this case. When a driver, travelling at 45 m.p.h. is dazzled by oncoming lights so that his vision is restricted to five feet or six feet it is surely his duty to slow down immediately just as it would be if his vision were limited or obscured by fog or any other cause; if he does not do so he is negligent. It does not necessarily follow that the negligence was a contributing cause to the death but it was probably so and we think it right to assume, for the purposes of this decision only, that it

was. On that basis there were three contributing factors—the condition of the lorry, the negligence of the driver of the car and, indirectly, the failure of the driver of the oncoming car to dip his lights. Whether the last mentioned driver ought to have dipped his lights or not, does not appear to affect the matter.

We do not read the judgment of the resident magistrate as altogether eliminating these factors as contributory causes, though the passage of her judgment last above quoted is deprecatory in tone. Her approach is to be gathered from two passages of her judgment and from a ruling given earlier that the appellant had a case to answer. The first passage is:

“Now I have considered these submissions carefully but as I have already stated in my ruling the operative word ‘cause’ in s. 44 (A) of the Traffic Ordinance must in my opinion be interpreted as meaning the immediate and direct cause. What the court must ask itself is whether the accident and therefore the death would have occurred had it not been for the position of the lorry and its lack of a rear light. Even after taking into account all the points the defence advocate has mentioned, I still find that the answer must be ‘No.’”

The ruling referred to, which was made at the close of the case for the Crown, should be reproduced in full:

“In submitting that the accused has no case to answer his advocate has stated that the prosecution has failed to make out a *prima facie* case as to the cause of the man’s death. He has submitted that at least two other possible causes, apart from the stationary lorry, have emerged in evidence: namely, the failure of the oncoming motorist to dip his headlights and the contributory negligence of the driver of the car in failing to slow down, though dazzled by these headlights.

“Now I am quite prepared to agree with the defence advocate that the word ‘cause’ is the operative word in s. 44 (A)—but to my mind the word must be interpreted in the normal commonsense way as meaning the immediate and direct cause. In other words, though other factors may have contributed to the accident, would the accident have happened had it not been for the fault on the part of the person charged with the offence?

“The defence advocate has made no submissions on the weight and credibility of the evidence and I do not propose to consider it at this stage, but the fact remains that evidence has been led, which if believed, would point clearly to the fact that had the accused not left his lorry in the manner, place and condition stated, the accident, and therefore the death, would not have occurred. I accordingly find that the accused should be put upon his defence in this case, and I rule accordingly.”

Finally the second passage from the judgment is as follows:

“The hard fact remains that if the lorry, lighted or unlighted, had been pulled completely off the road on to the grass verge no accident would have taken place, and if the lorry had been properly lighted, whatever its position on the road, it would have been seen from a distance and the car driver would have had ample time to take steps to avoid it, dazzling lights or not.”

It is quite clear from the passages that the resident magistrate, in directing herself that “cause” meant “immediate and direct cause” interpreted these words as a *causa sine qua non*. As she said,

“... if the lorry had been properly lighted, whatever its position on the road, it would have been seen from a distance and the car driver would have had ample time to take steps to avoid it, dazzling lights or not.”

The ground of appeal now under consideration is that the resident magistrate misdirected herself in using the words “the immediate and direct cause” and that she should have directed herself that the act of the appellant was, “the substantial cause of death”. For this phrase counsel relied upon the case of *R. v. Curphey*, (8) 41 Cr. App. R. 78. The charge there was one of causing death by dangerous driving and Finnemore, J., directed the jury (at p. 79) that:

“... they must be satisfied first that the prisoner was doing a dangerous thing in driving as he did in the circumstances prevailing at the time, and that secondly, if they were satisfied that he was driving dangerously, that he caused the death of the motor-cyclist thereby.”

The jury returned for further direction and the learned judge said, at p. 79:

“... that they must be satisfied that the dangerous driving was the substantial, although it need not have been the sole, cause of the motorcyclist’s death.”

We agree that the use of the words “substantial cause” is preferable to “immediate and direct cause” which phrase might be thought to import from the earlier law of tort the suggestion that the person responsible was he who had the last opportunity of avoiding the accident. The direction of Finnemore, J., however, raises the question whether he intended to convey, by using the words “*the* substantial”, that although there may have been other contributory causes of death they must have been something of little moment, something subordinate to the dangerous driving. Must they, in a word, have been insubstantial? If that is the law this appeal would have to be allowed, for, although we are not to be taken as saying that “*causa sine qua non*” is in all cases synonymous with “substantial cause”, reading the judgment of the resident magistrate as a whole we think it is inescapable that she regarded the condition of the lorry as the substantial cause of death and considered that the other contributory causes played little, if any, part. In our opinion the resident magistrate was fully justified on the evidence in regarding the condition of the lorry as a substantial cause of death but, as we have indicated, we think that she misdirected herself as to the duties of the driver of the car which was involved in the collision. If, therefore, it is correct in law that the act of the appellant must have been the only substantial cause of death the conviction could not be sustained, for the measure of the contribution of the driver of the colliding car has not, in our view, been properly assessed.

We do not, however, consider that to be a correct statement of the law. There can obviously be more than one substantial cause of an accident and of a resulting death. Equally dangerous driving by two motorists may cause the death of a pedestrian or passenger. If two drivers approached at speed and from opposite directions a narrow hump bridge where visibility was restricted, and by colliding in the middle killed a passenger in one of the cars the dangerous driving of each would be substantial cause of death. Neither, if charged under s. 44 (A), could advance effectually as a defence that his driving was only one of two substantial causes of death. In an indictment for manslaughter it is not a defence that the deceased was guilty of contributory negligence and the only question for the jury is whether the action or conduct of the accused materially contributed to the death of the deceased—*R. v. Swindall* (9) (1846), 2 Car. & Kir. 230 (175 E.R. 95). That reference is to the contributory negligence of the deceased himself which is of course not the present case. Questions of causation in which third parties intervene frequently arise in relation to medical treatment or other events which follow a wounding. In a recent case *R. v. Smith* (10), [1959] 2 Q.B. 35 the deceased had received two bayonet wounds, had been dropped twice on the way to the medical reception station and had been given incorrect medical treatment. In the judgment of the Court of Appeal, at p. 42 and p. 43 is the following passage:

“In these circumstances Mr. Bowen urges that not only was a careful summing-up required but that a correct direction to the court would have been that they must be satisfied that the death of Private Creed was a natural consequence and the sole consequence of the wound sustained by him and flowed directly from it. If there was, says Mr. Bowen, any other cause, whether resulting from negligence or not, if, as he contends here, something happened which impeded the chance of the deceased recovering, then the death did not result from the wound. The court is quite unable to accept that contention. It seems to the court that if at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating. Only if it can be said that the original wounding is merely the setting in which another cause operates can it be said that the death does not result from the wound. Putting it in another way, only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that the death does not flow from the wound.

“There are a number of cases in the law of contract and tort on these matters of causation, and it is always difficult to find a form of words when directing a jury or, as here, a court which will convey in simple language the principle of causation. It seems to the court enough for this purpose to refer to one passage in the judgment of Lord Wright in *The Oropesa*, where he said: ‘To break the chain of causation it must be shown that there is something which I will call ultraneous, something unwarrantable, a new cause which disturbs the sequence of events, something which can be described as either unreasonable or extraneous or extrinsic’. To much the same effect was a judgment on the question of causation given by Denning, L.J., in *Minister of Pensions v. Chennell*.”

Part of the judgment of Denning, J., (as he then was) in the last mentioned case, which is reported in [1947] K.B. 250, is as follows (p. 252 and p. 253):

“Much depends on the right approach. The best way is to start with the injury and inquire what are the causes of it. Sometimes there may be a single cause. More often there is a combination of causes. If the discharge of a missile or other event may be properly said to be a cause of the injury, that is sufficient to entitle the claimant to an award of a pension, notwithstanding that there may be other causes co-operating to produce it, whether they be antecedent, concurrent or intervening. It is not necessary that the discharge of the missile or other event should be ‘the’ cause of the injury in the sense either of the sole cause or of the effective and predominant cause. In many cases where there is a combination of causes, it is impossible to single out one cause as distinct from others, and any attempt to achieve that impossible task would lead to difficulties as the insurance cases amply show.”

Later in his judgment Denning, J., said that the only case which was inconsistent with the principles he had stated was *Greenfield v. London and N.E. Railway* (12), [1945] K.B. 89 in which he considered that the approach of the Court of Appeal had been shown to be wrong by the House of Lords in *Adams v. Naylor* (13), [1946] A.C. 543. We mention this as *Greenfield v. London and N.E. Railway* (12) was relied upon by counsel for the appellant before this court. In *Howgate v. Bagnall* (14), [1951] 1 K.B. 265, Barry, J., agreed that the authority of *Greenfield v. London and N.E. Railway* (12) had been seriously undermined and said (at p. 271 and p. 272):

“It can, I think, no longer be said that the ‘impact’ must be the *sole* or *immediate* or *precipitating* cause of the injuries. Other cause may also

operate to bring about the injuries but, nonetheless, the impact must of itself be a real and effective cause. It is not a real and effective cause if it is nothing more than an event or circumstance on which the true causes either previously or subsequently operate.”

In the notes to s. 8 of the Road Traffic Act, 1956, in Halsbury’s Statutes of England (2nd Edn.) Vol. 36, p. 809 in relation to the word “causes”, is the following statement, on the authority of *R. v. Curley* (15), 2 Cr. App. R. 96, and *R. v. Beech* (16)(1912), 107 L.T. 461:

“The dangerous or careless driving causes the death of another if it is its proximate cause or, in other words, if the death is a natural consequence of the driving;”

Both of those cases are far removed on the facts from traffic cases, as in each a women fell or jumped from a window in fear of violence or threatened violence from the accused. In *Curley’s* case (15) (one of manslaughter) the following sentence appears in the judgment of the Court of Criminal Appeal at p. 110:

“The jumping out of the window was contributed to by the appellant’s unlawful act.”

Having regard to these various authorities we consider that, while there is no precise form of words which must be adhered to as a direction in cases under this section, the word “substantial”, used by Finmore, J., is a suitable word provided that the direction as a whole does not convey that there cannot be more than one substantial cause of death, or that the conduct of the accused must have been the only substantial cause of death. That, in our opinion, is not the law. It follows that even if the manner of driving of his motor-car by Patel amounted to a substantial contributory cause of death the conviction must nevertheless be sustained, for the only question for the court was whether the leaving of the lorry unlighted upon the road was also a substantial cause of death. It has not been suggested, nor do we think that it could be, that Patel’s negligence was (in words adapted from the judgment in *R. v. Smith* (10), a cause so overwhelming as to make the presence and condition of the lorry merely part of the history. The question of the appellant’s liability had therefore to be determined in relation to his own actions and the part they played in causing the death of the deceased. This, in effect, was the course pursued by the resident magistrate and if, as we have held, she misdirected herself to some extent on the question of Patel’s negligence, the misdirection occasioned no failure of justice. For these reasons the appeal must be dismissed.

Counsel for the appellant asked the court to consider reducing the sentence imposed. This is, however, a second appeal, and by s. 360 (1) of the Criminal Procedure Code no second appeal lies against severity of sentence. We have therefore no jurisdiction in the matter.

Appeal dismissed.

For the appellant:

M Kean

Sirley & Kean, Nairobi

For the respondent:

GP Nazareth (Crown Counsel, Kenya)

The Attorney-General, Kenya

Re W W K Nadiope (debtor)

[1959] 1 EA 950 (HCU)

Division: HM High Court of Uganda at Kampala
Date of judgment: 13 November 1959
Case Number: 10/1959
Before: Bennett J
Sourced by: LawAfrica

[1] *Bankruptcy – Bankruptcy notice – Validity – Post office box given as address of creditor – Whether address given sufficient – Bankruptcy Ordinance (Cap. 29), s. 164 (U.).*

Editor's Summary

The only address of a creditor given in a bankruptcy notice was a post office box number. The debtor applied to set aside the bankruptcy notice on the ground that the address given was insufficient since it was not an address at which the creditor could be found.

Held – a post office box number is not a sufficient address for the purpose of a bankruptcy notice, since it is not an address at which the creditor can be found; nor is it an address at which he can be paid or at which the debt can be compounded.

Application allowed.

Cases referred to in judgment

- (1) *In re Stogdon*, [1895] 2 Q.B. 534.
- (2) *In re Beauchamp*, [1904] 1 K.B. 572.

Judgment

Bennett J: This is an application to set aside a bankruptcy notice. The English Bankruptcy Rules, 1915, have been applied in Uganda by s. 164 of the Bankruptcy Ordinance, Cap. 29, and a bankruptcy notice must be in the form prescribed by those Rules.

A number of grounds have been urged in support of the application, but it is necessary to deal with only one of them.

The only address of the creditor given in the notice is a Kampala post office box number. It is contended that this is not a sufficient address because it is not an address at which the creditor can be found. There is authority to support this contention. In the case of *In re Stogdon* (1), [1895] 2 Q.B. 534, a London club was given as the address of the creditor. The creditor did not reside at the club. In his judgment, with which the other members of the court agreed, Kay, L.J., said:

“The address given by the creditor was one at which he might be heard of, but at which he was certain not to be found. If the address given is one at which the creditor may be heard of, but at which the debt cannot be paid to him, the provisions of the Act and the Rules are, in my opinion, not complied with.”

In re Stogdon (1) was followed by the Court of Appeal in *In re Beauchamp* (2), [1904] 1 K.B. 572. In that case the creditor gave as her address a London hotel where she frequently stopped but at which she did not permanently retain a room. This was held to be an insufficient address.

Vaughan William, L.J., in delivering the judgment of the court, said:

“In order to see whether this address fulfils the conditions laid down in *In re Stogdon*, we must ascertain what is the principle of that decision; and it is the more necessary to do so because it will govern the practice of the Bankruptcy Court hereafter. It is plain that it is not sufficient for the

creditor merely to give an address where he can be heard of; it must be an address where he can be paid, or where, by agreement, the debt can be secured or compounded.”

In my judgment a post box number is not a sufficient address for the purpose of a bankruptcy notice, since it is not an address at which the creditor can be found; nor is it an address at which he can be paid or at which the debt can be compounded.

I therefore hold that non-payment of the debt within the seven days prescribed by the notice did not constitute an act of bankruptcy, and I set aside the notice.

The respondent will pay the applicant’s costs.

Application allowed.

Mohanlal Mepa Shah v R [1959] 1 EA 951 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	26 October 1959
Case Number:	587/1959
Before:	Rudd Ag CJ and Mayers J
Sourced by:	LawAfrica

[1] Immigration – Charge of failing to attend when summoned by immigration officer – Accused suspected of being prohibited immigrant – Whether immigration officer required to have reasonable grounds for suspicions and to disclose grounds – Immigration Ordinance, 1956, s. 4 (1) (b), s. 4 (3) and s. 4 (4) (a) (K.).

Editor’s Summary

The appellant was summoned to appear before an immigration officer who suspected that the appellant was a prohibited immigrant. The appellant disobeyed the summons and subsequently his advocate wrote stating that the reason why the appellant had not attended was that no grounds had been stated for the belief that the appellant was a prohibited immigrant. The appellant having been convicted of failing to attend when summoned by an immigration officer appealed.

Held –

- (i) an immigration officer is not required to inform a person whom he wishes to interrogate in accordance with s. 4 (1) (b) of the Immigration Ordinance, 1956, of the nature of his grounds believing that such person is a prohibited immigrant.
- (ii) a person who has been duly summoned by an immigration officer for interrogation under s. 4 (3) of the Immigration Ordinance, 1956, is not entitled as of right to be informed before obeys the

summons of the grounds for the belief that he is a prohibited immigrant.

- (iii) it was not established that the immigration officer had reasonable grounds for his belief that the appellant was a prohibited immigrant and accordingly he had not sufficient legal justification for summoning the appellant under s. 4 (3) nor to interrogate him under s. 4 (1) (*b*) of the Immigration Ordinance, 1956.

Appeal allowed. Conviction and sentence set aside.

No Cases referred to in judgment in judgment

Judgment

Rudd Ag CJ: read the following judgment of the court: The appellant appeals from conviction on a charge of failing to attend when summoned by an immigration officer contrary to s. 4, sub-s. (4), para. (a) of the Immigration Ordinance, 1956, and s. 15, sub-s. (2) of that Ordinance in that on April 23, 1959, at Nairobi having been summoned in writing by an immigration officer under the powers conferred on him by s. 4 (3) of the Immigration Ordinance, 1956, i.e. being a person who the said immigration officer had reasonable grounds for suspecting was a prohibited immigrant, to attend at the Immigration Office, Gill House, Nairobi, at 10.00 a.m. on Thursday, April 23, 1959, failed without reasonable excuse to attend at the time and place appointed.

Section 4, sub-s. 1 (b) of the Immigration Ordinance, 1956, provides as follows:

- “4. (1) For the purpose of exercising his powers and functions and carrying out his duties under this Ordinance, any immigration officer may—
- (b) interrogate any person who desires to enter the Colony, or any person whom he has reasonable ground for believing to be a prohibited immigrant, or any person whom he reasonably believes can give material information regarding any such person as aforesaid;”

Sub-section (3) of s. 4 provides:

- “4. (3) Any immigration officer may, in writing, summon for the purposes of interrogation any person whom he is empowered by para. (b) of sub-s. (1) of this section to interrogate, and may require any such person to produce any document in his custody or possession or under his control relating to any matter upon which he may be interrogated.”

Sub-section (4) provides:

- “(4) Any person who—
- (a) having been summoned aforesaid, without reasonable excuse fails to attend at the time and place appointed; . . .
- shall be guilty of an offence against this Ordinance.”

Section 15 (2) is merely a penalty section.

The facts of the case are as follows: On April 17, 1946, the appellant was permitted to enter the Colony under the Defence (Admission of Women and Children) Regulations, 1940, on the ground that he was the son, under eighteen years of age, of a resident named Mepa Punja Shah who, by a letter dated October 30, 1945, had stated that the appellant was his son and then aged seventeen years.

Upon reference to the official records in connection with Mepa Punja Shah the immigration officer discovered that his wife Paniben had declared that she was born in India in 1915 and that she married Mepa Punja Shah in India on February 15, 1931. Upon considering these facts the immigration officer came to the conclusion that it was highly unlikely that Mepa Punja Shah’s wife Paniben could be the mother of the appellant for if the appellant was seventeen years of age in February, 1946, and was the son of Paniben he would have been born in 1929 before Paniben was married and at a time when Paniben was aged about thirteen to fourteen years of age.

In the circumstances we think that the immigration officer could reasonably have formed the belief that the appellant was not the son of Paniben, but the immigration officer claims to have formed the belief that the appellant was not the son of Mepa Punja Shah. We can find nothing in the facts which could

reasonably substantiate this last belief. There is nothing to indicate that Paniben was the appellant's mother or that Mepa Punja Shah did not marry the appellant's mother before he married Paniben.

The immigration officer summoned the appellant to appear before him for interrogation on the ground that the immigration officer had reason to believe that the appellant was a prohibited immigrant, which belief was based on information to the effect that the appellant's original entry into and subsequent presence in the Colony was unlawful. The appellant disobeyed this summons and subsequently the appellant's advocate wrote to the immigration officer stating that the reason for the non-attendance of the appellant was that the immigration officer did not disclose to the appellant the grounds for believing the appellant to be a prohibited immigrant.

We do not think that the immigration officer is required to inform a person whom he wishes to interrogate in accordance with s. 4 (1) (b) of the Immigration Ordinance, 1956, of the nature of his grounds for belief that such a person is a prohibited immigrant, nor do we think that a person who has been duly summoned for purposes of interrogation under s. 4, sub-s. (3) of the Ordinance is in law entitled to demand as of right to be informed before he obeys the summons of the immigration officer's grounds for believing him to be a prohibited immigrant.

In our opinion the law is that a person who disobeys a summons issued under s. (4), sub-s. (3) of the Ordinance does so at his peril, nevertheless if he disobeys such a summons and is prosecuted for such disobedience he is entitled to be acquitted if it is not established to the satisfaction of the court that the immigration officer had reasonable grounds for belief that the person who disobeyed the summons was a prohibited immigrant.

In the present case the basis of the suggestion that the appellant was a prohibited immigrant rested solely on the alleged belief of the immigration officer that the appellant was not the natural legitimate son of Mepa Punja Shah on the ground that it was the highly improbable that he was the son of Mepa Punja Shah's wife Paniben who married Mepa Punja Shah after the birth of the appellant. We are satisfied that on the information which the immigration officer had there was no ground for belief that the appellant was not a natural and legitimate son of Mepa Punja Shah, there was merely a reasonable ground for belief that he was not the son of Paniben.

In the circumstances it was not established that the immigration officer had sufficient legal justification to summon the appellant under s. 4, sub-s. (3) or to interrogate him under s. 4, sub-s. (1) (b.). For these reasons we set aside the conviction and sentence and order that the appellant be acquitted.

Appeal allowed. Conviction and sentence set aside.

For the appellant:

J Gledhill

J Gledhill, Nairobi

For the respondent:

DD Charters (Crown Counsel, Kenya)

The Attorney-General, Kenya

Andera Kanyi Belezia v R

[1959] 1 EA 954 (SCK)

Division: HM Supreme Court of Kenya at Nairobi
Date of judgment: 6 October 1959
Case Number: 695/1959
Before: Rudd Ag CJ and Mayers J
Sourced by: LawAfrica

[1] Immigration – Charge – Particulars of offence specifying several alleged infringements of law – Whether charge defective – Immigration Ordinance, 1959, s. 15 (1) (i), (K.).

Editor's Summary

The appellant, an African, was convicted on his own plea of guilty of being unlawfully present within the Colony contrary to the Immigration Ordinance, 1959. The particulars of the alleged offence read that the appellant “was not in possession of a Resident’s Certificate, or an Entry Permit, or a Pass or Certificate of Exemption authorising him to remain in the Colony, nor was he excluded from requiring such authority to remain, nor was he otherwise entitled to remain in the Colony” and was sentenced to three months’ imprisonment. On appeal against sentence.

Held – the charge was bad for uncertainty as it did not give the appellant any proper intimation of the nature of the particular infringement of the Immigration Ordinance upon which the prosecution intended to rely to substantiate the prosecution and accordingly the whole proceedings were unsatisfactory.

Appeal allowed.

No Cases referred to in judgment in judgment

Judgment

Rudd Ag CJ: read the following judgment of the court: Although the appellant only appealed from sentence of three months’ imprisonment pursuant to a conviction of being unlawfully present within the Colony contrary to s. 15 (1)9i) [sic] and punishable under s. 15 (2) of the Immigration Ordinance, 1959, on September 22, 1959, we set aside both the conviction and sentence and ordered the appellant to be released stating that we would give our reasons at a later date.

The particulars of the charge read as follows:

“Andera Kanyi Belezia, on the 19th August, 1959, at Nairobi, in the Extra Provincial District of Nairobi, was found to be unlawfully present within the Colony in contravention of the provisions of the Immigration Ordinance, 1956, in that he was not in possession of a Resident’s Certificate, or an Entry Permit, or a Pass or Certificate of Exemption authorising him to remain in the Colony, nor was he excluded from requiring such authority to remain, nor was he otherwise entitled to remain in the Colony.”

Although the appellant purported to plead guilty unequivocally to this charge and was convicted accordingly, in our opinion the charge was bad for uncertainty and did not give the appellant any proper

intimation of the nature of the particular infringement of the Ordinance that the prosecution intended to rely upon to substantiate the prosecution.

The appellant is an African and we doubt that the charge was properly explained to him or indeed in view of its wording that it could have been properly explained to him. We think it is significant that when the appellant addressed us one of the first things which he said was that he had been born in Kenya.

There is no provision in the Ordinance that could be stated as s. 15 (1)9i) which is probably a clerical error as it would seem that the charge was intended to be laid under s. 15 (1) (i) of the Ordinance, but errors of this nature should not appear in the statement of a charge which an accused person is required to answer. It may be misleading.

In the circumstances we are satisfied that the whole proceedings were unsatisfactory and that the charge was not a good charge. We set aside both the conviction and sentence and ordered that the appellant be released in so far as these proceedings on this charge are concerned. If the appellant remains in Kenya unlawfully this order would not be a bar to a subsequent prosecution upon a properly drawn charge which would indicate in its particulars the nature of the case alleged on the part of the Crown in sufficient detail to enable the appellant to realise the nature of the charge and to meet it in any way which might be possible for him.

Appeal allowed.

The appellant did not appear and was not represented.

For the respondent:

GP Nazareth (Crown Counsel, Kenya)

The Attorney-General, Kenya

Mwangi Macharia v R **[1959] 1 EA 955 (SCK)**

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	6 October 1959
Case Number:	609/1959
Before:	Rudd Ag CJ and Mayers J
Sourced by:	LawAfrica

[1] *Criminal law – Jurisdiction – Conviction of accused after plea of “not guilty” – No evidence called – Whether conviction ultra vires.*

[2] *Criminal law – Practice – Withdrawal of charge by Crown after accused admits charge – Magistrate subsequently proceeding to conviction and sentence – Whether conviction and sentence valid – Penal Code (Cap. 24), s. 270 (K.) – Criminal Procedure Code (Cap. 27), s. 87, s. 320 and s. 321 (K.).*

Editor’s Summary

The appellant appeared before a senior resident magistrate upon two charge sheets: the first charged him with larceny and the second with failing to carry an identity card. He pleaded “not guilty” to the first and

admitted the second charge. The magistrate, however, recorded “Convicted as charged of theft contra to s. 270 Penal Code” but did not make any specific order in relation to the second charge although he did make an order that it be heard before another magistrate. When accused appeared before another magistrate the latter recorded that the charge was explained to the appellant and that he pleaded “not guilty” but the record did not state to which charge the appellant had been required to plead. The prosecutor then applied for and was granted leave to withdraw both charges. Later the senior resident magistrate having discovered his error on the charge of larceny, had the appellant brought before him and then recorded that the charge of larceny had been withdrawn and purported to sentence the appellant to twelve months imprisonment on the charge of failing to carry an identity card to which he had pleaded “guilty”.

Held –

- (i) the conviction of larceny was clearly ultra vires as the appellant

had pleaded “not guilty”.

- (ii) both charges having been withdrawn, there was in fact no charge against the appellant at the time when the senior resident magistrate purported to sentence him for not being in possession of his identity card.

Appeal allowed. Conviction quashed and sentence set aside.

No Cases referred to in judgment in judgment

Judgment

Rudd Ag CJ: read the following judgment of the court: At the hearing of this appeal we quashed the conviction of the appellant and set aside the sentence passed upon him and intimated that by reason of certain unusual features we proposed to deliver our reasons subsequently.

Properly to understand the reasons for our decision it is necessary to recite the facts in some detail.

On June 8, 1959, the accused was brought before the senior resident magistrate for Nairobi upon two charge sheets. The first of these charge sheets charged the accused with larceny and the second with failing to carry an identity card. The appellant’s pleas before the senior resident magistrate appear from the record to have been:

“Count 1. Not guilty.

“Count 2. I was at Pumwani in Nairobi. I had not my identity card on my person.”

Clearly, therefore, the accused denied the first charge of larceny and admitted every ingredient of the offence charged in the second charge sheet. In error, however, the learned senior resident magistrate made the following entry upon the record:

“Convicted as charged of theft contra s. 270 Penal Code.”

but did not make any specific order in relation to the offence charged in the second charge sheet although he did make an order for the matter to be heard before another magistrate on July 6.

Quite clearly, the conviction upon the charge of larceny was ultra vires, the appellant having in terms pleaded “not guilty” to that charge.

The record of what happened when the accused was brought before another magistrate for trial on July 6 is in the following terms:

“Substance of charge and every element of it has been read and explained to the accused person who, on being asked whether he admits or denies the truth of every element of the charge replies ‘not guilty’.”

It does not appear from the record whether the charge to which the accused was required to plead on July 6 was the charge of larceny, to which he had previously pleaded “not guilty”, but of which he had been convicted, or the charge of not being in possession of his identity card, to which he had previously pleaded “guilty”. Be that as it may, the prosecutor thereupon applied for and was granted leave to withdraw both charges. On July 16 the learned senior resident magistrate before whom the accused had first appeared, discovered the error which had led to the accused having been purported to have been convicted of the charge of larceny to which he had pleaded “not guilty” and having recorded that the charge of larceny had been withdrawn made an order for the appellant to be produced before him for

sentence upon the charge to which he had in fact pleaded “guilty”, i.e. that of being in Nairobi without an identity card, and when the accused was so produced purported to

sentence him to twelve months imprisonment.

It is quite clear from the record that on July 6 and before sentence was pronounced the Crown asked for and obtained permission to withdraw both charges. Section 87 of the Criminal Procedure Code is, so far as immediately material, in the following terms:

“87. In any trial before a subordinate court any public prosecutor may with the consent of the court . . . at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon such withdrawal—(a) if it is made before the accused person is called upon to make his defence, he shall be discharged . . .”

Section 320 (1) of the Criminal Procedure Code is, so far as material, in the following terms:

“320. (1) The accused person may, at any time before sentence, whether on his plea of guilty of otherwise move in arrest of judgment . . .”

Likewise, s. 321 of the Criminal Procedure Code is, so far as material, in the following terms:

“321. If no motion in arrest of judgment is made, or if the court decides against the accused person upon such motion, the court may sentence the accused person . . .”

Quite clearly, in view of these provisions, the passing of sentence is dependent upon no motion having been made in arrest of judgment or upon such motion having been disposed of before sentence is passed. From this it follows that the passing of sentence forms part of the judgment. Consequently, it was competent for the public prosecutor, with the leave of the court, to withdraw both charges, as he purported to do. Both charges having been withdrawn there was in fact no charge against the appellant at the time when the learned senior magistrate purported to sentence him upon the charge of not being in possession of his identity card.

Appeal allowed. Conviction quashed and sentence set aside.

The appellant did not appear and was not represented.

For the respondent:

GP Nazareth (Crown Counsel, Kenya)

The Attorney-General, Kenya

V S Dukhiya v The Standard Bank of South Africa Limited [1959] 1 EA 958 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	2 November 1959
Case Number:	38/1959
Before:	Gould Ag V-P, Windham JA and Sir Owen Corrie Ag JA
Sourced by:	LawAfrica
Appeal from	H.M. Supreme Court of Kenya—Miles, J

[1] *Bank – Mistake – Action to recover money credited to customer’s bank account under mistake – Mistake induced by fraud of bank clerk – Customer making payments to bank clerk without knowledge of fraud after checking bank balance – Whether customer entitled to defence of estoppel – Indian Evidence Act, 1872, s. 115 – Indian Contract Act, 1872, s. 72.*

[2] *Mistake – Mistake of fact – Money paid under mistake of fact induced by fraud – Recovery – Payments made fraudulently from one customer’s account to another account at same bank – Whether bank can recover from customer whose account credited – Estoppel not pleaded – Indian Contract Act, 1872, s. 72 – Indian Evidence Act, 1872, s. 115.*

Editor’s Summary

A bank clerk who had previously borrowed money from the appellant offered to deposit money with the appellant repayable on demand. The appellant having agreed to the proposal the bank clerk fraudulently debited the ledger accounts of the bank’s customers and by forging cheques had the bank account of the appellant credited with sums aggregating Shs. 32,800/-. The bank clerk informed the appellant that he had credited the money to the appellant’s bank account and the appellant after checking his balance at the bank paid the clerk when demand was made. When the transactions were discovered, the police seized, examined and kept the appellant’s records for some time but took no further action against him. The bank clerk was prosecuted and convicted for his frauds, after which the bank sued the appellant for Shs. 32,800/-, alleging that he had received the money fraudulently or, alternatively, under a mistake of fact induced by the clerk’s fraud. The appellant denied the fraud alleged and claimed that he had received and later paid the money to the clerk in good faith. No estoppel was specifically pleaded, although it was mentioned in argument at the trial. The trial judge held that fraud had not been proved but that the bank was entitled to recover, since the money was paid into the appellant’s account under a mistake induced by the frauds. In his appeal the appellant contended, *inter alia*, that he was entitled to rely upon estoppel, whilst the respondent sought again on the evidence given at the trial to prove fraud on the part of the appellant.

Held –

- (i) the finding of the trial judge, that the position of the appellant was analogous to that of a banker, did not entitle the appellant to the benefit of defences open to an agent, unless he was in fact an agent in the transactions.
- (ii) the trial judge correctly regarded the relationship of the appellant with the bank clerk as that of debtor and creditor.
- (iii) the appellant was not the agent of the bank clerk in receiving the money, and the respondent dealt with and regarded the appellant as a principal and customer.
- (iv) the appellant clearly altered his position to his own detriment before the respondent claimed repayment of the money and did so in reliance upon the respondent’s representations as to the appellant’s bank balance.
- (v) since the main facts had been pleaded and the trial judge had considered

the question, and as the respondent's case had not been prejudiced, the omission to plead estoppel was not fatal and the appellant would be permitted to rely on it.

- (vi) there was nothing in the respondent's submissions on the evidence to induce the court to reverse the findings of fact in the court below.

Appeal allowed.

Cases referred to in judgment

- (1) *Kerrison v. Glyn Mills, Currie & Co.* (1912), 81 L.J.K.B. 465.
- (2) *Bavins Junr. and Sims v. London and South Western Bank Ltd.*, [1900] 1 Q.B. 270.
- (3) *Kleinwort v. Dunlop Rubber Co.* (1907), 23 T.L.R. 696.
- (4) *General Accident Fire and Life Assurance Corporation Ltd. v. Midland Bank Ltd.*, [1940] 2 K.B. 388; [1940] 3 All E.R. 252.
- (5) *Jones Ltd. v. Waring and Gillow Ltd.*, [1926] A.C. 670.
- (6) *Skyring v. Greenwood*, 107 E.R. 1064.
- (7) *Holt v. Markham*, [1923] 1 K.B. 504.
- (8) *Solomon Jacob v. The National Bank of India., Aden* (1918), 42 Bom. 16.
- (9) *Attorney-General of Kenya v. Block and Another*, [1959] E.A. 180 (C.A.).
- (10) *Akerhielm v. De Mare*, [1959] 3 W.L.R. 108; [1959] E.A. 476 (P.C.).
- (11) *Banque Belge v. Hambrouck*, [1921] 1 K.B. 321.

November 2. The following judgments were read by direction of the court:

Judgment

Gould Ag V-P: This is an appeal from the judgment in an action in which the respondent, a bank, claimed the sum of Shs. 32,800/- and interest in circumstances having their origin in a fraud carried out by one of the respondent's employees. The plaintiff alleged that in the year 1953, one Nathubhai Shivabhai Patel, one of their ledger clerks, falsely debited the ledger account, on one occasion that of Mohamed Adam, and on a subsequent occasion that of the estate of Mohamed Yusuf, with the sums of Shs. 12,800/- and Shs. 20,000/- respectively and that subsequently by means of forged cheques he caused these amounts to be credited to the account of the appellant in the respondent's books. Paragraphs 7, 8 and 9 of the plaintiff are as follows:

- "7. Each of the aforesaid sums was received by the defendant fraudulently, knowing they were credited to his account as a result of the said Nathubhai Shivabhai Patel's frauds upon the plaintiff.
- "8. Alternatively the defendant received the said sums well knowing he had no title thereto.
- "9. The plaintiff claims the said sums as moneys had and received by the defendant to his use."

In his defence the appellant admitted that he was at all material times a customer of the respondent and denied all other material allegations, including of course knowledge of any fraud on the part of Patel.

Paragraphs 8, 9 and 10 of the defence read:

- “8. Further or alternatively, if (which is denied) the defendant received the said or any sums as alleged or at all, the same were received lawfully in the following circumstances. The said Patel well knowing that the defendant habitually lent money and received sums of money on deposit obtained in 1952 loans from the defendant whereof a balance remained outstanding in April, 1953, amounting to Shs. 740/- or thereabouts. The

defendant then asked the said Patel to settle this balance whereupon the said Patel offered to place sums of money on deposit with the defendant conditional upon such sums being repaid on demand. The defendant acting in good faith agreed to receive sums of money on deposit from the said Patel and to repay any such sums (or any part thereof) on demand in consideration of having the use thereof until demand. Pursuant to the said agreement the defendant received from and repaid to the said Patel the sums hereinafter set out.

Particulars of Receipts

<i>1953</i>	<i>Shs.</i>	
April 18	12,800/-	Credited to defendant's bank account.
June 8	5,000/-	Paid in cash.
September 13	700/-	Paid in cash.
October 16	20,000/-	Credited to defendant's bank account.
	<hr/> 38,500/- <hr/>	

Particulars of Payments

<i>1953</i>	<i>Shs.</i>	
April 19	3,000/-	By cheque.
May	60/-	By cash.
July 15	1,500/-	By cash.
July 25	1,000/-	By cash.
August 1	100/-	By cash.
August 11	1,200/-	By cash.
August 22	200/-	By cash.
August 29	500/-	By cash.
August 29	2,000/-	By cheque.
September 18	1,200/-	By cash.
October 6	2,900/-	By cheque.
October 17	10,000/-	By cheque.
October 26	8,100/-	By cheque.
November 5	2,000/-	By cash.
December 2	4,000/-	By cash.
	<hr/> 37,760/- <hr/>	

“9. In the premises the defendant received the said sums except for the said Shs. 740/- as depository and

without knowledge of any claim made thereto or any title thereto (which is denied) by the plaintiff as alleged or at all.

- “10. By reason of the facts and matters hereinbefore set out the defendant denies that he has received the said or any sums to the use of the plaintiff as alleged or at all. Further the defendant will say and contend that the plaintiff’s claim is misconceived and the relief claimed is invalid.”

The respondent joined issue in a reply and said:

- “2. Further or alternatively if (which is denied) the circumstances in which the defendant’s account was credited with the sums referred to in paras. 5 (c) and 6 (c) of the plaint were as alleged in paras. 8 and 9 of the defence the plaintiff says that the said sums were the plaintiff’s money

and were paid into the defendant's account under a mistake of fact induced by the fraud of Patel as set out in paras. 5 (a) and (b) and 6 (a) and (b) of the plaint.

Particulars of Mistake

"That Mohamed Adam and the administrator of the estate of Mohamed Yusuf (a) intended, and (b) in fact took all the necessary steps to cause the plaintiff to debit their respective accounts with the respective sums and to credit the defendant's account therewith.

"3. In the premises the plaintiff is entitled to recover each of the said sums from the defendant."

Issues were settled as follows:

- "1. Was the defendant's account credited with the sum of Shs. 12, 800/- or any sum in the circumstances alleged in para. 5 of the plaint?
- "2. Was the defendant's account credited with the sum of Shs. 20,000/- or any sum in the circumstances alleged in para. 6 of the plaint?
- "If the answer to issues 1 and 2 above or either of them be in the affirmative, then:
- "3. Did the defendant receive the aforesaid sums or either of them fraudulently or with the knowledge alleged in para. 7 of the plaint?
- "4. Did the defendant receive the said sums or either of them knowing that he had no title thereto?
- "5. Did the defendant receive the said sums and repay the same as alleged in para. 8 of the defence?
- "6. If the answer to the issue numbered 5 above be in the affirmative is the plaintiff entitled to recover the said sums or any part thereof from the defendant."

Some reference will later be made to the evidence but for the purposes of the appellant's case on appeal it will be sufficient to indicate the findings of the learned trial judge. He had no hesitation in answering the first two issues in the affirmative. Having correctly directed himself upon the question of the standard of proof required in civil actions when fraud is alleged he answered the third issue in the negative. He answered the fourth issue in the negative and the fifth in the affirmative. The learned judge then indicated that the plaintiff's (respondent's) case failed in so far as the allegations in paras. 7 and 8 of the plaint were concerned and proceeded to consider whether it could recover upon the basis set out in the reply—that the money was paid into the appellant's account under a mistake of fact induced by Patel's fraud. He held that upon the law applicable in the circumstances of the case the money was recoverable and gave judgment for the respondent accordingly.

The memorandum of appeal to this court contained the following grounds:

- "1. That the learned trial judge having found either expressly or by necessary implication:
 - (a) that one, N. S. Patel, named in the pleadings had paid or caused to be paid to the credit of the defendant the sums of money claimed by the plaintiff in this suit;
 - (b) that the said sums of money were deposited with the defendant to hold for the use of the said N. S. Patel upon demand;
 - (c) that the defendant had no actual or constructive knowledge of any fraud or lack of title relating to the said payments at the time when they were made;
 - (d) that the defendant had repaid the amounts of the said payments to the said N. S. Patel in good faith before he, the defendant, came to

know of any such fraud or lack of the title as aforesaid, erred in law for failing to hold that the plaintiff was estopped from claiming repayment of the said amounts from the defendant.

- “2. The learned trial judge erred in law in holding
- (a) that the defendant did not receive the said money on behalf of the said N. S. Patel;
 - (b) that the defendant received the said amounts for his own benefit; and
 - (c) that the defendant was not entitled to rely upon the defence of estoppel because he had dealt with the plaintiff as a principal.”

A motion to add a third paragraph to the memorandum was before this court and by consent the motion was allowed subject to the right of counsel for the respondent to take in argument such objection as he thought fit to any part of its contents. Paragraph 3 is as follows:

- “3. The learned trial judge erred in law in failing to hold that the defendant was entitled to succeed upon the grounds:
- (a) that he received the money sued for from the said N. S. Patel in good faith and for a valuable consideration, that is to say, the promise to repay the same upon demand;
 - (b) that the mistake of fact under which the money was paid by the respondent was a mistake with which the defendant had nothing to do; and
 - (c) that the said mistake was caused by the fraud of the said N. S. Patel in the course of his employment as a clerk of the respondent.”

Before considering the arguments of counsel I will set out certain relevant portions of the judgment under appeal. The learned judge indicated that the position in this country as to money paid by mistake is governed by s. 72 of the Indian Contract Act which is as follows:

- “72. A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.”

Though this section is, in its unqualified use of the word “mistake” more far reaching than the corresponding English common law, counsel were agreed that, in the circumstances of this case any difference was immaterial and that the English authorities were fully applicable. In particular it was common ground that the principles of the English law as to estoppel applied equally to s. 72. The learned judge said:

“Mr. O’Donovan’s answer to the claim under this head is that an agent who has received money on behalf of his principal and has paid it over to his principal before he has come to know of the mistake, is not liable to repay the money to the person from whom he has received it.”

Later the judgment continued:

“In my view there are three answers to Mr. O’Donovan’s argument upon the evidence in the present case. The first is that the relation between Patel and the defendant was not that of principal and agent but of creditor and debtor. The defendant was not holding the money on behalf of Patel he was entitled to use it himself as is expressly pleaded in para. 8 of the defence. The defendant’s position was analogous to that of a banker. As between a banker and a customer the relation is not one of principal and agent but of debtor and creditor. This distinguishes the present case from those in which the recipient was a mere conduit. In the case of

Bavins v. London and South Western Bank, (1900) 1 Q.B. 270, the plaintiffs received from the company which was indebted to them, an order addressed to the company's bankers for the payment of the amount of their debt. The order was stolen from the plaintiffs, the receipt then being unsigned. It was subsequently handed to the defendants, a banking company, with a forged endorsement and receipt thereon for collection by a customer of theirs whom they credited with the amount of it. It did not appear that the customer knew that the order had been stolen. The order was presented by the defendants to the bank to whom it was addressed and the amount stated therein was paid by that bank to them. Subsequently, the plaintiffs gave notice to the defendants that the order was stolen from them and claimed the amount received by the defendants upon it. Nothing had in the meantime taken place to debar the defendants from cancelling the credit given to their customer. It was held that the plaintiffs were entitled to recover the amount received from the defendant as money received for the plaintiffs' use. As pointed out by Scott, C.J., in *Jacob v. The National Bank of India Limited*, the judgments of Collins, M.R., and Vaughan Williams, L.J., show that if the defendant bank had shown a payment over to the customer of the money received the plaintiff's claim would have failed. This, it is clear, was because the relation between the defendant bank and its customer was not that of debtor and creditor but of agent and principal since it was collecting the money on behalf of its customer. In the present case the defendant was not receiving the money on behalf of Patel."

The learned judge then set out his second and third reasons for rejecting Mr. O'Donovan's contention:

"The second reason why Mr. O'Donovan's argument must fail is that whatever may, in fact, be the true position of the defendant in an action brought to recover the money on a mistake of fact, he is liable to refund it if it be established that he dealt as a principal with the person who paid it to him, see *Kleinwort, Sons & Co. v. Dunlop Rubber Company*, 23 T.L.R. p. 696. In the present case the plaintiffs were dealing throughout with the defendant as principal and they had no knowledge whatsoever of the relationship, whatever that might be, between the defendant and N. S. Patel.

"Thirdly, the evidence clearly establishes, as I have mentioned above, that the defendant received this money for his benefit and made use of it. Scott, C.J., in *Jacob v. The National Bank of India*, (*supra*) pointed out that s. 72 of the Indian Contract Act should be read subject to the law of estoppel but, as he says at p. 33:

'Where a man receives money paid by mistake for his own benefit there can be no estoppel for he has received an accidental windfall which he has no right to keep'."

In argument before this court Mr. O'Donovan relied upon the learned judge's finding that "the defendant's position was analogous to that of a banker"; the reference is of course to his position vis-a-vis Patel. From this position counsel developed an argument based on the relationship of banker and customer simpliciter. He said that though a bank was not an agent in the strict sense and the relationship between a bank and its customer was one of debtor and creditor, the defences which were open to an agent who had paid money to his principal were open to a bank by virtue of its position as such. He conceded that a bank in some instances acted as a true agent but contended that even then the debtor-creditor relationship does not cease. The proposition which he sought to establish from the English authorities was formulated:

"where money is paid by mistake to an agent or a person in a position

equivalent to that of an agent, including a banker, it is a defence if the agent has paid over the money to his principal or otherwise accounted to him before receipt of notice of the mistake.”

It appears plain that this proposition is good law insofar as it relates to the position of an agent, but it goes a good deal further in saying that a banker is (invariably) as regards his customer, in the position of an agent. Counsel relied upon *Kerrison v. Glyn Mills, Currie & Co.* (1) (1912), 81 L.J.K.B. 465, *Bavins v. London and South Western Bank* (2), [1900] 1 Q.B. 270 and *Kleinwort v. Dunlop Rubber Co.* (3) (1907), 23 T.L.R. 696 but in my opinion none of these cases supports his argument in any way. In *Kerrison v. Glyn Mills, Currie & Co.* (1) it was sought to recover money paid under a mistake of fact to the defendant bank in England which was very clearly acting, and received the money as, agent for an American bank. Had the defendant altered its position in relation to its customer to its detriment on the faith of the payment that fact would have been available as a defence (as it would to any agent); but it was held that the defendant had not done so and the money was recoverable. The statement in the headnote that:

“The position of a banker does not differ from that of any other recipient of money acting as factor or agent”;

has relation to an argument (which was rejected) that the special relationship of debtor and creditor between a bank and its customer provided a defence in the circumstances, and does not denote that a bank is invariably in the position of a factor or agent. *Bavins v. London and South Western Bank* (2) was a case of an action for money received to the plaintiff’s use. The defendant was a bank which, on behalf of a customer, forwarded an order to another bank and received the proceeds thereof. Unknown to the defendant bank or its customer the order had been stolen from the plaintiff. It was held in this case that though the defendant bank had credited its customer with the amount in question it was only a provisional credit and there had been no settlement of account which debarred the bank from recovering the money. The plaintiff therefore succeeded, but it appears very probable that, had the defendant bank been able to show that it had been prejudiced the result of the action would have been different. Counsel argued from this that it was clear that the bank would have been allowed the same defence as that which would have been open to an agent. That this is so does not, in my opinion, arise from any special position of bankers, but from the circumstance that the bank was in fact, in the transaction, its customer’s agent for collection. That position is not altered because the money was not paid to the defendant bank by the plaintiff; the case of the latter was that it was their money which had been paid to the defendant bank and it was open to the latter to say in defence that it had received the money as agent and (had it been the case) that it had paid it away to its principal. Counsel argued similarly with relation to *Kleinwort v. Dunlop Rubber Co.* (3) in which a bank, being an equitable assignee of its customer’s debt, was held to have acted as a principal. Had it been considered as a banker, it was submitted, it would have been entitled to the same remedies as an agent in the true sense. With regard to that it has merely to be pointed out that the question left to the jury was—“Did Kleinworts receive the money as principals or as agents?” Nothing hinged upon Kleinworts’ position as bankers simply; in fact the case fell to be decided upon the jury’s answer to the third issue—that Kleinworts had not been misled by the plaintiffs’ mistake to alter their position to their disadvantage—which rendered it immaterial whether Kleinworts were acting as agents or principals.

In my view therefore, the finding of the learned judge in the court below that the position of the appellant was analogous to that of a banker does not

entitle him to the benefit of defences open to an agent unless he were in fact an agent in the particular transaction. The analogy resulted, in the learned judge's view, in a relationship of debtor and creditor between the appellant and Patel, and while I do not consider that this result is by any means necessarily exclusive of agency, I agree that it was a correct estimation of the effect of the evidence in the present case. As is clear from the judgment, the appellant's version of events was accepted generally in preference to Patel's, and therefore the arrangement between the two had its origin in Patel's suggestion that he would make a deposit with the appellant. This he effected by fraudulently causing money to be credited to the appellant's bank account. The appellant in no way acted as Patel's agent to collect the money from the respondent and the position as between the appellant and Patel was the same (apart from the fraud) as if Patel had deposited equivalent sums in cash into the appellant's account. The appellant in no way brought the respondent and Patel into any form of contractual or other relationship. When the appellant paid the money out he did so partly to Patel and partly at his direction and he might therefore be regarded as Patel's agent to make the last mentioned payments. That does not alter the fact that he was not Patel's agent to collect or receive the moneys from the bank, and I consider that the learned judge correctly regarded the relationship as that of debtor and creditor. Counsel for the appellant relied on the case of *General Accident Fire and Life Assurance Corporation Ltd. v. Midland Bank Ltd.* (4), [1940] 2 K.B. 388 as showing that where a person acted as a mere conduit pipe he was entitled to rely on the defences open to an agent. At p. 416 of the report the Master of the Rolls drew a comparison between such persons and agents. The facts are, however, vastly different. A cheque had been sent to three insured companies and indorsed by two of them to the third, which was held by the court to be the only one entitled to the money. A claim for the return of the money against the two indorsers failed and the Master of the Rolls said, at p. 416:

"If money passes through the hands of persons who are mere conduit pipes and nothing else, I cannot see how a claim can be made against such persons if the money has passed from their hands and has come to rest in the place where it ought to be."

In the present case there is no doubt that the appellant received the money; it was disbursed to Patel or on his direction over a period of months. Furthermore, as counsel for the respondent demonstrated from the copy of the bank statement in evidence, the appellant appears to have utilised some portion of the credits, temporarily, for his own purposes; I do not consider that it can be said, in the circumstances, that the appellant was a mere conduit pipe. I see no difference in principle arising from the fact that the appellant's indebtedness to Patel was repayable on demand, or perhaps on reasonable notice, and was not a loan for a fixed period—no authority to the contrary was quoted.

I think it follows from what has been said that the appellant was not Patel's agent to receive the moneys and that the respondent dealt with him and was entitled to regard him as a principal. He was the respondent's customer; by reason of a mistake as to the validity of certain documents his account was credited with the sums in question; the mistake was, in my opinion, a mistake in the transaction itself. Apart therefore, from questions of estoppel, and subject to an aspect of the law mentioned at the end of this judgment, I consider that the respondent would be entitled to recover. Before proceeding, however, to the matter of estoppel, I would refer to a passage in the speech of the Lord Chancellor in *Kleinwort v. Dunlop* (3) at p. 697:

"Your Lordships heard an interesting and learned argument as to the difference in law between the position of a principal to whom money has been paid under a mistake of fact and that of an agent in like case. The

appellants contended that this sum had been paid to them as agents, and that they had accounted for it to their principals in a way equivalent to payment. The respondents claimed that in receiving this money Messrs. Kleinwort, Sons & Co. were really principals, and therefore liable to repay it, whether they had paid it over to others or not. In the view I take of the case this is immaterial; for it is indisputable that, if money paid under a mistake of fact is redemanded from the person who received it before his position has been altered to his disadvantage, the money must be repaid in whatever character it was received. Now that is this case.”

It was, I think, suggested in argument that this passage could be read as meaning that there is no difference between the position of a principal and that of an agent who has received money paid under mistake. The passage does not say that. It says that the difference is immaterial if the money is redemanded before the recipient has altered his position to his disadvantage. Lord Atkinson put the matter thus (at p. 697):

“Many authorities were cited to your lordships, the decisions in which are little more than applications of the broad principles laid down by Lord Mansfield in ‘*Buller v. Harrison*’ in 2 Cowper, 565. They seem to establish that whatever may in fact, be the true position of the defendant in an action brought to recover money paid to him in mistake of fact, he will be liable to refund it if it be established that he dealt as a principal with the person who paid it to him. Whether he will be liable if he dealt as agent with such a person will depend upon this, whether, before the mistake was discovered, he had paid over the money he received to the principal, or settled such an account with the principal as amounts to payment, or did something which so prejudiced his position that it would be inequitable to require him to refund.”

The decision of the House of Lords in *Jones Ltd. v. Waring and Gillow Ltd.* (5), [1926] A.C. 670, in which money was recovered from a company which had been dealt with as a principal, is in accordance with the statement of the law by Lord Atkinson.

I come now to the question of estoppel. I conceive it to be clearly established that the appellant altered his position to his detriment before demand was made by the respondent for repayment of the money in question. It was found by the learned judge, pursuant to issue No. 5, that all the money was paid by the appellant to Patel or at his direction. On the basis of this finding it is common ground that the payments were all made before the fraud was discovered and demand for repayment made. In order to found an estoppel, in the full sense, it must also appear that the alteration of the appellant’s position was induced by some representation made by the respondent with the intention that it should be acted upon. Counsel for the appellant has argued further that if the alteration of the appellant’s position to his detriment was brought about by some breach of duty on the part of the respondent that is a sufficient defence. For the purposes of this case I see little difference in principle when the matter is put thus, for if the respondent was under a duty towards the appellant and if the detrimental alteration of position was due to the breach of that duty it seems inevitably to follow that the breach of duty either amounted to or resulted in a representation to the appellant, either positive or negative.

The cases of *Skyring v. Greenwood* (6), 107 E.R. 1064 and *Holt v. Markham* (7), [1923] 1 K.B. 504 were quoted as illustrative of cases where a duty existed. The former was a case in which army paymasters, having been informed in 1816 that certain increased pay would not be allowed to persons in the position of the officer in question, failed to inform him accordingly and continued to credit him with the increase until 1821. They then purported to set off the amount over credited against subsequent pay, but an action for money had and

received by the personal representatives of the officer succeeded. Abbott, C.J., said in his judgment, at p. 1067:

“I think it was their duty to communicate to the deceased the information which they had received from the Board of Ordnance; but they forbore to do so, and they suffered him to suppose during all the intervening time that he was entitled to the increased allowances. It is of great importance to any man, and certainly not less to military men than others, that they should not be led to suppose that their annual income is greater than it really is. Every prudent man accommodates his mode of living to what he supposes to be his income; it therefore works a great prejudice to any man, if after having had credit given him in account for certain sums, and having been allowed to draw on his agent on the faith that those sums belonged to him, he may be called upon to pay them back. Here the defendants have not merely made an error in account, but they have been guilty of a breach of duty, by not communicating to Major Skyring the instruction they received from the Board of Ordnance in 1816; and I think, therefore, that justice requires that they shall not be permitted either to recover back or retain by way of set-off the money which they had once allowed him in account.”

In *Jones Ltd. v. Waring and Gillow Ltd.* (5) in which the plaintiff recovered money paid to the defendant by a mistake of fact, having dealt with the defendant as a principal and in circumstances which the majority of the House considered created no estoppel, *Skyring v. Greenwood* (6) was distinguished by Lord Sumner at p. 697 of the report, as follows:

“The case is quite different, where, as in *Skyring v. Greenwood*, the payers are under an obligation to inform the payee of the true state of his account and, disregarding this obligation, pay him more than he was entitled to. The payment is then at their risk and they must stand by it.”

The facts in *Holt v. Markham* (7) were very similar to those in *Skyring v. Greenwood* (6); all three judges were of opinion that if the mistake made by the plaintiffs was a mistake of fact (which they did not accept) that the plaintiffs were estopped from recovering. Scrutton, L.J., said, at p. 514:

“I think this is a simple case of estoppel. The plaintiffs represented to the defendant that he was entitled to a certain sum of money and paid it, and after a lapse of time sufficient to enable any mistake to be rectified he acted upon that representation and spent the money. That is a case to which the ordinary rule of estoppel applies.”

Scrutton, L.J., appeared also to regard *Skyring v. Greenwood* (6) as having been decided upon the principle of estoppel. In both *Skyring v. Greenwood* (6) and *Holt v. Markham* (7) it appears to have been considered sufficient detriment to the person concerned that he was induced to spend the money as his own. It is not necessary that I should consider what limitations there may be on that principle, for, in the present case, as I have indicated, the appellant had paid away the money to Patel, whom he believed to be the person entitled to it, and who was, when the action came on for hearing, serving a term of imprisonment for offences related to the frauds in question. There can be no doubt in my view that the appellant had altered his position to his detriment.

The question which falls to be decided is firstly whether there was any breach of a duty owed by the respondent to the appellant. Then, if so, was that breach of duty the proximate cause of the appellant's having altered his position to his detriment? Counsel for the appellant submitted that the respondent was under a duty towards its customer to inform him of the true state of his account, a description which he drew from the words of Lord Sumner in the passage

above quoted from *Jones Ltd. v. Waring and Gillow Ltd.* (5). Perhaps this might be more aptly expressed, for the purposes of this case, in the negative form—not to misinform him of the true state of his account. No further authority was quoted by counsel for either party indicative of the nature or extent of the duty owed by a bank to its customer in this connection, but to my mind the duty relied upon is supported by the cases quoted and is one which may be regarded as reasonable in the conditions of modern commerce. Whether such a duty is absolute or limited to taking reasonable care is not a question which, in my opinion, needs discussion in the present case, for, whatever its nature, it cannot conceivably be so limited as to enable a bank to avoid the consequences of its breach by reliance upon the fact that it was occasioned by the fraudulent act of its own servant.

The next question, on the basis of the existence of this duty, is whether the respondent did misinform the appellant of the true state of his account and whether that was the proximate cause of his altering his position to his detriment. It should be observed in the first place that the case is not one in which the appellant should have known the state of his own accounts and so been put upon inquiry, for he had every reason, owing to his dealings with Patel, to expect that his account would be credited with the sums in question. There is no finding of the learned judge as to how and when the appellant was informed by the respondent of the credits but (subject to a submission of counsel for the respondent to which I shall refer shortly) the evidence presents no difficulty. The appellant said that on April 19, 1953, Patel informed him at his office of the credit of Shs. 12,800/- and showed him a credit slip. He paid Patel Shs. 3,000/- forthwith. Later he checked his balance with the bank, owing to a doubt concerning bank charges of Shs. 64/- which, he had thought, might be payable on the cheque credited to his account. How much later that enquiry was made is not stated. With regard to the Shs. 20,000/- the appellant's evidence was that he ascertained his balance from the respondent before making any payment to Patel. No credit slip had been brought on that occasion and Patel was given Shs. 10,000/- after the credit had been verified. Upon this evidence counsel for the respondent submitted that the payments made by the appellant were not made on the faith of representations by the respondent but in reliance on Patel's honesty—in the case of the Shs. 12,800/- also in reliance upon the credit slip produced by Patel. Counsel conceded that information given by the respondent to the appellant as to his balance would amount to a representation. I cannot attach much weight to this argument. Had the matter been confined to the credit slip, and the payment made to Patel when it was produced I would have accepted it, to the extent that the appellant probably relied on the credit slip, though not on Patel. Whether the slip, which has not been produced, was to be regarded as a representation by the respondent is too speculative to warrant consideration. The crux of the matter is however that in October, before paying any sum to Patel, the appellant verified the amount of his balance. This indicated that he was not relying on Patel but upon the information obtained from the respondent, and indeed I think it is against reason to suppose anything else. When this check was made in October, the balance given the appellant by the respondent would reflect both credits—the Shs. 12,800/- and the Shs. 20,000/-—and amount to a representation as to both. In those circumstances it does not matter whether, and how frequently, the appellant checked his balance between April and October, for there was a two-fold detriment following upon the October representation; in the first place there was the continuance of payments made by the appellant to Patel and in the second, the loss of opportunity to take prompt action to retrieve his position and recover amounts already paid. There is no challenge to the evidence on this matter and although there is no finding by the learned trial judge I consider it is open to me to arrive at this conclusion.

In the result I am of opinion that the respondent made a representation (or representations) of fact to the appellant which was the proximate cause of his acting (as he did) to his detriment. That the representation was intended to be acted upon cannot be gainsaid for it was natural and probable that it would be relied upon; Mr. Gatehouse, counsel for the respondent, conceded this point. The representation continued for a period far longer than would normally be necessary to clear a cheque in the ordinary course of banking business, and amounted to a representation that genuine payments had been made into his account. These circumstances, in my opinion, estop the respondent from denying that the two credits in question were anything but valid and genuine. The duty of the respondent towards the appellant, as banker to customer, discussed above, may not be essential to this finding, but is at least relevant to the question of the extent of the representation and as tending to show that it included not only the existence but also the validity of the credit entries.

It must now be considered whether, in this appeal, the appellant should be permitted to rely upon the estoppel which I have found to have been created. The word “estoppel” does not appear in the pleadings but counsel for the respondent accepted the law as stated in Sarkar on Evidence (9th Edn.) at p. 921 in the following passage:

“However, if all necessary facts are pleaded or proved or admitted, the defence of estoppel can always be taken even if not specifically pleaded as it is for the court to draw the legal inference [*Co-operative T. Bank v. Shanmugan*, 8 R. 223; A 1930, R. 265; *Somnath v. Ambika*, A 1950, A. 121].”

Counsel submitted that the pleadings did not set out all of the essential facts, as they did not state that the plaintiff’s representation was the proximate cause of the defendant’s having acted to his detriment.

In the court below estoppel was mentioned by counsel for the appellant but could not be said to have been argued. Counsel for the respondent is recorded as having said that estoppel had not been pleaded. The learned judge quoted an extract from *Solomon Jacob v. The National Bank of India Ltd., Aden* (8) (1918), 42 Bom. 16 which estoppel in relation to s. 72 of the Indian Contract Act was discussed and said:

“Thirdly, the evidence clearly establishes, as I have mentioned above, that the defendant received this money for his benefit and made use of it. Scott, C.J., in *Jacob v. The National bank of India (supra)*, pointed out that s. 72 of the Indian Contract Act should be read subject to the law of estoppel but, as he says at p. 33:

‘Where a man receives money paid by mistake for his own benefit there can be no estoppel for he had received an accidental windfall which he has no right to keep’.”

The learned judge must therefore have given some consideration to the question, and the principles argued by counsel before him were closely akin to that of estoppel. The bulk of the essential facts were included in the pleadings of one side or other. The fact of the making of the credits in the appellant’s account was pleaded in the plaint by the respondent as was the appellant’s knowledge of that fact. The plea that such knowledge was fraudulent was rejected by the learned judge in the court below. In his alternative defence the appellant pleaded (in effect) that the money had been paid to his account pursuant to an agreement he had made in good faith with Patel and had been repaid to Patel thereafter in pursuance of the same agreement. It is clearly stated that the money was agreed to be (and was) “repaid” to Patel and the making of the credits in the appellant’s bank account was impliedly, but none the less clearly, a sine qua non in respect of the repayments. The only fact necessary

to estoppel which was not pleaded is that the appellant relied upon an assurance from the respondent that the credits had been effected. When the issues were framed by consent, Issue No. 6 was put in terms sufficiently wide to embrace almost any defence but it must of course be read in the light of the pleadings.

To my mind the defect of pleading is not a substantial one and only if the pleading of the missing allegation of fact would have altered in some way the presentation of the respondent's case or its counsel's approach to the evidence, do I think that the appellant should be debarred from relying on the defence, which I consider is established on the proved facts. I am satisfied that there is no such prejudice. It would be particularly within the knowledge of the appellant if and when he requested information from the respondent concerning his bank balance, and I think it must be accepted as a matter of common practice that, except where a bank statement is supplied, such information is often given informally. Then there is the overriding consideration that, while the appellant was apparently prepared to pay Patel Shs. 3,000/- on the faith of a bank deposit slip, no sane man is likely to pay out Shs. 32,800/- in reliance upon supposed credits in his account without verifying that they have been made. In my opinion the defect in pleading caused no prejudice to the respondent and the appellant should be permitted to rely upon estoppel.

Prior to the hearing of this appeal the advocates for the respondent gave notice that the respondent would contend that the decision of the learned judge should be affirmed not only on the grounds upon which he relied but also on the ground that:

"... the defendant received the sums of money claimed by the plaintiff in this suit fraudulently and/or knowing that they were credited to his account as a result of the said N. S. Patel's frauds upon the plaintiff and/or knowing that he had no title thereto."

Counsel for the appellant referred to this as a cross-appeal but I do not think it is properly so described, having regard to the rules of this court. The respondent does not seek to vary the decree but to support it upon additional grounds, and notice of such intention is not necessitated by rule 65 of the Eastern African Court of Appeal Rules, 1954, in its present form. This point was decided in *Attorney-General of Kenya v. Block and Another* (9), [1959] E.A. 180 (C.A.). An amending rule which will change this position has been made but is not yet in force.

Counsel for the respondent conceded that he was under a heavy burden in seeking to displace in a Court of Appeal the findings of fact of the trial judge. In a case in which fraud is alleged the burden is heavy indeed, as is indicated by the Privy Council decision in *Akerhielm v. De Mare* (10), [1959] 3 W.L.R. 108, and a Court of Appeal will not reverse, except on the clearest ground, a finding in the court below that a defendant has not been guilty of fraud. Counsel submitted, however, that his attack was upon the learned judge's inferences rather than on his primary findings of fact. He then proceeded to argue a number of matters but, having considered them all, I find little of persuasive value in any, with one exception, and think it likely that the majority of the points taken were designed to provide a background for the one point of substance, to which, therefore, I propose to confine my discussion. While considering at length in his judgment the possibility of the appellant's having been a party to Patel's fraud, the learned judge said:

"The one matter which has caused me some concern is the missing counterfoil No. 52744, Now, the counterfoils on either side of this are dated respectively October 10 and 17, 1953, and the suggestion which is made on behalf of the plaintiff, of course, is that this cheque No. 52744 was used by the defendant in connection with the Shs. 20,000/-. The defendant is quite unable to give any explanation of the tearing out of

this

counterfoil. This cheque book was taken by the police. It is difficult to think of any reason why the police should have removed it. I note that the receipt (exhibit 8) signed by the defendant for the return of the property seized by the police comprises 'one counterfoil on Standard Bank comprising Y. 72726 to Y. 72750'. This suggests that the cheque stubs in respect of this particular book were returned to the defendant complete. If that was so, somebody, and it must have been the defendant, tore the counterfoil out after he had received the book from the police. It seems to me unlikely that the police would have failed to notice the removal. On the other hand, if the counterfoil for No. 52744 was still there when the police had the book the inference is that it could not have contained anything which the police regarded as incriminating. This is certainly the least satisfactory part of the defendant's evidence, but in the circumstances of this case, and having regard to the lapse of time that has taken place before these proceedings were instituted, I do not think it is right to condemn the defendant simply upon this. I cannot close my eyes to the fact that this book was for some time in the possession of the police."

The fraud in connection with the Shs. 20,000/- was carried out on October 16, 1953, and it was therefore not impossible (from the point of view of date) for the missing cheque to have been used in its commission. In the passage above quoted the learned judge considers various related probabilities. He was, as we were informed by counsel and as appears also from the record of the evidence of the appellant, under one misapprehension. The receipt (exhibit 8) for the cheque book counterfoils "Y. 72726 to Y. 72750" (the initial figure "7" must be supposed to be a typing error for "5") was given by the police, though signed by the appellant, when the various documents were taken by them and not when they were returned. This negatives the suggestion that the particular book of cheque stubs was "returned to the defendant complete" for no detailed examination would have been made when the documents were seized. It is difficult to say, from a study of the three sentences which follow the phrase last quoted, exactly what the learned judge drew from the evidence on this matter. Obviously and understandably he could arrive at no firm conclusion. It is apparent that, had the appellant torn out the cheque stub after receiving back the book from the police, that would have been some evidence of a guilty mind. The two sentences beginning, "It seems . . ." and "On the other hand . . ." then appear to present arguments for and against accepting that the appellant had subsequently torn out the stub. On the argument as presented to this court these considerations become irrelevant, for counsel has clearly demonstrated on the evidence before the court, a strong probability that the cheque stub was removed from the book of counterfoils not after, but before, the book was handed to the police.

Examination of the counterfoils shows that the appellant was in the habit, when he drew a cheque, of making a pencil note of his bank balance, the amount of the cheque, any intervening credit, and the resulting bank balance, on the back of the counterfoils. When a cheque was drawn, the calculation in pencil would appear on the back of the preceding counterfoil. The entry on the back of counterfoil No. 52743 reflects the bank balance and the amount of the cheque No. 52745 as if No. 52744 had never existed. In turn this indicates that the counterfoil of No. 52744 was not in the book when cheque No. 52745 was drawn on October 17, 1953, or, if it was, that the appellant knew that the corresponding cheque would never be debited to his bank account. This was Mr. Gatehouse's argument and I accept it. Mr. O'Donovan, for the appellant, agreed with the inference that the appellant could not have used cheque No. 52744 for his own purposes and that it must have been torn out "at the time". He suggested that had the matter been presented to the appellant in this way when he was giving evidence he might have remembered what

happened to the cheque, but that the action had been brought some four or five years after the event, which rendered an explanation more difficult.

In the court below, counsel for the respondent did not call attention to the facts now under discussion and it is therefore quite understandable that the learned judge himself drew no inferences from them. His attention appears to have been centred on the question whether the appellant might have torn out the particular counterfoil after the return of the book by the police. I have already expressed the view that that, if proved, would have been evidence of a guilty mind. This court has not, however, the benefit of any expressed view by the learned trial judge as to what his attitude would have been, had he drawn the inference, which is now conceded to be justifiable, that the cheque and probably the counterfoil were torn out at approximately the relevant time.

In these circumstances this particular matter must be considered to be at large for the consideration of this court. The only suggestion in evidence that the appellant's cheque was used for one of the fraudulent transactions appears to be contained in a sworn statement (exhibit D) made by Patel on March 4, 1959, while in prison. It contains the passage:

"He, Dukhiya, gave me a cheque for Shs. 20,000/- drawn against this account, which had been written by an unauthorised person. He never told me who actually signed it. It was not drawn in favour of an individual, but was a cash cheque and I credited it to his account as he had told me. I myself was given no part of this money."

Passages from Patel's evidence in court are as follows:

"(i) I made out one cheque for Shs. 12,800/- payable to Mr. Dukhiya. I forged the signature of Mohamed Adam. I can't remember whose cheque is Y 34167."

(As the learned judge indicated in his judgment it was established that cheque No. 34167 came from a book issued to Patel).

"(ii) I debited a cheque of Shs. 20,000/-. The cheque form was mine. I can't remember what cheques I used for the first transaction."

Those passages are from the witness' examination-in-chief. In cross-examination he said:

"I used my cheque leaf at the time of preparing credit slip for Shs. 20,000/-. I made out the cheque for Shs. 20,000/- in the office of the bank. That was at the very moment I was putting through the false entries. I think I was by myself. Mr. Dukhiya was not there. What I said in my statement (D) is quite incorrect. I signed the cheque.

"Finding the account, deciding what cheque to use and making the entries—I did on my initiative."

This was relative to the Shs. 12,800/- transaction. In re-examination he said:

"On both the Shs. 12,800/- and Shs. 20,000/- transaction I used my own cheque. I used my own cheque on one transaction. I am not positive on whether it was the first or second occasion but on one occasion I used a bank slip—a debit slip.

"I used a cheque on each occasion. It was my cheque on each occasion. The second occasion was my own cheque. On the first occasion I do not remember now whether I used my own cheque."

In all this there is very little which counts against the appellant. In fact, in the evidence of Patel, an utterly discredited witness, there is nothing at all which involves him. There is only the one isolated inculpatory statement made before

trial and completely repudiated at the trial. All that is left is that the absence of the counterfoil is in itself a suspicious circumstance, the degree of suspicion being to some extent heightened by the denial of the appellant that he had torn it out. To that denial of course the passage of a number of years between 1953 and the trial is relevant. Having regard to the mass of evidence which the learned judge had to consider and particularly to his finding that

“ . . . it is abundantly clear that Patel has received the various payments alleged by the defendant . . . ”

I find nothing in this episode which in the least inclines me to think that the decision of the learned judge in the matter should be varied. A charge of fraud is a serious allegation which cannot be established by evidence of this kind and even considering such implications as arise from the absence of the counterfoil in conjunction with the other weak points in the appellant's case I find nothing which would induce me to reverse the finding of fact in the court below. Had the inference as to the time when the counterfoil was removed, which arose from the facts as presented in argument before this court, been brought to the notice of the learned trial judge, I do not consider that he would thereby have varied his decision or would have been justified in doing so. For these reasons, in my opinion, the submissions on the facts by counsel for the respondent should fail, and, having regard to the opinion on the law which I have indicated earlier the appeal should succeed.

I have not found it necessary to deal with the additional grounds of appeal which were added by leave to the memorandum. I would however express a merely tentative opinion that ground 3 (a) may not be without merit. That is:

“(a) that he received the money sued for from the said N. S. Patel in good faith and for a valuable consideration, that is to say, the promise to repay the same upon demand”;

it would appear, upon principles discussed in *Banque Belge v. Hambrouck* (11), [1921] 1 K.B. 321 that if Patel by his forged cheques had procured the moneys in question to be paid to his own bank account, and then drawn them out and paid them to the appellant, the respondent's right to recover from the appellant would depend upon whether the latter had received the money in good faith without notice of the fraud and for value. For example had the appellant received the money as the price of a motor-car sold to Patel in those circumstances, the respondent could not have recovered. As at present advised I do not see that any different principle should apply in the present circumstances, in which Patel by his fraud procured the payment by the respondent direct to the appellant's account. The valuable consideration mentioned in the ground of appeal above set out, is, however, an executory one, and, provided demand was made by the respondent while it remained so, it would hardly be conceivable that the respondent could not recover. Once the consideration became executed by payment by the appellant pursuant to his agreement, in good faith and without notice of the fraud, it is reasonable to expect that he would be protected. It is not necessary that I should express a concluded view on this question.

I would allow the appeal with costs (certified for two counsel) and set aside the judgment and decree in the court below. I would order that the action in the court below be dismissed and that the defendant's costs (certified for two counsel) be paid by the plaintiff.

Windham JA: I agree that the appeal should be allowed for the reasons given in the judgment of the learned acting vice-president, and with the orders as to costs therein contained.

Sir Owen Corrie Ag JA: I also agree.

Appeal allowed.

For the appellant:

Bryan O' Donovan QC and RC de Souza
Stephen & Roche, Nairobi

For the respondent:

RA Gatehouse (of the English Bar)
Hamilton, Harrison & Mathews, Nairobi

Nyinge s/o Suwatu v R
[1959] 1 EA 974 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgement:	10 November 1959
Case Number:	141/1959
Before:	Forbes Ag P, Gould Ag V-P and Windham JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya–Mayers, J

[1] *Criminal law – Insanity – Murder – Accused labouring under delusion – Accused admitting killing and surrendering to police “to be killed” – Whether admission shows accused aware that act was wrong – Penal Code (Cap. 24), s. 13 (K.) – Criminal Procedure Code (Cap. 27), s. 166 (K.).*

[2] *Criminal law – Evidence – Confession to police officer – Confession proved for purpose of submission that accused insane – Whether confession proved “as against” accused – Indian Evidence Act, 1872, s. 25.*

Editor’s Summary

Under the delusion that an inspector of police was plotting his death, an African killed him. He then surrendered to the police and stated that having killed the inspector “I have come here to be killed because they wanted my head”. At his trial a mental specialist gave evidence for the Crown that the accused would know what he was doing, but not that it was wrong. The trial judge, whilst accepting that the accused was, at the material time, insane in a medical sense, held that the accused’s statement to the police showed that he knew that what he had done was wrong and convicted him of murder. On appeal

Held –

- (i) the appellant's statement to the police when reporting that he had killed the police officer was a confession within s. 25 of the Indian Evidence Act.
- (ii) the confession was not "proved as against" the appellant since the evidence was led by counsel for the appellant at the trial to support a defence of insanity, and on that account was not inadmissible under s. 25 of the Indian Evidence Act.
- (iii) the burden on the defence in a case of alleged insanity is to prove insanity on a balance of probabilities and not merely to raise a reasonable doubt as to the sanity of the accused.

Appeal dismissed.

Cases referred to in judgment

- (1) *Swami v. R.*, [1939] 1 All E.R. 396.
- (2) *Bampamiyiki v. R.*, [1957] E.A. 473 (C.A.).
- (3) *Ali Gohar Mahi Machi v. R.* (1941), A.I.R.Sind. 134.
- (4) *R. v. Kibiegon arap Bargutwa* (1939), 6 E.A.C.A. 142.

(5) *Ghatu Pramanik v. R.* (1901), 28 Cal. 613.

(6) *Philip Muswi v. R.* (1956), 23 E.A.C.A. 622.

Judgment

Windham JA: read the following judgment of the court: The appellant was convicted of the murder in Mombasa of one Hamisi Sharbaid, a police inspector, by stabbing him with a knife in the head, the face, and the body (one of the blows entering the lung), death ensuing from the resulting haemorrhage. The appellant at all times admitted having stabbed the deceased, and from the nature of the injuries a murderous intention on his part could be properly presumed. The defences, or partial defences, advanced on the appellant's behalf were (a) that he was insane; (b) that he was labouring under an insane delusion; (c) that he acted under grave and sudden provocation; (d) that he acted in self-defence.

With regard to provocation and self-defence, the learned trial judge, accepting on the point the evidence of a prosecution eye-witness and rejecting that of the appellant, held that the deceased, before being stabbed, neither provoked nor attacked the appellant, and that those two lines of defence accordingly failed. We see no ground for interfering with his findings on those defences.

As to the question whether the appellant, when he killed the deceased, was legally insane or suffering from an insane delusion, it seems to have been common ground between the prosecution and the defence (the appellant being legally represented at his trial, though not before us on appeal) that the appellant's sanity was at least questionable; for the doctor who testified on the point after having had the appellant under observation, Dr. Margetts, the specialist psychiatrist in charge of Mathari Mental Hospital, was called as the first witness for the prosecution. We will consider presently the propriety of a mental specialist testifying as to an accused's sanity, being called as a prosecution witness rather than for the defence. But for the moment it is sufficient to say that it was Dr. Margetts' opinion that, by reason of insanity, the appellant when he killed the deceased did not know that what he was doing was wrong; in short, that he was legally insane within the meaning of the M'Naghten rules. Dr. Margetts, in answer to a question in examination-in-chief whether in his view the appellant would have known the physical nature of his act in stabbing the deceased, replied:

"Yes, I think he would know what he was doing, but he would not know that what he was doing was wrong".

And he continued:

"I reached that conclusion in spite of the fact that he went to the police station and gave himself up. He had many delusions of a persecutory nature which I gather that he had had for some years. The chief delusion was that he thought that there was, as he described it, a terrorist gang in Mombasa who were trying to kill him. The reason he gave me, which I believe to be a delusion, was that deceased was a member of the gang and was planning to kill him. He believed that he was legally justified in killing the man."

On this evidence of Dr. Margetts', it might have been expected that the learned trial judge would have found the appellant guilty but insane, in pursuance of s. 13 of the Penal Code and s. 166 of the Criminal Procedure Code. But a court is not obliged to accept medical testimony if there is good reason for not doing so, and the learned trial judge rejected it in the following

final paragraph of his judgment:

“It remains therefore to consider the defence of insanity. That the accused man was insane in the medical sense of the term at the material time and had been so insane for long before, I have no doubt at all. To relieve from criminal responsibility, however, insanity must be such that the accused either did not know what he was doing or did not know that what he was doing was legally wrong. Dr. Margetts considers that the accused knew what he was doing but he also considers that the accused did not know that what he was doing was wrong. The conclusion that the accused did not know that what he was doing was wrong would appear to have been based upon a statement made by the accused to Dr. Margetts on July 10 to the effect that he had gone to the police because he killed the deceased ‘because this man, deceased, had wanted to cut his head off’. While I have no doubt that the killing of the deceased by the accused was entirely due to the delusion of the accused that the deceased was plotting his death, it seems to me wholly impossible to reconcile Dr. Margetts’ view that the accused did not know that what he was doing was wrong with the accused’s words to Constable Okech: ‘I have killed Inspector Hamisi with a knife, I have come here to be killed because they wanted my head.’ Had the accused thought that he was legally justified in killing the deceased, he would not, in my view, have said on going to the police station that he had gone there to be killed because of his having killed Hamisi. For these reasons, despite the unanimous opinion of the assessors that the accused was insane, I find the accused guilty of the murder of Hamisi.”

From the above passage it appears, on the face of it, that the learned trial judge was rejecting Dr. Margetts’ view that the appellant did not know the wrongness of his act, wholly on the strength of a statement which the appellant had made to a police constable immediately after the killing, when he went to the police station and reported the incident. Police Constable Okech, the constable concerned, who gave evidence for the prosecution later than Dr. Margetts, very properly said, in examination-in-chief,

“Accused came in and made a report. As a result of what he said I arrested him . . .”

In examination-in-chief he was not asked, nor did he say, what it was that the appellant had said to him. But learned defence counsel, in opening his cross-examination, asked him: “Can you remember what accused said when he came to the police station?” Thereupon the witness replied:

“Accused said: ‘I have killed Inspector Hamisi with a knife. I have come here to be killed because they wanted my head.’ He didn’t explain who ‘they’ were. He said nothing more.”

The first question that arises is whether this statement by the appellant to Constable Okech, to which the learned trial judge attached such vital importance, was properly admitted in evidence at all, or whether it was inadmissible as falling within s. 25 of the Indian Evidence Act, which provides that—

“No confession made to a police officer shall be proved as against a person accused of any offence.”

And the answer to this depends on two further questions; first, was it a “confession”; secondly, if it was, then was it being proved “as against” the appellant?

As to whether the appellant’s statement was a confession, we think, upon consideration of the authorities, that it was. The words which he used did not, it is true, amount to a confession of murder, since, neither expressly nor by

implication, did he admit having killed the deceased with malice aforethought without such circumstances as would or might reduce his offence from murder to manslaughter. But he did expressly admit having killed the deceased; and the words which he then added, namely, "I have come here to be killed" (by which he obviously meant "to suffer the death penalty") indicate clearly, in our view, that he knew that what he had just done was wrong and that he was accordingly not merely admitting a justifiable killing (such as killing by accident or even one in justifiable self-defence). In other words, the appellant's statement to the constable amounted to a confession of an unlawful killing, that is to say, of manslaughter. Now in the Privy Council decision in *Swami v. R.* (1), [1939] 1 All E.R. 396, Lord Atkin, at p. 405, when considering the meaning of "confession" in s. 25 of the Indian Evidence Act, said that:

"a confession must admit in terms either the offence, or, at any rate, substantially all the facts which constitute the offence".

It was not necessary for their lordships to indicate in that case, nor did they indicate, whether the words "the offence" must mean the offence with which the accused was charged, or whether on the other hand an admission of any offence involving facts substantially in issue at the accused's trial for some other offence would amount to a confession. But that point was recently decided, in the latter and wider sense, by this court in *Bampamiyiki v. R.* (2), [1957] E.A. 473 (C.A.), in a long judgment in which *Swami v. R.* (1) was considered, and in which a decision in the Indian case of *Ali Gohar Mahi Machi v. R.* (3) (1941), A.I.R. Sind. 134, was followed. In *Ali Gohar's* case the very question now before us was in issue, namely whether, in a trial for murder, an admission to a police constable of manslaughter (in that case a killing with malice aforethought but upon grave and sudden provocation) constituted a confession for the purpose of s. 25. It was held that it did, the court rightly holding that *Swami v. R.* (1) did not touch the point. In *Bampamiyiki v. R.* (2) this court, following *Ali Gohar's* case (3), went even further, and held that an admission of arson, in a charge of murder, amounted to a confession, the facts constituting the arson being substantially in issue in the murder charge. It is unnecessary to say more than that we follow the decisions in those two cases and hold that the appellant's words to Constable Okech in the present case, amounting as they did to an admission of unlawful killing (manslaughter) were a confession for the purpose of s. 25 of the Indian Evidence Act.

The statement would still not be inadmissible under that section, however, unless it could be held to have been "proved as against" the appellant. Can it be said to have been so proved in this case? Certainly it was ultimately made use of by the learned trial judge against the appellant, in the broad sense that it was by reason of the statement that the judge held that the appellant had failed to discharge his burden of proving insanity. But from the very fact that this burden lay on the appellant, coupled with the fact that it was the appellant's counsel in cross-examination, and not the Crown, who elicited the statement from Constable Okech, we think that the statement was sought to be proved not "as against" the appellant but in his favour. It is difficult to understand, in view of Dr. Margetts having already given his evidence regarding the appellant's insanity, in what way learned defence counsel hoped that the appellant's confession could be used in his favour. But however that may be, it is clear that the eliciting of it formed part and parcel of the defence of insanity, since that was the only line of defence being seriously advanced. And that defence, of course, was sought to be established in the appellant's favour, and was not "as against" him. Nor was it any the less in his favour from the fact that Dr. Margetts was called by the Crown and not by the defence; for that irregularity did not affect the burden, or the favourable legal result, of proving insanity. We think that in considering whether the defence of insanity was established the learned judge was entitled to consider the whole

of the evidence put forward by the defence in support of the plea. We therefore consider that the appellant's confession to Constable Okech was not "proved as against" the appellant within the meaning of s. 25 of the Indian Evidence Act, and was therefore not inadmissible in evidence. Nor do we find anything to justify us in interfering with the learned trial judge's rejection of Dr. Margetts' opinion that the appellant did not know that what he was doing was wrong. He rejected it in the light of that confession, and in particular in the light of the appellant's words "I have come here to be killed"—words which were not before Dr. Margetts when he expressed his opinion.

In arriving at this conclusion we are fortified by an admission of the appellant himself regarding his knowledge of the wrongness of his act, an admission made in his sworn evidence at the trial. Crown Counsel asked him in cross-examination, "Did you know what you were doing was wrong-against the law?". To this the appellant replied, "It was wrong, but they wanted to kill me". Having regard to the form of the question, this answer must, we think, be taken as an admission that the appellant knew, when he killed the deceased, that he was doing wrong. Curiously, the learned trial judge does not mention in his judgment, nor in his summing-up to the assessors, this admission of the appellant on so vital a point regarding his insanity in the legal sense. But it strengthens the conclusion at which he did arrive, that the appellant was not legally insane at the time of the killing.

For these reasons we dismiss the appeal. But there are one or two further matters which call for comment. The first is the manner in which the learned trial judge dealt with the question of the appellant's insane delusions. In view of his findings of fact, the matter becomes academic; but it nevertheless calls for comment. In evidence, the appellant stated that he killed the deceased because (a) the deceased was a member of a gang seeking to kill him; (b) the deceased was at the moment actually engaged in a murderous attack upon him. The learned trial judge found, quite properly on the evidence, that in fact the deceased was not a member of any such gang and was not attacking the appellant, and (as we have seen) the defences of provocation and self-defence accordingly failed. He also found, rightly in our view on the evidence (including that of Dr. Margetts) that the appellant was not even labouring under a delusion that the deceased was actually murderously attacking him. But he did find, and his finding was based on Dr. Margetts' evidence together with the appellant's own, that the appellant was labouring under a delusion of persecution, an insane delusion that the deceased was a member of a gang seeking to kill him, though not engaged at that moment in trying to do so.

In considering what would have been the legal position if the appellant had killed the deceased because he was under an insane delusion that the deceased was at that moment murderously attacking him, the learned trial judge said this in his summing-up to the assessors:

"If you believe that the accused in killing the deceased acted under a delusion that he was in present danger of his life from the deceased, that there was no means of avoiding that danger other than by stabbing the deceased, then, the accused is entitled to a verdict of not guilty."

In his judgment, the point had become academic because of his finding that the appellant was not labouring under any such insane delusion of a murderous attack being made upon him. But a passage from the judgment suggests that the learned trial judge's direction to the assessors was based on—

"... the provisions of s. 11 of the Penal Code which in effect provides that where an act is done under a mistaken belief in the existence of a state of things, the person doing the act is not criminally responsible for the act to any greater extent than he would have been if the real state of things had been such as he believed to exist, read in conjunction with the

authorities in relation to persons who commit acts when labouring under delusion . . .”

On careful consideration, we think that the above direction that, in the circumstances supposed, the appellant would have been entitled to a verdict of “not guilty”, was wrong. The proper verdict, in our view, would have been one of guilty but insane. To begin with, we consider the reference to s. 11 of the Penal Code to be inapposite. That section, which deals with the mistakes of fact, provides thus:

“11. A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.

“The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.”

Section 11, it will be seen, requires that the mistake, in order to fall within its scope, must have been a “reasonable” one. But a mistake induced by an insane delusion, that is to say a delusion of one who (at least on the particular point) has lost his reason, is ex hypothesis not a reasonable one. Hence the section, quite apart from any operation of the last two lines of it, can have no application in the case of such a mistake.

Support for the learned trial judge’s conclusion might seem to be afforded by an earlier decision of this court in *R. v. Kibiegona arap Bargutwa* (4) (1939), 6 E.A.C.A. 142, where, in considering the legal effect of an insane delusion on what would otherwise be murder, the court held as follows:

“The effect of such a delusion was considered in the answer of the Judges to question 4 in MacNaughton’s Case (8 E.R. 718). The question was: ‘If a person under an insane delusion as to the existing facts, commits an offence in consequence thereof, is he thereby excused?’ The answer was as follows: ‘The answer must, of course, depend on the nature of the delusion; but making the same assumption as we did before, that he labours under such partial delusion only and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes in self-defence, he would be exempted from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.’ Assuming that the delusion existed in the present case the accused must accordingly be judged as though the facts with respect to which the delusion existed were real and such facts would in our opinion constitute sufficient provocation to reduce the offence to manslaughter. It is clear from note 3 on p. 904 of Wood Renton on Lunacy (1896 Edn.), and from the interpretations put upon the fourth answer in the judgments in the case of *Ghatu Pramanik v. King Emperor*, I.L.R. 28 Cal. 613, that the finding in such a case must be manslaughter followed by sentence of imprisonment and not a special finding of guilty but insane.”

R. v. Kibiegona (4), however, is distinguishable on its facts from the facts which, for the purpose of his direction regarding insane delusion, were being assumed by the learned trial judge in the present case. In *R. v. Kibiegona* (4), the delusion was one falling short of legal insanity. The accused in that case had a delusion that his father was assaulting him, an assault which, if true, would have constituted grave and sudden provocation for his killing his

father. Such a delusion did not prevent the accused from knowing that what he was doing was wrong; for his act was still wrong, being an unlawful killing, even though the supposed provocation reduced it from murder to manslaughter. Therefore, in that case, the accused did not satisfy the McNaghten test of insanity, and this court rightly held that the proper verdict was manslaughter. The observations of the learned judges in *Ghatu Pramanik v. R.* (5) (1901), 28 Cal. 613, referred to in the passage from the judgment in *R. v. Kibiegion* (4), which we have quoted, were likewise directed to a situation in which the accused's alleged delusion would, if true, have afforded grave and sudden provocation for his otherwise murderous act, and would thus have reduced it to culpable homicide but not made it no wrongful act at all. In the present case, however, the appellant's postulated delusion was such as, if it had been true, would have rendered his act not wrongful at all. For if a man kills another under an insane delusion that he is doing so in self-defence, in order to preserve his own life where there is no other way open to him of doing so, then he must think that his own action is justified, as in fact it would be justified if his delusion were true; and in such a case he would (through a disease affecting his mind) be incapable of "knowing that he ought not to do the act" for the purpose of s. 13 of the Penal Code. Accordingly he would not be "criminally responsible" for his act, under that section; and the proper verdict in such a case, as laid down by s. 166 of the Criminal Procedure Code (as re-enacted in the amending ordinance No. 22 of 1959) is guilty of the act but insane. The judgment in *R. v. Kibiegion* (4), does not therefore cover such a case as the present. And with regard to the passage quoted in that judgment from the answer of the judges to question 4 in the *McNaghten* case,—that a man killing another in the delusion of acting in self-defence would be "exempt from punishment", we think that answer is consistent with the view that we have expressed. For a verdict of guilty but insane is a verdict of acquittal, and the detention ordered is not punishment.

One further misdirection, immaterial in the circumstances and no doubt an oversight, appears in the judgment. The learned trial judge, after rightly stating that the burden of an accused to prove insanity is not to prove it beyond reasonable doubt, goes on to say that it is

"merely a burden to establish such facts as suffice to raise a doubt that he is in fact sane".

This is placing the burden too low. An accused must not merely raise a reasonable doubt; his burden, as in a civil case, is to prove insanity upon a balance of probability; that is to say he must show, on all the evidence, that insanity is more likely than sanity, though it may be ever so little more likely. Merely to raise a reasonable doubt might still leave the balance tilted on the side of sanity.

Lastly, much of the difficulty raised in this case, both below and on appeal, was caused by the fact that the medical witness called to testify regarding the appellant's sanity was called by the Crown as their first witness, instead of being put into the box by the defence. For the Crown to call such a witness, in order that he may give evidence relevant to a defence of insanity which it lies on an accused to establish, would no doubt be justified, in the accused's own interest, if the latter were unrepresented at the trial. But where (as here) he is represented by Counsel, then the proper procedure in all ordinary cases is for the defence to call him. We need do no more than repeat and endorse the recent remarks of this court on the very same point, in *Philip Muswi v. R.* (6) (1956), 23 E.A.C.A. 622, at p. 625. No doubt, in the present case, the Crown called Dr. Margetts as their witness with the best of motives, in order to assist the defence, conceding as they did that the appellant's mental state, from a medical if not from a legal point of view, was at least questionable, and having in mind, perhaps, that from a practical point of view it is easier for the Crown to secure the attendance of a

government physician at a trial than it is for the defence to do so. But if that be so, the proper course is for the Crown to offer him to the defence, who would no doubt avail themselves of the offer and call him as their witness.

Appeal dismissed.

The appellant in person (not represented).

For the respondent:

JP Webber (Deputy Public Prosecutor, Kenya)

The Attorney-General, Kenya

Ram Rakha s/o Shandar Bootamal Horra v Shandar Bootamal Horra and others

[1959] 1 EA 981 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	4 October 1959
Case Number:	842/1957
Before:	MacDuff J
Sourced by:	LawAfrica

[1] *Practice – Pleading – Action against partners of dissolved firm – Partners sued by their individual names and as former partners – Partners entering appearance individually – Joint defence filed – Application to strike out appearances and defence – Civil Procedure (Revised) Rules, 1948, O. XXIX, r. 1 (K.).*

Editor’s Summary

The plaintiff sued four defendants averring that they were all formerly trading as “Colonial Printing Works”. The partnership itself having been dissolved as from July 1, 1953, the defendants were served personally. Each of the first three defendants entered appearance on his own behalf and later they filed a joint defence in which they described themselves as “Defendants No. 1, 2 and 3, being three of the four partners of the former firm of Colonial Printing Works”. The plaintiff applied to strike out the defence on the ground that the defence was not in form a defence by the firm and also to strike out the appearances on the ground that the individual partners did not describe themselves as partners in the partnership firm, appearing on behalf of the firm. It was contended for the three defendants that although they had been sued as partners they had not been sued in the firm name.

Held –

- (i) the partners were not sued in the firm name in the manner envisaged by O. XXIX, r. 1 of the Civil Procedure (Revised) Rules, 1948.
- (ii) the plaintiff should have sued the defendants as “The Colonial Printing Works” to bring himself within the provisions of O. XXIX and since this was not done the plaintiff had elected to sue partners individually and as partners of the firm on their joint liability as partners.

Application refused.

Cases referred to in judgment

- (1) *Chhottelal Ratanlal and Another v. Rajmal Milapchand and Others* (1951), A.I.R. Nag. 448.
- (2) *Wigram v. Cox, Sons, Buckley & Co.*, [1894] 1 Q.B. 792.

Judgment

MacDuff J: The plaintiff has sued the four defendants “*all*

formerly trading as Colonial Printing Works”, for the sum of Shs. 42,280/78 which is made up of two parts

- (a) Shs. 25,422/36 for moneys paid out by the plaintiff on behalf of the firm;
- (b) Shs. 16,858/42 for interest at the rate of 12 per cent. on the payments respectively constituting the Shs. 25,422/36.

The four defendants were served personally, the partnership itself having been dissolved as from July 15, 1953, by order of this court dated September 21, 1954. The first three defendants each entered appearance on his own behalf and later filed a joint defence in which they describe themselves as

“Defendants No. 1, 2 and 3, being three of the four partners of the former firm of Colonial Printing Works.”

In that defence these three defendants admit their joint liability for the first sum claimed, Shs. 25,422/36, but deny liability for the interest claimed. The fourth defendant partner has not appeared and to complicate matters further the first defendant has died since the filing of this motion.

The first order prayed is that the defences of the first, second and third defendants be struck out as the defence is not in form a defence by the firm with the further order that the appearances be struck out as the individual defendants do not describe themselves as partners in the partnership firm, appearing on behalf of the firm. Against this it is contended for the three defendants that although they have been sued as partners they have not been sued in the firm name. I would agree that they have not been sued in the firm name in the manner envisaged by O. XXIX, r. 1. On the other hand they have been sued in an alternative form i.e. being named individually but also described jointly in the words “*all* formerly trading as Colonial Printing Works”. I have been referred to the case of *Chhottelal Ratanlal and Another v. Rajmal Milapchand and Others* (1) (1951), A.I.R. Nag. 448, where it was held that in that case there was nothing to indicate that the partnership firm was made the defendant to the suit. The plaintiffs did not sue the firm in accordance with O. XXIX, r. 1 (which is identical with our O. XXIX, r. 1). The defendants to the suit were four individuals even though they might have been described as proprietors of the firm. The mere mention of the name of the firm in the description of the defendants did not mean that the firm was being sued. There is support for this view in respect of the corresponding English rule 48 A. Pollock on Partnership (15th Edn.) at p. 133 comments on r. 3 of that order in these words:

“Hence if partners carry on business in England in a firm name they can all be sued in England if service is effected under this rule, . . . Otherwise it is necessary to sue each partner naming them separately in the writ, . . .”

The effect of the institution of O. 48 A is set out in the judgment of Cave, J., in *Wigram v. Cox, Sons, Buckley & Co.* (2), [1894] 1 Q.B. 792 at p. 795, as follows:

“Before the legislation permitting actions against a firm in the name of the firm the plaintiff must have served every person against whom he issued his writ. If he did not any judgment against such a person would be null and void.”

As I see it to bring himself within the provisions of O. XXIX the plaintiff should have sued the defendants as “The Colonial Printing Works”, and this he could have done although the firm had been dissolved. Not having done so in my view he has elected to sue the partners individually and as partners of

the firm on their joint liability as partners. For that reason the first order prayed must be refused.

In the alternative the plaintiff asks for judgment against the defendant firm for Shs. 25,422/36 upon the admission of liability in that sum made in the written statement of defence by the first, second and third defendants. There is certainly an admission by these partners and no appearance has been entered by the fourth and remaining partner. Although the first defendant is now dead I think I am entitled to enter judgment against the partnership as such and judgment against the three living partners personally.

Some argument was addressed to the court on the question of execution in view of the fact that the partnership assets are in the hands of a receiver appointed by the court. That is a matter that in my view I should not deal with at this stage.

Judgment will be entered against the partnership formerly known as “The Colonial Printing Works” and against the second, third and fourth defendants in their personal capacity for Shs. 25,422/36, costs of suit thereon interest thereon, interest thereon from the date of filing suit until judgment at 8 per cent. per annum. As to the costs of the present motion in view of the fact that the plaintiff has succeeded on his alternative prayer and much argument on the first prayer was engendered by the intermediate death of the first defendant I allow the plaintiff two-thirds of his taxed costs.

In view of the balance of the claim now left in dispute relating to interest I reserve the right to the plaintiff to claim interest at 12 per cent. in lieu of the 8 per cent. allowed in this preliminary judgment.

Application refused.

For the plaintiff:

DN Khanna

DN & RN Khanna, Nairobi

For the first, second and third defendants:

Chanan Singh

Chanan Singh & Handa, Nairobi

Elia Nguni v R
[1959] 1 EA 984 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of Judgment:	6 October 1959
Case Number:	682/1959
Before:	Rudd Ag CJ and Mayers J
Sourced by:	LawAfrica

[1] Criminal law – Plea – Accused admitting charge of neglect of duty by servant in preserving

employer's property – Particulars of offence defective – No averment in particulars of lawful act which accused refused or omitted to do – Whether accused's plea constitutes unequivocal admission of offence charged – Employment Ordinance, s. 67 (1) (b) (K.).

Editor's Summary

The appellant was charged with neglect of duty contrary to s. 67 (1) (b) of the Employment Ordinance. The particulars of the charge simply stated that the appellant had by neglect of duty omitted to preserve in safety property placed in his charge by his employer. The magistrate recorded the appellant's plea as "I admit the charge. I have nothing to say", convicted him and sentenced him to imprisonment without a fine. On appeal.

Held –

- (i) in a charge under s. 67 (1) (b) of the Employment Ordinance it is necessary that the particulars of the charge should specify the lawful act which the person accused is alleged to have refused or omitted to do; here the particulars of the offence omitted any allegation as to the essential ingredients of the charge.
- (ii) the particulars of the charge were defective, the appellant's plea was not an unequivocal plea of guilty to a proper charge under s. 67 (1) (b) of the Employment Ordinance, and the sentence was ultra vires.

Appeal allowed. Conviction quashed and sentence set aside.

No Cases referred to in judgment in judgment

Judgment

Rudd Ag CJ: read the following judgment of the court: The appellant appeals from a conviction of neglect of duty contrary to s. 67 (1) (b) of the Employment Ordinance, Cap. 109 of the Laws of Kenya, 1948, and from sentence of three months' imprisonment in respect of that conviction. On September 24, 1959, we set aside the appellant's conviction and sentence, acquitted the appellant and stated that reasons would be given at a later date. We now give our reasons.

The particulars of the charge were as follows:

"Elian Ngugi s/o Daniel Njonge. On the 30th day of July, 1959 at about 6.30 p.m. in Naivasha-South Kinangop Road within the Naivasha District of the Rift Valley Province, did by neglect of duty omitted to preserve in safety property placed in his charge by his employer, namely one tractor the property of Mr. J. W. Etherington."

The appellant purported to plead guilty to these particulars in the lower court and the prosecutor then stated the facts of the case as follows:

"Accused is a mechanic in charge of the transport belonging to Mr. Etherington. The tractor concerned was new and had just been serviced. Accused was present at the servicing. After the servicing accused drove the tractor away from the garage where the vehicle was serviced. It had only travelled a short distance when it stopped. Accused reported the

stoppage to his employer. On investigation the sump was found to contain fresh oil and there appeared to be no reason why it had stopped. On further investigation the sump was found to contain pieces of bearing and it was obvious that at some time the engine had been run without oil and the fresh oil put in later. The engine was irreparably damaged. The cost of replacement being £200.”

Section 67 (1) (b) of the Ordinance is as follows:

“Any employee may be fined a sum not exceeding Shs. 100/- and in default of payment may be imprisoned for a period not exceeding six months if he is convicted of any of the following acts:

- (b) if he, by wilful breach of duty or by neglect of duty or through drunkenness, refuses or omits to do any lawful act proper and requisite to be done by him for preserving in safety any property placed by his employer in his charge, or placed by any other person in his charge for delivery to or on account of his employer”;

In a charge under this provision of law it is necessary that the particulars of the charge should specify the lawful act which the person accused is alleged to have refused or omitted to do. The particulars of the charge in the present case omitted any allegation as to this essential ingredient of the case. We are quite satisfied that the particulars of the charge were defective, that in the circumstances the appellant’s plea was not an unequivocal plea of guilty to a proper charge under s. 67 (1) (b) of the Ordinance. The appellant’s plea was recorded as follows:

“I admit the charge. I have nothing to say”. The magistrate referred to this when sentencing the appellant saying

“Accused pleads guilty. He has been given every chance to change his plea but persists and has nothing to say in defence. He just says it happened.”

We are far from satisfied that the nature of the alleged offence was properly explained to the appellant. We think that when he said “It happened” he was referring to the seizure of the engine and we doubt that he ever intended to admit responsibility for that seizure. Even if the facts as stated by the prosecutor be accepted they are insufficient to establish an offence on the part of the appellant under s. 67 (1) (b). They did not contain any allegation that the appellant was provided with oil for the tractor or that the tractor’s engine could not have been started up when there was no oil in the sump without the appellant’s knowledge or consent, nor do we think that the fact that the sump was found to contain pieces of metal after it left the servicing garage necessarily indicates that the sump had contained such pieces of metal before the tractor was brought to the garage for servicing. It seems unlikely that the tractor should not have seized before it reached the garage if that had been the case. In any case the sentence is completely ultra vires. There is no provision for the imposition of imprisonment without a fine in respect of an offence under s. 67 (1) (b) of the Ordinance. We think that the proceedings were quite unsatisfactory.

Appeal allowed. Conviction quashed and sentence set aside.

The appellant did not appear and was not represented.

For the respondent:

GP Nazareth (Crown Counsel, Kenya)

The Attorney-General, Kenya

[1959] 1 EA 986 (SCK)

Division: HM Supreme Court of Kenya at Nairobi
Date of Judgment: 6 October 1959
Case Number: 515/1959.
Before: Rudd Ag CJ and Mayers J
Sourced by: LawAfrica

[1] Criminal law – Evidence – Confession – Admission of charges to police officers while in custody – Allegation by accused that confessions obtained by force – No inquiry by trial magistrate whether confessions made voluntarily – Whether confessions admissible – Whether safe to convict upon retracted confession in absence of corroboration – Indian Evidence Act, 1872, s. 25.

Editor's Summary

The appellant appealed against convictions for housebreaking and larceny. On May 18, 1959, the appellant having been informed that the police were looking for him went to a police station, where, on the instructions of a police sergeant, he was arrested and later that day taken before a chief inspector of police. On being charged with the two offences and cautioned, he made a wholly exculpatory statement, and was then returned to the cells. The following day the appellant was interviewed by an assistant inspector of police who, according to his own testimony, asked the appellant if he had broken into the house concerned which the appellant admitted. Subsequently, on the same day, the appellant upon being again charged with larceny and cautioned, made a wholly incriminatory statement to the chief inspector. In his evidence at the hearing, the appellant alleged that both the sergeant and the assistant inspector had beaten him with a view to extracting a confession.

Held –

- (i) the magistrate did not appear to have applied his mind at all to the fact that the confession to the assistant inspector was made in answer to questions at a time when the appellant was in custody and had not been cautioned; nor did he appear to have considered whether the alleged confessions to either the sergeant or the assistant inspector were voluntary.
- (ii) the magistrate should have asked the appellant whether he admitted the statement which, it was alleged he had made, was made voluntarily, and if he had denied that it was made voluntarily, the magistrate should have proceeded to hold a trial within a trial for the purpose of determining its voluntary nature or otherwise.
- (iii) the confession to the assistant inspector ought to be rejected as the burden of proving that a confession which is denied was made voluntarily rests upon the Crown.
- (iv) the failure to consider whether the confession made to the chief inspector was or was not voluntary entails a failure to consider a vital part of the appellant's case, as he had cross-examined the chief inspector with a view to establishing that the confession to him had been forced; therefore, this confession too was inadmissible.
- (v) it is wholly wrong to act upon a retracted confession in the absence of corroboration if that

confession is not regarded by the court as accurate in every respect.
Appeal allowed. Conviction quashed.

Case referred to in judgment

(1) *R. v. Bass*, [1953] 1 All E.R. 1064; 37 Cr. App. R. 51.

Judgment

Rudd Ag CJ: read the following judgment of the court: This appellant having appealed against his convictions and sentences upon charges of housebreaking and larceny, we allowed the appeal and intimated that our reasons would subsequently be given.

The material facts are that on May 5, 1959, a safe containing money was stolen from a house occupied by two priests attached to St. Francis Xavier's Church, Westlands. Later that day the safe was found by a policeman, broken open, in a field near to Eastleigh Air Station. On May 18 the appellant, a former employee of the priests already referred to, having been informed that the police were looking for him, went to Parklands Police Station. Thereupon, on the instructions of a police sergeant, he was arrested and later that day was taken before a police chief inspector. The appellant was then charged with housebreaking and larceny and upon being cautioned made a wholly exculpatory statement. He was then returned to the cells. On the following day, however, he was asked by a police sergeant "about the safe" and, again to quote, was asked "Take us to the place where you broke open the safe." There is no evidence of any caution having been administered to him by this sergeant. Subsequently the appellant was interviewed by an assistant inspector of police who, according to his own testimony, asked the appellant if he had broken into the priests' house and upon the appellant admitting that he had done so asked him to take the police to the place where he had broken open the safe, to which the appellant agreed. Subsequently, on the same day, the appellant either took the police as alleged by the Crown witnesses, or was taken by them as the appellant maintains, to the spot where the safe had been found. On their return from this expedition the appellant was again placed in the cells and some two hours later was taken before the chief inspector of police already referred to—as the assistant inspector alleges at his own request—and upon being again charged with larceny and cautioned, made a wholly incriminatory statement to the chief inspector.

By virtue of the provisions of s. 25 of the Indian Evidence Act, no confession made to a police officer below the rank of assistant inspector, is admissible in evidence. In this context "confession" means not merely a formal confession of guilt taken down in writing and signed by the accused but any

"admission or confession of his guilt or of any fact which may tend to the proof of it to any person other than a judge or magistrate seized of the charge against him"

vide Archbold (33rd Edn.), p. 407. Clearly therefore nothing which passed between the sergeant and the appellant could properly be received in evidence.

No objection can be taken upon this ground to the alleged confession to the assistant inspector of police. It is, however, a contravention of the Judges' Rules for any person when in custody to be questioned by a police officer unless he has been cautioned. The rule clearly requires a caution to be administered immediately before the accused is questioned and does not authorise the questioning of the accused by one officer merely because the accused had upon some previous occasion (in this case the day before) been cautioned by some other officer. Here there is no evidence that the accused was cautioned by the assistant inspector before he was questioned by him. A breach of the Judges' Rules does not in itself render a statement by an accused person inadmissible in evidence. Where, however, there has been such a breach it is open to the court to decline to allow the confession to be tendered in evidence. In *R. v. Bass* (1), 37 Cr. App. R. 51, where a prisoner had been questioned by the police without having been previously cautioned and the judge admitted the confession, wrongly taking the view that the prisoner

was not in custody at the time and therefore that there had been no contravention of the Judges' Rules the Court of Criminal Appeal quashed the conviction

in view of the fact that the judge had not exercised his discretion on the question whether he would admit the confession or not and had failed to direct the jury that they ought to disregard the confession unless they were satisfied that it was made voluntarily. In the instant case the magistrate does not appear to have applied his mind at all to the fact that the confession to the assistant inspector was made in answer to questions at a time when the appellant was in custody and had not been cautioned; nor does he appear to have considered whether the alleged confessions to either the sergeant or the assistant inspector were voluntary. As it had been suggested to the sergeant, who gave evidence before the assistant inspector, that he had threatened the appellant and beaten the appellant with a view to extracting a confession the court was clearly put on its inquiry as to whether or no any other alleged confessions might not, according to the appellant at least, have been extorted by fear or force. Consequently, before allowing any such confession to be tendered in evidence, or evidence of any oral confession to be given, the court should have asked the appellant whether he admitted that the statement which he was alleged to have made to a police officer was made voluntarily and if the accused had denied that it was made voluntarily, should have proceeded to hold a trial within a trial for the purpose of determining its voluntary nature or otherwise. That had the appellant been asked whether the statement made by him to the assistant inspector of police was admitted by him to have been made voluntarily the answer would have been in the negative, is clear, alike from the fact that the appellant cross-examined the assistant inspector as to whether or no he had beaten the appellant, and when he was called upon for his defence, specifically alleged that he had been beaten. The alleged confession to the assistant inspector of police must also, therefore, be rejected as the burden of proving that a confession which is denied was made voluntarily, rests upon the Crown.

Allegations having been made that the accused was beaten and was threatened subsequent to his having been taken into custody and before he was taken before the chief inspector on the 19th, the court was clearly put on its inquiry as to whether although there was no suggestion that the chief inspector had himself either threatened or beaten the accused, the alleged confession to him might not have been consequent upon the appellant having been previously threatened and beaten. This aspect of the matter, however, appears to have received no attention at all from the magistrate. The failure to consider whether the confession made to the chief inspector was or was not voluntary entails a failure to consider a vital part of the appellant's case as he cross-examined the chief inspector with a view to establishing that the confession to him had, in fact, been forced. It seems to us, therefore, that this confession too is inadmissible in evidence. Moreover, the magistrate appears to have had grave suspicion as to the credibility of the evidence of the police sergeant, the assistant inspector and the chief inspector alike inasmuch as he says of the first two

"This evidence is, in my opinion, not too reliable, and witness appears to have allowed his over-zeal to outrun his veracity"

and, of the statement recorded by the chief inspector:

"This statement strikes me as being too 'slick' and bearing the imprint of the author's 'ghost' to be entirely convincing, and in my opinion it would not be safe to place too much reliance on it."

It has been laid down that it is unsafe to act upon a retracted confession in the absence of corroboration. The magistrate does not appear to have directed himself in these terms at all and it certainly would be wholly wrong to act upon a retracted confession in the absence of corroboration if that confession is not regarded as accurate in every respect.

The factors which seemed to the magistrate to justify the conviction of the appellant would appear from his judgment to have been threefold:

- (1) That the thief must have been someone who was familiar with the habits of the priests' household and knew at what times they would be out. (The appellant undoubtedly fell within this category of persons, so however, do other former or present employees of the priests and there was before the magistrate evidence that immediately after the larceny there were four such employees).
- (2) That the appellant despite having been out of work for over a month bought a new bicycle on the day of the theft. (The purchase price of this bicycle may have come from money stolen from the priests but even if it could properly be assumed that it came from some illicit source it by no means follows that that source was the priests' safe.)
- (3) Finally that the safe was found at a spot which the magistrate describes as "not too far" from the accused's place of residence at Eastleigh.

The finding of any stolen article cannot be regarded as casting suspicion upon everyone who lives in the vicinity of the place where that article was found.

For these reasons we have no hesitation in coming to the conclusion that the evidence before the court was wholly insufficient to warrant the conviction of the appellant.

Appeal allowed. Conviction quashed.

The appellant did not appear and was not represented.

For the respondent:

DD Charters (Crown Counsel, Kenya)

The Attorney-General, Kenya

Angela Gomes v Indravati Melaram Punjabi
[1959] 1 EA 990 (HCZ)

Division:	HM High Court for Zanzibar at Zanzibar
Date of judgment:	3 October 1959
Case Number:	10/1958
Before:	Horsfall J
Sourced by:	LawAfrica

[1] *Rent restriction – Standard rent – Substantial reconstruction of premises – Application for assessment of standard rent – Change of character and identity of dwelling house by alterations – Whether house “substantially reconstructed” – Rent Restriction Decree, 1953, s. 4 (1) (a) and (b) (Z.).*

Editor's Summary

The respondent who had carried out alterations and repairs to a house to the value of Shs. 28,000/-, applied to the Rent Restriction Board for assessment of the standard rent. The board held that the works carried out amounted to "substantial reconstruction" and assessed the standard rent at Shs. 4,990/- per annum. On appeal against the assessment it was contended *inter alia* that the works carried out amounted to no more than "improvements and structural alterations"; that the board should have assessed the rent according to the formula laid down in s. 4 (1) (a) of the Rent Restriction Decree, 1953; and that the board, in taking into account the value of the original building when fixing the standard rent under s. 4 (1) (b) had erred. It was further contended that the board had failed to direct itself on the true meaning of "substantial reconstruction".

Held –

- (i) the board had directed its mind to the true meaning of "substantial reconstruction" and there was adequate evidence to show that the house was substantially reconstructed.
- (ii) the board was right to take into account the value of the original building in fixing the standard rent under s. 4 (1) (b) of the Rent Restriction Decree.

Appeal dismissed.

Cases referred to in judgment

- (1) *Solle v. Butcher*, [1950] 1 K.B. 671; [1949] 2 All E.R. 1107.
- (2) *Wakf Commissioners v. African Mercantile Co. Ltd. and Others*, Zanzibar Rent Restriction Application, No. 116 of 1955 (unreported).
- (3) *Mitchell v. Barnes*, [1950] 1 K.B. 448; [1949] 2 All E.R. 719.
- (4) *Maulvi Muhammad Abdul Majid v. Muhammad Abdul Aziz* (1896), 24 I.A. 22.

Judgment

Horsfall J: This is an appeal by a tenant from two orders of the Zanzibar Rent Restriction Board dated October 1, 1958.

2. The first grounds of appeal allege that the board erred to fix the standard rent of the premises at Shs. 4,990/- per annum, and that the reasoning adopted in fixing the rent was not proper and the standard rent was not fixed according to s. 4 (1) of the Rent Restriction Decree, 1953 (No. 15 of 1953).

3. It is not disputed that works have been carried out on the premises by Mawji Nathoo, a building contractor, on behalf of the landlord-respondent in accordance with the plans marked exhibits B. and A. by the board and that exhibit C. is the contract for the works in question for which Mawji Nathoo was to receive Shs. 28,000/- of which Shs. 21,000/- has been paid to him. Mawji Nathoo also did certain additional works to the value of Shs. 2,000/- which are not shown on the plans nor is the evidence on that record before the

board clear as to what these additional works comprised. For the purposes of this appeal I accept the works to the value of Shs. 28,000/- were carried out on the premises and that particulars of such works are shown in the plans exhibit B. and exhibit A. It is not clear on the board's record how the particulars of works to be carried out according to the contract (exhibit C.) correspond to the works shown on the plans (exhibits B. and A.) since there is no internal evidence connecting exhibit C. with either plan exhibit B. or A.; but the point is not important in view of the board's finding in their ruling that it is not disputed that works have been carried out in accordance with exhibits A. and B.

4. Counsel for the tenant appellant alleges that the board in its ruling is wrong in holding that these works amount to "substantial reconstruction" and in assessing the standard rent according to the formula laid down in s. 4 (1) (b). He says that the works amount to no more than "improvements and structural alterations" and that the board should have assessed the standard rent according to the formula laid down in s. 4 (1) (a). The relevant portion of the board's ruling is as follows:

"There is no doubt in our minds that the works carried out amount to substantial reconstruction. One has only to peruse the plans and refer to the evidence of Mr. Sachania, an architect, to be convinced of this. We have, moreover, visited the premises and there is no doubt whatsoever in our minds that the works carried out amount to reconstruction".

5. It would have been convenient if the board had listed in its ruling what these works were, but in view of the above finding this Appeal Court considers that it is permissible for it to refer to the plans exhibits A. and B. and to the evidence of Mr. Sachania and to discover for itself the list of works on which the board relied.

Mr. Sachania stated:

"I visited the premises during October, 1957. The construction at that time was practically completed . . . In my opinion the premises have been reconstructed. Exhibit A. was prepared and approved after 75 per cent of the reconstruction work was completed. It shows only new door, and windows, new staircase, replaster to walls cement and floors, new bath and w.c. on ground and first floors and a completely new room on the second floor with a new staircase. Exhibit B. is the plan originally approved. It shows on the ground floor certain new doors and windows to be installed, new bath and w.c. (main drain) on the ground and first floor, new roof, and heightening of the walls over a room. In exhibit A. one of the walls of the second floor was completely demolished and rebuilt. Original masonry staircase from ground to first was demolished and rebuilt in R.C.C. with new balcony. The original wooden staircase leading from the first to the second floor was replaced by a new wooden staircase. The house has completely changed its character . . . I did not see the suit premises before reconstruction".

Criticism was made that Mr. Sachania's evidence was materially weakened by his failure to see the suit premises before reconstruction, but as he is an architect and expert witness I don't think it made any material difference to the value of his evidence.

6. Counsel do not dispute the legal meaning to be attached to the words "substantially reconstructed". Counsels agree that the meaning to be ascribed to that phrase in Zanzibar is the same as that ascribed to the slightly different phrase "substantial structural alteration" in England. Bucknill, L.J., stated in *Solle v. Butcher* (1), [1950] 1 K.B. 671 at p. 680.

“On the first issue, whether this was the same building after these alterations had been made, I find a statement in Meggery on the Rent Acts (4th Edn.) at pp. 27–38 which appears to me to sum up correctly the various decisions on the point. The author refers to the general principle that, ‘if a house within the Acts is subjected to such substantial structural alteration that it becomes a new and separate dwelling house in fact by reason of change of identity, the new premises shed all the attributes of the old’.”

Counsel for the tenant appellant has contended that the board has failed to direct itself on the true meaning of “substantially reconstructed” since nowhere in its ruling is there any reference to the essential requirement of a change of identity and also that the evidence as accepted by the board does not prove that the new works did in fact effect such change of identity.

7. The board did not have the advantage, which I have had, of the citation of a number of English cases under the Rent Acts illustrating what works have and what works have not been deemed to have effected a change of identity in a building. It is also true that nowhere in their ruling do they define what they mean by “substantial reconstruction”. Yet there is an oblique reference to “loss of identity” since the board in another connection referred to the reasoning adopted by them in *Wakf Commissioners v. African Mercantile Co. Ltd. and Others* (2), Zanzibar, High Court, Rent Restriction Application No. 116 of 1955 (unreported. This Appeal Court has had that ruling placed before it in connection with another ground of this appeal. The oblique reference occurs when the board refers to the arguments of Mr. Karai that

“the old building having lost its identity by reconstruction the value of any portion of the old premises utilised in the reconstruction could not be considered.”

Mr. Talati for the landlord-respondent has referred me to para. 3 of the annexure of the application to the board to fix the standard rent and to paras. 2, 4 and 5 of the defence from which it is apparent that the issue in dispute was whether the landlord had completely reconstructed and rebuilt the whole house or whether he had effected only minor alterations and repairs to the building. I am satisfied that the board did direct its mind to the true question of “structural alteration” and “substantial reconstruction” and in respect of this last approached it in the light of its meaning as established in the leading cases.

As regards the second criticism that the house was not in fact “substantially reconstructed” I refer to the duties of an Appeal Court as stated by Hodson, J. (as he then was) in *Mitchell v. Barnes* (3), [1950] 1 K.B. 448 at p. 451;

“It has been argued here that the country court judge was wrong in coming to the conclusion that the two flats concerned in this case had not been substantially changed in identity by virtue of the reconstruction which admittedly took place. It has been said that this court has in a number of cases treated that question, which has often arisen, as one of law. I think it clear from the authorities to which our attention has been drawn that that is not so, and that the Court of Appeal has consistently treated the question of reconstruction which is said to change the identity of a house as one of fact. It is only where the court has come to the conclusion that there was really no evidence on which the county court judge could come to the conclusion at which he arrived, or had misdirected himself, that this court has interfered.”

Mr. Talati also referred me to the following passage in Meggery on the Rent Acts (7th Edn.) p. 104:

“In determining whether alterations amount to reconstruction the two main points are the nature of the alterations, and the cost; and of these, the first is the more important.”

In this instant case the board did visit the premises, it had the plans exhibits B. and A. before it, it accepted the evidence of Mr. Sachania and Mawji Nathoo. I cannot say that there was no evidence on which they could find that the works were substantial reconstruction. I think that there was adequate evidence that the premises were substantially reconstructed. The appeal is dismissed on the first ground.

8. Counsel argued as his second ground of appeal that the board erred in taking into account the value of the original building in fixing the standard rent under s. 4 (1) (b). He argued that the words in the sub-section:

“ten per centum of the market cost of construction at the date of completing such construction”

means the cost of the new work only. Express words would require to be added to include the price of the old work. In this connection I was referred to the previous ruling of the board in *Wakf Commissioners v. African Mercantile Co. Ltd. and Others* (2). I agree with the logic of the board that the words “at date of completing such construction” imply that reconstructed premises must be looked at as a whole when arriving at the market cost of construction at the relevant date. It appears to me that a “market cost” can only be gauged by what an average willing contractor and owner would be prepared to pay for the construction works and it is reasonable to suppose that they would include in that cost the value of old materials, which were serviceable and were so utilized. I am also attracted by Mr. Talati’s observation that when a house loses its identity owing to substantial reconstruction you should take into account the value of the old materials. The second ground of appeal fails.

9. The third ground of appeal argued was that the board erred in making the second order requiring the appellant to pay arrears of rent from October 1, 1957, to September 30, 1958, inclusive, amounting to Shs. 4989/96, since the advocates had consented only for fixation of rent and not for payment; and secondly the application was not completely heard and decided—as the appellant had not yet closed her case. It is true that the tenant-appellant had a counterclaim unheard. Case of *Maulvi Muhammad Abdul Majid v. Muhammad Abdul Aziz* (4), (1896) 24 I.A. 22 is authority for inherent power in the board to decide this counterclaim after disposing of the issue relating to the fixation of standard rent. I agree with Mr. Talati that the order for payment of arrears of standard rent was consequential on the order fixing the standard rent. I agree with the reasoning of the board as shown in the record when they made the order on October 1, 1958. The third ground of appeal fails.

10. The last ground of appeal argued was that the board erred in fixing October 1, 1957, as the date from which standard rent should take effect, since the completion certificate in regard to the suit premises was granted on January 30, 1958. The prayer to the application to the board was amended to read that the standard rent should commence from February 20, 1958. The board gave no reason to explain why they fixed October 1, 1957, as the date for the commencement of the standard rent, but one may perhaps assume that it was because the tenant-appellant had gone into residence in September, 1957. I think it right to amend this date and to direct that the standard rent shall begin to run as from February 22, 1958.

11. The appeal is dismissed with costs. Both orders of the board are amended to show that standard rent at Shs. 4,990/- shall take effect as from February 22, 1958, and that arrears of standard rent shall begin to run also from that date.

Appeal dismissed.

For the appellant:

DF Karai

DK Karai, Zanzibar

For the respondent:

KS Talati

Wiggins and Stephens, Zanzibar

CT Patel and others v Barclays Bank DCO
[1959] 1 EA 994 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	25 November 1959
Case Number:	7/1959
Before:	Sir Audley Mckisack CJ
Sourced by:	LawAfrica

[1] *Costs – Instruction fee – Whether taxing officer has discretion to allow sum lower than scale fee – Advocates’ (Remuneration and Taxation of Costs) Rules, 1959, Schedule VI, Proviso (1) (U.).*

Editor’s Summary

An advocate who had acted for three defendants claimed in his bill of costs the sums of Shs. 7,500/-, Shs. 5,000/- and Shs. 5,000/- respectively as instructions fees. The taxing officer disallowed separate instructions fees in respect of two defendants as the issues involved were identical and assessed the fee at Shs. 3,000/-, and allowed Shs. 200/- in respect of the third defendant as the advocate’s instructions had been merely to set aside an *ex parte* judgment since that defendant had not been served. On appeal from the taxing officer’s order it was contended that the scale fee prescribed for instructions to sue or defend in Schedule VI to the Advocates’ (Remuneration and Taxation of Costs) Rules 1959, was Shs. 5,000/- at the least as the subject matter exceeded Shs. 200,000/- and the substantial point was whether the first proviso to the Schedule (which appears in full in the judgment) conferred on the taxing officer a power to allow a sum lower than the scale fee or merely empowered him to increase the scale fee.

Held –

- (i) there is nothing to fetter the taxing officer’s discretion conferred by the proviso, save that the matters he takes into consideration must be “relevant”;
- (ii) if it was intended that the discretion should only be exercisable for the purpose of increasing the specified amounts in the Schedule, this would surely have been stated in terms; there was nothing in the body of the rules that necessitated any construction of this proviso otherwise than as a discretion to vary such fees in either direction.

Order of the taxing officer varied on another point.

Cases referred to in judgment

(1) *Redstone Quarries Ltd. v. Shantilal K. Shah*, Uganda High Court Civil Case No. 296 of 1958 (unreported).

(2) *N. R. Patel v. The Trustee of the Property of B. N. Patel*, [1957] E.A. 366 (C.A.).

Judgment

Sir Audley McKisack CJ: This is an appeal against a decision of the deputy registrar, as taxing officer, concerning the instructions fee in respect of three of the eight defendants in the suit. Mr. M. L. Patel, who was the advocate for defendants nos. 3, 4 and 5, claimed the sums of Shs. 7,500/-, Shs. 5,000/- and Shs. 5,000/-, respectively, for the instructions fees in respect of those three defendants. The taxing officer disallowed separate instructions fees in respect of defendants nos. 3 and 4, and assessed the fee at Shs. 3,000/-. In respect of defendant no. 5, he allowed Shs. 200/-.

I cannot detect any error of principle in the taxing officer's decision that separate instructions fees should not be allowed in relation to defendants

nos. 3 and 4. He has duly dealt with this question in his taxing order and, as he has pointed out, the same advocate was acting for both those parties and the same issues were involved. In fact the written statement of defence filed by each of those defendants was practically identical. The suit was upon two guarantees, both of which affected defendant no. 3, and one only of which affected defendant no. 4, but the substantial identity of the two written statements of defence shows that, for all practical purposes, the same issues were involved.

The reasons of the taxing officer for allowing only Shs. 200/- in respect of defendant no. 5 were that Mr. Patel's instructions were merely to set aside an *ex parte* judgment, that defendant not having been duly served.

Mr. Patel contends that the taxing officer erred in allowing so low an amount as Shs. 3,000/- (in respect of defendants nos. 3 and 4), whereas the scale fee prescribed for instructions to sue or defend in Schedule VI to the Advocates' (Remuneration and Taxation of Costs) Rules, 1959, is Shs. 5,000/- where the value of the subject matter in the suit exceeds Shs. 200,000/-. The amount claimed by the plaintiff was, as against five of the eight defendants, Shs. 303,452/12 and, as against six of them, the further sum of Shs. 376,749/38. Mr. Patel contends that the taxing officer has no power to allow an instructions fee at an amount less than that prescribed in the scale, and consequently, in this case, he should have allowed it at Shs. 5,000/- at the least. It has been decided by Bennett J., on a reference by the deputy registrar in another case, *Redstone Quarries Ltd. v. Shantilal K. Shah* (1), Uganda High Court Civil Case No. 296 of 1958, (unreported) that all the fees prescribed under part (1) of Schedule VI for instructions to sue or defend are subject to the proviso (which is divided into five paragraphs) that appears at the end of that part of the Schedule. But Mr. Patel now raises the question whether the first of those provisos confers on the taxing officer a power to allow a sum lower than the scale fee, or merely empowers him to increase the scale fee. He contends that the power is to increase only and not to reduce. The proviso is in the following terms:

"Provided that—

- "(i) the taxing officer may at his discretion take into consideration the other fees and allowances (if any) to the advocate in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings, and all the other relevant circumstances;"

I do not agree with Mr. Patel's contention. It seems to me that there is nothing to fetter the taxing officer's discretion conferred by the proviso, save that the matters he takes into consideration must, of course, be "relevant". If it was intended that the discretion should only be exercisable for the purpose of increasing the specified amounts, this would surely have been stated in terms. It is true that certain of the items under part (1) of the Schedule are expressed to be "not less than" a specified amount. It may be that, because of those words, the taxing officer has no power to allow a sum that is less than the specified amount in respect of those particular items. But it is not necessary for me to decide that question, since the fee with which I am concerned is not one of those expressed as "not less than" a specified amount. It is a specified amount without qualifications save, of course, that it is subject to the qualification in the proviso now under consideration. Nor do I think that there is anything in the body of the rules (to which this and other schedules are appended) that necessitates any construction of this proviso otherwise than as discretion to vary such fees in either direction. Mr. Patel relies on r. 4, which is as follows:

- "4. No advocate shall accept or agree to accept remuneration at less than that provided by these Rules except where the remuneration assessed

under these Rules would exceed the sum of Shs. 5,000/- and in such event the agreed fee shall not be less than Shs. 5,000/-.”

But I see nothing inconsistent between that rule and a power in the taxing officer to reduce the amount specified in Schedule VI (1). The remuneration “provided by these rules” is one which, in certain cases, includes a discretion conferred on the taxing officer. If the taxing officer, exercising that discretion, allows an amount lower than the scale fee, and the advocate accepts or agrees to accept the amount so allowed, he is accepting or agreeing to accept the remuneration provided by the rules and is in no way contravening them.

A further contention is that in this case the taxing officer erred in principle in taking into account that the same advocate appeared for all the three defendants in question. Mr. Patel referred me to *N. R. Patel v. The Trustee of the Property of B. N. Patel* (2), [1957] E.A. 366 (C.A.), where it was held that the taxing officer erred in principle in taking into consideration that counsel who had appeared for the respondent in the Supreme Court had also appeared on the appeal to the Eastern Africa Court of Appeal. But that case does not seem to me to be on all fours with the present one where one advocate has appeared in the court of first instance for several defendants and the issues were substantially the same.

There is, however, one matter where the taxing officer has fallen into error. He states at the beginning of his taxation order that the amount involved in the suit was Shs. 376,748/38. But in fact the amount involved was, as respects six of the defendants including no. 3 but not nos. 4 and 5, more than double that amount, viz., Shs. 680,201/50. I think I must take account of this error, since the amount involved in the suit is one of the guiding factors for a taxing officer’s decision. This is clear, firstly, from the fact that the prescribed instructions fee is graduated according to the value of the subject matter of the suit and, secondly, because in the proviso giving the taxing officer a discretion, which I have already discussed, the amount involved again appears as one of the circumstances which the taxing officer may take into consideration. If he had appreciated that the amount involved was over Shs. 600,000/- then I do not think he would have allowed so low a fee as Shs. 3,000/- seeing that the scale fee is Shs. 5,000/- for a subject matter exceeding Shs. 200,000/- in value. That he did take into account the amount involved (or which he believed to be involved) is clear from that sentence in his order which reads:

“Taking the complexity of law and fact involved together with the money issue at stake, I regard Shs. 3,000/- as an adequate instruction fee to cover both items 4 and 5”

(i.e., the instructions in respect of defendants Nos. 3 and 4). I accordingly vary the taxing officer’s decision and increase the fee of Shs. 3,000/- to Shs. 5,000/-. The bill of costs must be taxed accordingly. The fee of Shs. 200/- in respect of defendant No. 5 does not call for alteration, since the amount involved in his case was correctly stated by the taxing officer.

Order of the taxing officer varied on another point.

For the appellant:

ML Patel

Manubhai Patel & Son, Kampala

For the respondent:

TFJ Troughton

Hunter & Greig, Kampala

Re G L Binaisa
[1959] 1 EA 997 (HCU)

Division: H.M. High Court of Uganda at Kampala
Date of judgment: 30 October 1959
Case Number: 88/1959
Before: Sir Audley McKisack CJ
Sourced by: LawAfrica

[1] Habeas Corpus – Deportation – Applicant arrested and held in custody pending inquiry into question of deportation – Whether any time limit for inquiry – Whether applicant can be held in custody pending inquiry – Deportation Ordinance, 1956, s. 3, s. 4, s. 7, s. 14 (U.).

Editor’s Summary

B., an advocate practising in Uganda, was arrested upon a warrant reciting that he was a person against whom proceedings under the Deportation Ordinance were pending and was remanded in custody. B. was also served with a notice stating the grounds on which it was sought to deport him and requiring him to show cause before a judge some twenty-seven days later. An application was then made on behalf of B. for a writ of habeas corpus at the hearing of which it was contended that s. 7 of the Deportation Ordinance only authorised detention for a reasonable time and that twenty-seven days is unreasonably long.

Held –

- (i) s. 7 (2) of the Deportation Ordinance authorises the detention of a person arrested with a view to deportation pending an inquiry under s. 3 and no time limit for the inquiry is provided for.
- (ii) although s. 4 of the Ordinance only provides for the “arrest” of a person against whom proceedings are to be taken, if s. 4 and s. 7 are read together the only reasonable interpretation is that a proposed deportee can be held in custody pending the inquiry.

Application dismissed.

No Cases referred to in judgment in judgment

Judgment

Sir Audley McKisack CJ: This is an application for a writ of Habeas Corpus to issue to the superintendent of the prison at Luzira, where Mr. G. L. Binaisa, an advocate practising in Uganda, is held in custody.

On October 7, 1959, the applicant was arrested upon a warrant reciting that he was

“a person against whom proceedings under the Deportation Ordinance are about to be taken”.

The warrant was issued by a magistrate of the District Court of Mengo and directed that the applicant be arrested and produced before the magistrate as soon as possible. At the time of the arrest a notice was served on the applicant specifying the grounds on which it was proposed that an order of deportation should be made, and requiring him to show cause before a judge on November 3, 1959, why such order should not be made. The applicant was arrested and brought before the magistrate on October 7, and the magistrate then signed a warrant addressed to the superintendent of the prison at Luzira reciting that the applicant had been remanded until November 3, and authorising the superintendent to receive the applicant into his custody and produce him before the High Court on that date. On October 8, the Governor of Uganda issued

an order in writing to the officer in charge of the prison at Luzira requiring him to hold the applicant in custody “pending further orders”. The applicant is still held in custody in that prison, and for the purpose of the present proceedings the superintendent has filed an affidavit stating that the applicant is detained in his custody by virtue of the warrant and order above-mentioned. The relevant provisions of the Deportation Ordinance (Cap. 46, as amended by Deportation (Amendment) Ordinance, 1956) are as follows:

- “3. No order of deportation shall be made under the provisions of s. 2 of this Ordinance unless a judge has, in accordance with the provisions of s. 4, s. 5 and s. 6 of this Ordinance, held an inquiry and furnished a report on the proposed deportation.
- “4. (1) Prior to the holding of an inquiry under the provisions of s. 3 of this Ordinance, notice in writing, signed by the chief secretary, shall be served upon the proposed deportee specifying the grounds upon which it is proposed that an order of deportation under the provisions of this Ordinance should be made against him, and requiring him to show cause, before a judge, at a place and time to be appointed in such notice, why such order should not be made against him.
(2) In any case where proceedings under this Ordinance are about to be taken, and upon application in that behalf made on oath, a magistrate of the first class shall issue a warrant for the arrest of the proposed deportee, and if the notice for which provision is made by sub-s. (1) of this section has not already been served upon the proposed deportee, it shall be so served within twenty-four hours after the execution of such warrant.
- “7. (1) On the conclusion of an inquiry held under the provisions of this Ordinance, pending the decision of the Governor, the proposed deportee shall continue, unless the judge otherwise orders, to be held in custody for a period not exceeding twenty-eight days and such custody shall be lawful custody.
(2) Any person held in custody pending the making of a deportation order against him either before or after an inquiry under the Ordinance, may be detained in police or prison custody and shall be treated as an unconvicted prisoner.
- “14. Where, under this Ordinance, a person is to be deported, he shall by warrant of the Governor, under his hand and seal, be detained if necessary, in custody or in prison, until a fit opportunity for his deportation occurs.”

There is no express provision in s. 4, or elsewhere in the Ordinance, saying what is to be done with the proposed deportee after he has been arrested. Mr. Lubowa, however, who appeared for the applicant, does not contend that there is no power to detain in custody a proposed deportee who has been arrested under the provisions of s. 4, but he relies upon sub-s. (2) of s. 7, which, he says, must be construed as authorising detention for a reasonable period only. He maintains that it is for the court to say what is a reasonable period, and asks the court to say that the period of twenty-seven days between the arrest of the applicant and the date of the inquiry before a judge is unreasonably long. I am quite unable to agree with that interpretation of the Ordinance. What sub-s. (2) of s. 7 does is to describe the nature of the custody in which a person may be held and the manner in which he is to be treated while in custody. The period of his detention is not for determination by the court but is limited by the Ordinance itself; that is to say, he may be detained for the period between arrest and the holding of the inquiry and for a period of twenty-eight days after the conclusion of the inquiry. That is clear from s. 4 (2) and s. 7. Whether any

further detention is lawful by virtue of a Governor's warrant under s. 14 is not a question with which I need deal for the purpose of the present proceedings.

It is true that the Ordinance does not fix a limit for the period which may elapse between the arrest of a proposed deportee and the holding of the inquiry before a judge. Presumably the legislature considered such limitation unnecessary and it may be that their reason was that the date of the inquiry could hardly be fixed without reference to the High Court, and the High Court would presumably not countenance undue delay. Even if there were some provision in the Ordinance limiting the period to a "reasonable" period, I do not think I have any material before me on which I could say that twenty-seven days was unreasonable in the present case.

Although Mr. Lubowa did not raise the question, the Solicitor-General has, at my invitation, argued the question of the validity of the magistrate's warrant and of the Governor's order. The Deportation Ordinance is contained in the 1951 Revised Edition of the Laws of Uganda and consolidates four Ordinances enacted between 1908 and 1945. Those Ordinances made no provision for a judicial inquiry, which was introduced only by the amending Ordinance of 1956. Before that amendment the Governor's power to issue an order of deportation upon a person who conducted himself in the manner described in s. 2 (1) was limited only by the requirement, firstly, that the Governor should be satisfied by evidence on oath that the person in question was so conducting himself, and, secondly, that the Governor should consider deportation necessary for preventing a continuance or recurrence of such conduct. Since the enactment of the 1956 amending Ordinance, the requirement that the Governor be satisfied by evidence on oath has been deleted, and in its place is the requirement that an order of deportation shall not be made unless a judge has held an inquiry and furnished a report (see the new s. 3). The provision for arrest pending the inquiry was, of course, also introduced in 1956, and there was no equivalent provision before then. It is curious that the 1956 Ordinance did not say in terms that a warrant of arrest issued under s. 4 (2) was to be authority for the detention of the proposed deportee until the conclusion of the inquiry before a judge, or that it did not contain some express provision having the like effect. Section 4 stops short at providing for arrest. The Solicitor-General points out, however, that when s. 4 is read together with s. 7, the only reasonable interpretation is that the proposed deportee can be kept in custody pending the inquiry. Sub-section (1) of s. 7 speaks of the custody "continuing" after the conclusion of an inquiry, and this seems to assume that the proposed deportee can have been kept in custody before and during the inquiry. Sub-section (2) of that section, although its purpose is merely to describe the nature of the custody, expressly refers to custody "either before or after an inquiry". I agree with the Solicitor-General that an absurdity would result if one was to construe the Ordinance as providing for the mere arrest of the proposed deportee, and not for his detention after his arrest. I consider that, although the drafting of the amending Ordinance undoubtedly leaves a good deal to be desired, the legislature must, according to the accepted canons of statutory interpretation, be taken as having intended to provide for the proposed deportee to be held in custody, since his arrest would otherwise be meaningless. Further, I do not think there is any need for a magistrate to issue (as has been done in the present case) a "remand warrant", since it appears to me to follow from the construction I have placed upon the Ordinance that, once the magistrate has issued the warrant of arrest, the Ordinance itself provides for the proposed deportee to be kept in custody until the inquiry in the manner prescribed in s. 7 (2). But the warrant of arrest should, for that purpose, be appropriately worded and should not require the production of the arrest person before the magistrate. In view of what I have already said it

becomes unnecessary for me to consider the validity or effect of the order issued by the Governor on October 8.

Application dismissed.

For the applicant:

L Lubowa

Binaisa & Kazzora, Kampala

For the respondent:

B Slade, Q.C (Solicitor-General, Uganda)

The Attorney-General, Uganda

Sebastian R D’Souza and others v Charles Clemente Ferrao and others
[1959] 1 EA 1000 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	9 December 1959
Case Number:	57/1959
Before:	Sir Kenneth O’Connor P, Forbes V-P and Gould JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya—Templeton, J

[1] Discovery – Interrogatories – Action against many defendants – Failure to state which defendants required to answer interrogatories – Whether if all defendants answer all interrogatories costs likely to be saved – Whether procedure adopted reasonable – Discretion of judge – Civil Procedure (Revised) Rules, 1948, O. X, r. 1, r. 2 and r. 3 (K.).

Editor’s Summary

The applicants had applied to the Supreme Court for leave to administer interrogatories to the defendants who numbered twenty-nine. At the hearing of the application, counsel for the defendants objected that no note appeared at the foot of the proposed interrogatories stating which of the twenty-nine defendants were required to answer, as required by O. X, r. 1. The learned judge held that the provisions of O. X, r. 1, were mandatory and dismissed the application. On appeal, it was submitted that the heading of the draft interrogatories indicating that they were “for the examination of the above-named defendants” was a sufficient compliance with r. 1 and, as a matter of construction, meant that all must answer.

Held –

- (i) the requirement of O. X, r. 1, was quite unambiguous and there was no difficulty in complying with it;
- (ii) even though a judge takes the view that the proposed interrogatories would not save costs, he should allow them if he considers them necessary for disposing fairly of the suit;
- (iii) the concepts of necessity and reasonableness extend to the number of persons who are required to answer particular interrogatories as well as to the material sought to be included;
- (iv) the judge's view, that interrogation to such an extent was not necessary for disposing fairly of the suit, was fully justified.

Per curiam: "It is not necessary to decide here whether a fresh application could be made in the court below but it is clear that the judge has a discretion and that where a first set of proposed interrogatories has been disallowed it is competent to make an application for leave to deliver a new set".

Appeal dismissed.

Cases referred to in judgment

- (1) *Berkeley v. Standard Discount Co.* (1879), 13 Ch. D. 97.
- (2) *Wilson v. Church* (1878), 9 Ch. D. 552.
- (3) *Boake v. Stevenson*, [1895] 1 Ch. 358.

December 9. The following judgments were read by direction of the court:

Judgment

Gould JA: This is an appeal by leave of a judge of the Supreme Court from an order by a judge in chambers dismissing an application for leave to administer interrogatories. The application was made on behalf of the plaintiffs, of whom there are thirteen, against the defendants, twenty-nine in number, though the court was informed from the bar that one had died before the application was heard.

The plaint indicates that the dispute concerns the affairs of an association called the Goans Overseas Association and the plaintiffs, in para. 1, claim to be suing on behalf of themselves and all members of the association except the defendants. Though the action is brought against the defendants individually, twenty of them are stated to have been office bearers or committee members of the association up to the date of a general meeting held on December 1, 1957; after that meeting the plaint shows that their places had been taken by the other nine defendants. The offices of president and vice-president remained in the same individuals; the honorary general secretary prior to the meeting became a second vice-president, and one of the new members became secretary; the office of hon. treasurer remained vested in the same individual.

The claim is, in brief, for a declaration that the proceedings and elections at the meeting of December 1, 1957, were null and void by reason of the exclusion of certain of the plaintiffs from it, because non-members were permitted to be present and to vote thereat, and by reason of certain other alleged breaches of the rules of the association. These matters were put in issue by the defence. As to the proposed interrogatories themselves, the first fifteen relate to events prior to the meeting of December 1, 1957, and the next four events at that meeting; the last three appear to be completely irrelevant to the issues though that is a matter which has not been argued before this court.

Upon the hearing of the application in chambers counsel for the defendants took, apparently as a preliminary objection, the point that no note appeared at the foot of the proposed interrogatories stating which of them each of the defendants was required to answer. This he submitted was contrary to O. X, r. 1, of the Civil Procedure (Revised) Rules, 1948, which is as follows:

- “1. In any suit the plaintiff or defendant, by leave of the court, may deliver interrogatories in writing for the examination of the opposite parties, or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof stating which of such interrogatories each of such persons is required to answer:

Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose:

Provided also that interrogatories which do not relate to any matters in question in the suit shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness.”

The learned judge's notes of what then transpired are brief and, so far as relevant, they and the consequent order are set out below:

“Mota Singh–If parties refuse to answer it will mean putting them in cross-examination and costs might be increased.

“Malik–Provisions of rule mandatory–applicants should be dismissed instead of putting on my client the burden of preparing twenty-nine affidavits.

“Order:

“In my view the failure of applicant to state at the foot of the interrogatories which of the parties is required to answer each interrogation must put the defendants in an embarrassing position in view of the fact that there are twenty-nine defendants, and if each had to answer all the interrogatories there would be no saving of costs. The requirement under O. 10, r. 1, is mandatory.”

The learned judge dismissed the application.

I will deal first with the last sentence in the order above set out. I would agree that O. X, r. 1, imposes a mandatory requirement that interrogatories when delivered shall have a note at the foot thereof stating which of the interrogatories each person is required to answer. It is true however, as Mr. Khanna argued, that the submission of the proposed interrogatories to the court under r. 2 is not the delivery to the opposite party provided for in r. 1. To my mind the only result of this is that if, as here, the note is omitted from what I shall call “the draft” the matter is curable by amendment or by making the order giving approval subject to a specific note being endorsed upon the interrogatories when delivered. There should, however, be no necessity for any such procedure for the court must obviously be informed of the persons required to answer the various interrogatories in order to enable it to decide whether their delivery is necessary; it is therefore common practice (so far as my own experience extends) and one which should be adhered to, that the note is endorsed at the foot of the draft submitted for approval. There is no note in the record of any amendment having been applied for in this case and we were not informed from the bar that any had been. It seems inconceivable that counsel should in fact have insisted that he should be permitted to deliver interrogatories in conformity with his draft, without a note in conformity with r. 1, but if that was his attitude, the learned judge was quite justified in rejecting the application in limine on that ground. As is pointed out in a note in the Annual Practice (1958) at p. 683 (to which we were informed the learned judge referred) if the note is omitted the party interrogated is not in default if he fails to answer all or any of the interrogatories. Such a position would obviously result in futility and involve a waste of costs.

On this aspect of the matter Mr. Khanna submitted that the heading of the draft interrogatories indicating that they were “for the examination of the above-named defendants” was a sufficient compliance with r. 1 and, as a matter of construction, meant that all must answer. This submission is quite unacceptable. The heading is part of the form prescribed as Form 2, Appendix B. to the Civil Procedure (Revised) Rules, 1948, which also contains reference to the note to be made at the foot pursuant to r. 1. The requirement of that rule is quite unambiguous and there is no difficulty in complying with it.

As the details of what happened before the learned judge are obscure, I propose to accept what this court was informed from the bar was the attitude of counsel for the appellant in the court below and to examine the position upon that basis. Counsel’s then attitude, which was also adhered to by counsel before this court, was that he had, and insisted upon, a right to interrogate fully, all twenty-nine defendants. This, of course, is an overstatement. A plaintiff has a right to deliver the particular interrogatories in respect of which he has applied for and obtained the leave of the court. That leave is given in the discretion of

a judge and his discretion is to be guided by the two factors mentioned in O. X, r. 2, which are—whether they are necessary for disposing fairly of the suit, or for saving costs. First as to the saving of costs, the opinion of the learned judge that there would be no saving of costs if the order was made as asked is, in my opinion, to be supported. The advocate for the defendants would, upon the making of such an order, have had to go in detail through some seventy-three questions with each of twenty-three deponents in order to take instructions, and it matters nothing whether the result was to be embodied in twenty-nine affidavits or on one long composite affidavit. The costs of such a proceeding would be very substantial and Mr. Khanna's suggestion that little more than a number of filing fees would be involved is quite unacceptable. Mr. Mota Singh's suggestion in the court below was that the alternative was to put these questions in cross-examination; it is unlikely that the defendants would oblige him by calling all twenty-nine as witnesses, and there would be no great increase in costs involved by the additional cross-examination of those that were called. If, in the absence of interrogatories to the extent asked, the plaintiffs would themselves have had to call additional witness, this was not mentioned or urged by counsel and if a party relies upon saving of costs in support of his application for leave to deliver interrogatories I am of opinion that it is upon him to show the likelihood that costs would be saved. That is far from being the case here.

As I read r. 2, however, a judge, even though he takes the view that the proposed interrogatories would not save costs, should allow them if he considers them necessary for disposing fairly of the suit. The use of the words “either . . . or” in the rule make this clear, though the element of cost may also be one of the factors to be considered in deciding the question of fair disposal. There is of course, a special provision in r. 3 relating to the costs of interrogatories “exhibited unreasonably, vexatiously, or at improper length” but that arises upon ex post facto consideration of the matter and does not relieve the judge from his duty to consider all relevant factors when the application is made.

Interrogatories must be necessary and not unreasonable (See Halsbury's Laws of England, 3rd Edn., Vol. 12, p. 68). I am satisfied on the ordinary meaning of language that the concepts of necessity and reasonableness extend to the number of persons who are required to answer particular interrogatories as well as to the material sought to be included. No authority was quoted to this court on the particular point and the lack of it may indicate that counsel do not normally adopt an intransigent attitude in matters which are susceptible to and plainly call for discussion and negotiation. In the present case the defendants are the officers of an association, and the former and present members of the committee. The matters upon which interrogation is sought relate exclusively to the conduct of the association's affairs and membership. Many of them are particularly referable to the duties and office of secretary. Though fifteen out of the twenty-two interrogatories relate to matters prior to the meeting of December 1, 1957, it was proposed to interrogate the new committee members upon these as well as the former members.

If the association as such had been made the defendant in the section, instead of individual officers and committee members, the position would have been regulated by r. 5 under which an order can be applied for against any member or officer. As a rule the order is directed to the secretary as the appropriate person—*Berkeley v. Standard Discount Co.* (1) (1879), 13 Ch. D. 97 at 99; but it is open to the plaintiff to show that a particular member can give the information—see *Wilson v. Church* (2) (1878), 9 Ch. D. 552, where in the judgment of Jessel, M.R., at pp. 556–7, is the following:

“Then it is said, in this particular instance Colonel *Church* is the proper man to give discovery. The answer is, that it will be decided at Chambers if you ask for interrogatories to examine Colonel *Church*, because it is allowed

to deliver interrogatories to any member or officer of such corporation. It is for the court to decide which member is to be interrogated, and if you show reasons why one member can give the information and not another, or why one member can give information on one set of question, and another member on another set of questions, the court can direct which member or members shall be examined to give information.”

This is not of course a true analogy for, as I have said, the defendants were sued individually, and r. 5 does not therefore apply. There is, however, in my opinion a sufficient analogy, to have induced the plaintiffs to seek to limit their proposed interrogatories on similar lines. It has been submitted that the plaintiffs do not know who can best answer their questions. Even if that were so, it would be no reason for interrogating a number of defendants concerning acts of the committee which took place before they were committee-members. But I would not in any event accept that submission: the plaintiffs comprise members and would-be members of the association and they claim to sue on behalf of all the remaining members other than the defendants. They must, or ought to, know who was in control of the association’s affairs at relevant times. There is an obvious nucleus in the president, vice-president, secretary and treasurer. It was suggested that the secretary might have been away. If so, that would be known to the plaintiffs, who would also be most likely to know who had replaced him. In any event an order against him would require an answer to the best of his knowledge, information and belief; application might also have been made that there be liberty to apply for an order for leave to deliver interrogatories to other defendants if the necessity arose. The point is that it was perfectly feasible and indeed the obvious course, for the plaintiffs to have kept their application within reasonable limits. They did not do so but insisted that all seventy-three questions be answered by all twenty-nine defendants; they have only themselves to blame therefore for the learned judge’s finding that such an interrogation must put the defendants in an embarrassing position. It follows that in the learned judge’s view, which I would fully endorse, interrogation to such an extent was not necessary for disposing fairly of the suit. For these reasons I would hold that the learned judge exercised his discretion correctly and dismiss the appeal with costs—I would not certify for a second counsel.

It was suggested by counsel for the appellants that the order has resulted in injustice to the plaintiffs. Had their counsel in the court below asked for a more limited form of order he would no doubt have been given it, subject of course to consideration by the court of the individual interrogatories, and he cannot therefore be heard to complain. It is not necessary to decide here whether a fresh application could be made in the court below but it is clear that the judge has a discretion and that where a first set of proposed interrogatories has been disallowed it is competent to make an application for leave to deliver a new set: *Boake v. Stevenson* (3), [1895] 1 Ch. 358 at 360. The present application was refused because it sought a much wider interrogation than was necessary, and though, as the matter has not been argued before this court I express no concluded opinion, as at present advised my view is that the judge’s discretion would extend to enable him to entertain a further application upon a more limited basis.

Sir Kenneth O’Connor P: I agree. The appeal is dismissed with costs.

Forbes V-P: I also agree.

Appeal dismissed.

For the appellants:

DN Khanna and Mota Singh

Mota Singh, Nairobi

For the respondents:

AH Malik

AH Malik and Co, Nairobi

Inder Singh Gill v B E A Timber Company
[1959] 1 EA 1005 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 4 December 1959
Case Number: 9/1959 (P.C.) (Kenya)
Before: Sir Kenneth O'Connor P, Forbes V-P and Gould JA
Sourced by: LawAfrica

[1] *Practice – Privy Council – Leave to appeal – Case remitted by appellate court to lower court for assessment of damages – Application for leave to appeal to Privy Council before damages assessed – Money value of matter in dispute – Whether amount of plaintiff's claim is measure of value of case to defendant – East African (Appeal to Privy Council) Order-in-Council, 1951, s. 3.*

[2] *Privy Council – Leave to appeal – Whether amount claimed by plaintiff is measure of value of matter in dispute to defendant – East African (Appeal to Privy Council) Order-in-Council, 1951, s. 3.*

[3] *Privy Council – Leave to appeal – Whether procedural matters can constitute matters of great public and general importance – East African (Appeal to Privy Council) Order-in-Council, 1951, s. 3.*

Editor's Summary

The respondent firm sued the applicant claiming *inter alia* Shs. 132, 343/29 as damages arising from an order for possession of certain premises made by the Central Rent Control Board, Nairobi, in favour of the applicant, on the ground that such order had been obtained by fraud, misrepresentation and concealment of facts. The action was dismissed but the Court of Appeal allowed the respondent's appeal and ordered, *inter alia*, that the case be remitted to the Supreme Court for assessment of damages and that judgment be entered for the appellants for such damages as might be assessed by the Supreme Court. The applicant thereupon filed an application for leave to appeal to the Privy Council under s. 3 (a) of the East African (Appeal to Privy Council) Order-in-Council, 1951, alleging that he was entitled to appeal as of right, and alternatively under s. 3 (b) *ibid* for the court's discretion to be exercised in his favour on the ground that the matter involved in the appeal was of great general or public importance. The alleged matters of great or public importance were, firstly, that the amendment of the plaint by the respondent firm had not been made within the time limited by O. VI, r. 19 and secondly, that the amendment introduced a new cause of action which was barred by limitation. At the date of the hearing of this application the Supreme Court had not yet assessed the damages.

Held –

- (i) the claim made by a plaintiff cannot be the measure of the value of the appeal to the defendant, when it is the defendant who seeks to appeal;
- (ii) where the damages awarded are to be ascertained, the value claimed by the plaintiff cannot be taken as the measure of the value to the defendant, and no value to the defendant for the purpose of appeal can be assigned until the damages have been ascertained;
- (iii) the judgment of this court was in part final and in part interlocutory; so far as the final part of the judgment was concerned, there was no value to the applicant which could be expressed in terms of money; so far as the interlocutory part, that is, the part relating to the quantum of damages, was concerned, there was in effect, a blank, and when the blank had been filled in by the finding of the Supreme Court, then this part of the judgment could also be treated as final;
- (iv) in a case such as the present where a blank as to the amount of damages has been left, when that blank has been filled in, it relates back to the date of the judgment;

- (v) while time under s. 4 of the East African (Appeal to Privy Council) Order-in-Council, 1951, runs from the date of judgment and the applicant was correct in filing his application within the time there limited, yet it was impossible for this court to deal with the application under para. (a) of s. 3 *ibid* until the amount of damages awarded had been ascertained;
- (vi) there was little dispute as to the law, the question being the application of the established law to the facts of the case which did not raise a matter of great general or public importance.

Application under para. (a) of s. 3 *ibid* adjourned for decision after the assessment of damages by the Supreme Court, and under para. (b) dismissed.

[**Editorial Note:** See also *B.E.A. Timber Co. v. Inder Singh Gill*, [1959] E.A. 463 (C.A.).]

Cases referred to in judgment

- (1) *Macfarlane v. Leclaire* (1862), 15 Moo. P.C.C. 181; 15 E.R. 462.
- (2) *Cooper and Another v. Nevill and Another*, [1959] E.A. 74 (C.A.).
- (3) *Allan v. Pratt* (1888), 13 App. Cas. 780.
- (4) *Light v. William West & Sons Ltd.*, [1926] 2 K.B. 238.

December 4. The following judgments were read:

Judgment

Forbes V-P: This is an application for leave to appeal to Her Majesty in Council under s. 3 of the East African (Appeal to Privy Council) Order-in-Council, 1951 (hereinafter referred to as “the Order-in-Council”) from a final judgment and order to this court dated June 10, 1959. Section 3 of the Order-in-Council reads as follows:

“3. Subject to the provisions of this Order, an appeal shall lie—

- (a) as of right, from any final judgment of the court, where the matter in dispute on the appeal amounts to or is of the value of £1,000 sterling or upwards, or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the said value or upwards; and
- (b) at the discretion of the court, from any other judgment of the court, whether final or interlocutory, if, in the opinion of the court, the question involved in the appeal is one which, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision.”

The application is made, in the first place, under para. (a) of the section, the applicant alleging that he is entitled to appeal as of right. Alternatively the applicant applies under para. (b) for this court to exercise its discretion in his favour on the ground that the matter involved in the appeal is of great general or public importance.

The applicant was the original defendant in a suit filed in the Supreme Court of Kenya by the respondent firm, in which the respondent firm as plaintiff claimed, *inter alia*, the sum of Shs. 132,343/29 as damages arising from an order for possession of certain premises made by the Central Rent Control Board, Nairobi, in favour of the applicant, it being alleged that such order had been obtained by fraud,

misrepresentation and concealment of facts. The Supreme Court dismissed the suit, and the respondent firm appealed to this court. The material part of the order on the appeal to this court, in respect of which the applicant seeks leave to appeal, reads as follows:

“It is Ordered—

- (1) that the appeal be and is hereby allowed;
- (2) that the decree of Her Majesty’s Supreme Court of Kenya at Nairobi be and is hereby set aside;
- (3) that the order of the Central Rent Control Board be and is hereby set aside;
- (4) that judgment be entered for the appellants for such damages as may be assessed by Her Majesty’s Supreme Court of Kenya;
- (5) that the case be remitted to Her Majesty’s Supreme Court of Kenya for the purpose of assessing damages;
- (6) that the costs in the Supreme Court of Kenya be left to the discretion of the judge after the issue of quantum of damages has been decided; and
- (7) that the respondent do pay to the appellants their costs of this appeal which are certified for two counsel.”

At the date of the hearing of this application the Supreme Court had not yet assessed the damages.

In support of the application under para. (a) of s. 3 of the Order-in-Council, Mr. Nazareth for the applicant argued that the judgment of this court was a final judgment on the matter of liability; that the right of appeal arose at the moment of judgment and the value must be assessed as at that moment: *Macfarlane v. Leclaire* (1) (1862), 15 Moo. P.C.C. 181; 15 E.R. 462; that by the judgment the applicant was made liable in a sum up to Shs. 132,343/-; that that was the claim made by the plaintiff and is the only measure of value; that the claim made by the plaintiff is the amount in dispute; that as that claim and the maximum liability of the applicant is over £1,000, the appeal lies as of right under para. (a) of s. 3.

For the respondent firm Mr. Khanna agreed that the right to appeal arose as soon as judgment was pronounced, and that the decision should not await the assessment of damages. He submitted that the judgment was an interlocutory one, leaving the rights of the parties to be worked out, and that if the damages were found to be nil, the case might still be dismissed; that in any case whether the judgment was interlocutory or final was immaterial since it was impossible to assign any money value to the judgment; that *Macfarlane v. Leclaire* (1), was distinguishable since there was no question in that case of a hypothetical value being put on the judgment from which it was sought to appeal; that in no case cited had the value of the case been assessed on a mere possibility; that here it was but a possibility that the damages awarded would exceed £1,000; that until the quantum of damages had been dealt with it was impossible to attach any money value to the appeal; that the judgment of this court had dealt with the legal issue only; and that it was impossible to attach any money value to that issue.

In *Cooper and Another v. Nevill and Another* (2), [1959] E.A. 74 (C.A.), this court decided, both as a matter of construction and on the authority of the cases there cited, that in considering what is the value of the appeal, what is to be looked at is the value to the appellant of the intended appeal to the Privy Council. This is the principle which was acted upon by the Privy Council in *Macfarlane v. Leclaire* (1). Mr. Nazareth relied strongly on that case, and I therefore set out the whole of the relevant part of the judgment. The critical value for the purpose of ascertaining whether an appeal lay to the Privy Council was there £500.

The judgment is as follows:

“In order to ascertain the value of the matter in dispute, it is necessary to advert to the nature of the proceedings. The Petitioners brought their action in the Superior Court of Montreal against one Delesderniers, to recover the amount of certain promissory notes, and interest, amounting in the whole to a sum of much less than £500, sterling, viz.; the sum of £417 0s. 8d. Canadian currency. By a proceeding, analogous to the process of foreign attachment in the City of London, the petitioners with their declaration claimed a writ of saisie arrêt, or attachment before judgment, against certain goods of the debtor, which they alleged to be in the possession of the appellants, and prayed that they might be summoned as ‘tiers sasie’ or ‘garnishee’. The debtor, Delesderniers, suffered judgment by default in the action, and was condemned by the court to pay the £417 0s. 8d., the sum demanded. Upon the writ of saisie arrêt being issued against the appellants, they made a declaration denying that they had in their possession any goods of the debtor, and alleged that the goods claimed by the petitioners to have been the property of the debtor were purchased by the appellants from one Prevost, for the sum of £1,642 14s. 5d. currency. The petitioners, in reply, alleged facts to show that, the transfer of the property was fraudulent and void as against the creditors of Delesderniers, and, particularly as against themselves. The Superior Court dismissed the contestation, that is, the proceedings against the appellants, as garnishee, on the ground, that they could not declare the assignment of the property to be void without Prevost being made a party to the action. But, upon appeal, the Court of Queen’s Bench reversed the judgment of the Superior Court, and ordered the appellants to make a further declaration upon oath of the goods comprised in the alleged transfer which were unsold at the date of the saisie arrêt, or attachment. The effect of this judgment of the Queen’s Bench was to render all the goods contained in the assignment from Prevost which were in the possession of the appellants at the time of the attachment, liable to the claims of the creditors of the original defendant; the petitioners, by issuing their attachment, securing to themselves priority of satisfaction unless the debtor was insolvent, in which case they would only be entitled, *pari passu*, with the rest of the creditors. The course of proceedings under such a judgment, is to give notice to the creditors to come in and prove their debts by a particular day, after which a final distribution of the property is made amongst them.

“In determining the question of the value of the matter in dispute upon which the right to appeal depends, their lordships consider the correct course to adopt is to look at the judgment as it affects the interests of the parties who are prejudiced by it, and who seek to relieve themselves from it by an appeal. If their liability upon the judgment is of an amount sufficient to entitle them to appeal, they cannot be deprived of their right because the matter in dispute happens not to be of equal value to both parties; and, therefore, if the judgment had been in their favour, their adversary might possibly have had no power to question it by an appeal. In this case, the effect of the judgment was to place in jeopardy the whole of the goods contained in the assignment from Prevost, for which a sum of £1,642, currency had been paid. This property became immediately liable to satisfy the claims of creditors of the original defendant to an uncertain and indefinite amount. It may turn out in the result, that the petitioners are the sole creditors of Delesderniers, and, therefore, that the goods in possession of the appellants may have to bear no greater liability than the amount of the debt due to the petitioners. But all this was contingent at the time of the judgment, and it is the immediate effect of the judgment which must be regarded, as the right to appeal arises as soon as it is pronounced.

The petitioners, however, contend, that the judgment is interlocutory merely, and, therefore, that an appeal against it is premature. But, although the judgment is interlocutory in form, it is final in its effect upon the rights of the appellants. The goods which they claimed as their own are finally and conclusively fixed by the judgment to be the property of the original debtor, and must be applied in satisfaction of his debts, and there is no mode by which the appellants can be relieved from it except by an appeal. Their lordships are of opinion that, under the circumstances, the matter in dispute upon which the appeal is founded exceeds the value of £500 sterling.”

It is quite clear that in that case the basis of the decision was that the judgment from which the appellants sought to appeal had finally and conclusively determined that goods to the value of £1,642 which the appellants claimed as their own were liable to be applied in satisfaction of the debts of the original debtor, and that the value of the appeal to the appellants must be the whole value of the goods which had thus been condemned. The instant case in my view is entirely different. In *Allan v. Pratt* (3) (1888), 13 App. Cas. 780 at p. 781 the Earl of Selborne said

“Their lordships are of opinion that the appeal is incompetent. The proper measure of value for determining the question of the right of appeal is, in their judgment, the amount which has been recovered by the plaintiff in the action and against which the appeal could be brought. Their lordships, even if they were not bound by it, would agree in principle with the rule laid down in the judgment of this tribunal delivered by Lord Chelmsford in the case of *Macfarlane v. Leclaire*, that is, that the judgment is to be looked at as it affects the interests of the party who is prejudiced by it, and who seeks to relieve himself from it by appeal. If there is to be a limit of value at all, that seems evidently the right principle on which to measure it. The person against whom the judgment is passed has either lost what he demanded as plaintiff or has been adjudged to pay something or to do something as defendant. It may be that the value to the defendant of an adverse judgment is greater than the value laid by the plaintiff in his claim. If so, which was the case in *Macfarlane v. Leclaire* it would be very unjust that he should be bound, not by the value to himself but by the value originally assigned to the subject-matter of the action by his opponent. The present is the converse case. A man makes a claim for much larger damages than he is likely to recover. The injury to the defendant, if he is wrongly adjudged to pay damages, is measured by the amount of damages which he is adjudged to pay. That is not in the least enhanced to him by the fact that some greater sum had been claimed on the other side.”

I think it is clear from this judgment that the claim made by a plaintiff cannot be, as was contended by Mr. Nazareth, the measure of the value of the appeal to the defendant, when it is the defendant who seeks to appeal. The case established that where damages have been awarded, it is the value of the damages awarded, not the value claimed, that is the measure of value to the defendant. I think it follows that where the damages awarded are to be ascertained, the value claimed by the plaintiff cannot be taken as the measure of the value to the defendant, and that no value to the defendant for the purpose of appeal can be assigned until the damages have been ascertained.

In *Light v. William West & Sons* (4), [1926] 2 K.B. 238, the learned judge at first instance, upon a claim for damages, ordered, *inter alia*,

“That judgment be entered for the plaintiff for an amount to be ascertained (if not agreed) by a referee . . .”

The amount was in fact ascertained by a referee. Upon appeal on a matter of costs, as to which the question whether the order made was final or interlocutory

was relevant, Lord Hanworth M.R., at p. 241 said:

“What was the nature of that order? It appears to me that it was interlocutory in part and final in part. The plaintiff was to recover on the claim, and the counterclaim was to be dismissed, and on both those issues the plaintiff was to have the costs. So far it is a final order. But it was interlocutory as to the further proceedings for the purpose of taking the account between the plaintiff and defendants.”

At p. 244, Scrutton, L.J., said:

“The way I prefer to put it is thus—that when the matter is referred to the Master the amount of damages is left blank, and when the Master has given his certificate then the blank is filled in, and the judgment is treated as final.”

No case was cited to us in which the question of the value of the appeal has been considered where an issue of quantum has been referred to a lower court for decision. In the absence of any direct authority on the point, I would apply the reasoning in *Light v. William West & Sons Ltd.* (4). Upon the basis of that case it seems to me that the judgment of the court in the instant case was in part final and in part interlocutory. So far as the final part of the judgment is concerned, there is no value to the applicant which can be expressed in terms of money. So far as the interlocutory part, that is, the part relating to the quantum of damages, is concerned, there is, in effect, a blank, and when the blank has been filled in by the finding of the Supreme Court, then this part of the judgment also may be treated as final. I accept, as indeed I must on the authority of *Macfarlane v. Leclaire* (1), that

“it is the immediate effect of the judgment which must be regarded, as the right to appeal arises as soon as it is pronounced.”

See also s. 4 of the Order-in-Council as to the time for applying for leave to appeal. It seems to me, however, that in a case such as the present where a blank as to the amount of damages has been left, when that blank has been filled in, it relates back to the date of the judgment. It is to be noted in *Macfarlane v. Leclaire* (1), that the contingencies referred to which might ultimately affect the liability of the appellants were contingencies which had nothing to do with the case then before the courts, i.e. the existence or non-existence of other creditors of the original debtor. In the instant case there is no such contingency to be considered. There is instead an award of damages the value of which is to be assessed by an inquiry which is part of the proceedings in the action. The award of damages by this court has a value at the date of judgment, but the amount of such value is only ascertained upon the completion of the inquiry ordered.

I think, therefore, that, while time under s. 4 of the Order-in-Council runs from the date of judgment, and the applicants were correct in filing their application within the time there limited, yet it is impossible for this court to deal with the application under para. (a) of s. 3 of the Order-in-Council until the amount of the damages awarded has been ascertained. Counsel for both parties pressed for a final decision in the matter now, but I think it would be wrong to give one until the amount of the damages awarded is known. I would therefore order that the application under para. (a) be adjourned pending assessment of damages by the Supreme Court.

As regards the application under para. (b) of s. 3 of the Order-in-Council, Mr. Nazareth argued that two points decided on the appeal to this court raised questions of great general or public importance. The two points relate to an amendment of the plaint which purported to have been made under O. 6, r. 19

of the Civil Procedure (Revised) Rules, 1948. The Supreme Court ruled that the amendment was in order and this ruling was upheld on the appeal to this court. The first objection taken by the present applicant to the amendment was that it had not been made within the time limited by O. 6 r. 19. The point is purely procedural, and I cannot see that it is a matter of great public or general importance. The second objection to the amendment of the plaint taken by the present applicant was that the original plaint was based on the statutory cause of action contained in s. 16 (8) of the Increase of Rent (Restriction) Ordinance, 1949; that fraud was not a necessary ingredient of a cause of action under that section; and that the amendment introduced a new cause of action based on deceit, which cause of action was barred by limitation. This court held that the plaint was not founded on the statutory cause of action contained in s. 16 (8) of the Increase of Rent (Restriction) Ordinance, 1949, and that the amendment did not introduce a new cause of action. There was little dispute as to the law, the question being the application of the established law to the facts of the case. The decision turned on the particular facts and wording of the plaint, and has no general application. I do not see that the objection raises a matter of great general or public importance.

I would accordingly dismiss the application under para. (b) of s. 3 of the Order-in-Council, but would, as I have already indicated, adjourn the application under para. (a) for decision after the assessment of damages by the Supreme Court. I would reserve the question of costs of the application for decision when the application under para. (a) is decided.

Sir Kenneth O'Connor P: I agree. The application in so far as it falls under para. (b) of s. 3 of the East African (Appeal to Privy Council) Order-in-Council, 1951, is dismissed, and in so far as it falls under para. (a) of that section is stood over pending the assessment of damages by the Supreme Court. Upon such assessment the application is to be relisted for final determination. The question of costs of the application is reserved for consideration upon final disposal of the application.

Gould J A: I also agree.

Application under para. (a) of s. 3 ibid adjourned for decision after the assessment of damages by the Supreme Court, and under para. (b) dismissed.

For the applicant:

JM Nazareth QC and AE Hunter

For the respondent:

DN Khanna and US Kalsi

US Kalsi, Nairobi

For the appellant:

Daly & Figgis, Nairobi

London Overseas Trading Company Limited v The Raleigh Cycle Company Limited

[1959] 1 EA 1012 (HCU)

Division: HM High Court of Uganda at Kampala
Date of judgment: 24 November 1959
Case Number: 2/1959
Before: Sir Audley McKisack CJ
Sourced by: LawAfrica

[1] Trade Mark – Application to register – Application for word “Lale” – Opposition by registered owners of trade mark “Raleigh” – Objection on ground that word likely to deceive or cause confusion – Whether similarity of pronunciation in Uganda of letters “L” and “R” is a valid objection – Trade Marks Ordinance, 1952, s. 13 (2), s. 14, s. 15, s. 21 (5) and s. 54 (U.) – Trade Marks Rules, s. 52 (U.) – Trade Marks Act, 1938, s. 10, s. 11, s. 12 (1) – Evidence Ordinance (Cap. 9), s. 2 (U.) – Civil Procedure Rules O. 17, r. 3 (U.) – Interpretation and General Clauses Ordinance (Cap. 1), s. 2 (U.).

Editor’s Summary

The appellant applied for registration of the word “Lale” in class 12 of Part B. of the register of trade marks. The respondent, whose trade mark consisted of the device of a monogram of a heron’s head and the words “The Raleigh”, opposed the application on the ground that the word “Lale” was phonetically identical with the word “Raleigh”. The Registrar of Trade Marks upheld this objection. On appeal to the High Court, the appellant submitted that the registrar was not entitled to take judicial notice that the type of bicycle manufactured by the respondent company was known in the trade and by the public in Uganda as a “Raleigh” and that there was no evidence before him upon which he could make such a finding; that having found that the appellant’s trade mark was to be deemed capable of distinguishing their goods under s. 13 (2), the registrar was wrong to apply s. 14 to the question whether the appellant’s trade mark was likely to deceive or cause confusion; that the registrar was wrong in considering s. 15 in relation to the appellant’s application and in purporting to find that there was likely to be deception or confusion under s. 14.

Held –

- (i) bicycles made by the respondent are known in Uganda as “Raleigh” bicycles is not a matter which could properly be the subject of judicial notice; but the registrar had before him other evidence that the respondent’s bicycles were known as “Raleigh”;
- (ii) the Evidence Ordinance does not apply “to affidavits presented to any court or officer”, nor has O. 17, r. 3 of the Civil Procedure Rules any application to proceedings before the registrar;
- (iii) it was clearly the registrar’s duty to consider whether s. 14 was applicable and it was also open to him to consider whether the similarity of sound was such that registration is prohibited by s. 15 of the Trade Marks Ordinance;
- (iv) section 14 (1) is not restricted to cases where opposition to an application for registration of a trade mark is by the owner of an unregistered trade mark;
- (v) it was open to the registrar to find that the mark by being likely to deceive or cause confusion would be disentitled to protection in a court of justice.

Appeal dismissed.

Cases referred to in judgment

- (1) *Imperial Tobacco Company of Great Britain & Ireland v. Pasquali*, [1918] 2 Ch. 207.
- (2) *City Chemical Co. Ltd.'s Application* (1937), 54 R.P.C. 182.
- (3) *Bass, Ratcliff & Gretton Ltd. v. Nicholson & Sons Ltd.*, [1932] A.C. 130.

Judgment

Sir Audley McKisack CJ: This is an appeal against a decision of the Registrar of Trade Marks under the Trade Marks Ordinance, 1952, refusing an application by the appellant to register the word “Lale” in Part B. of the register of trade marks (in class 12, in respect of cycles and parts thereof). The application was opposed by the respondent on the ground that the word “Lale” is phonetically identical with the word “Raleigh”, which forms part of the registered trade mark of the respondent, by reason of the letter “R” being commonly pronounced as “L” in Uganda. The respondent’s trade mark consists of the device of a monogram of a heron’s head and the words “The Raleigh”. The learned registrar came to the following conclusion (see para.20 of his decision)–

“20. I have no hesitation whatsoever in holding that in use the word “Lale” will be confused with the word “Raleigh” and that if the word “Lale” were allowed to be registered as a trade mark, members of the public would be deceived into purchasing bicycles or parts thereof with which the applicants are connected in the course of trade when they intended to purchase bicycles or parts thereof with which the opponents are connected in the course of trade.”

The first ground of appeal is as follows:

“The learned Registrar of Trade Marks was not entitled in law to take judicial notice ‘that the type of bicycle manufactured by the Raleigh Cycle Company Limited has become and is known among the trade in Uganda and the general purchasing public as “a Raleigh” and there was no evidence before the learned registrar upon which such a finding of fact could be made.’”

The evidence before the registrar consisted of an affidavit by a Mr. Stuart (as to “Lale” and “Raleigh” having the same pronunciation) and a statutory declaration by a director of the respondent company, Mr. Harrison, (to which I shall refer later) but, as appears from paras. 8, 18 and 19 of his decision, the registrar took into account his own personal knowledge that the bicycles made by the respondent company are known in Uganda, among the trade and the general public, as “Raleigh” bicycles. Mr. Russell, who appeared for the respondent company, contends that, as the registrar does not constitute a court of law, he is not precluded from relying on his personal knowledge. I do not agree with that proposition. The Evidence Ordinance (Cap. 9) applies to

“all judicial proceedings in or before the High Court and all British Courts subordinate thereto but not to affidavits presented to any court or officer nor to proceedings before an arbitrator”. (see s. 2).

And s. 3 defines the term “court” as including

“all judges, magistrates, jurymen and assessors and all persons, except arbitrators, legally authorised to take evidence”.

That the Registrar of Trade Marks is a person “legally authorised to take evidence” is apparent from various provisions of the Trade Marks Ordinance, 1952, e.g. s. 21 (5) and s. 54, and from r. 52 of the Trade Marks Rules, 1952, (L.N. 275). Consequently, the Evidence Ordinance does apply to proceedings before the registrar. Needless to say, that Ordinance does not empower a court to rely on its own personal knowledge, save in so far as the court may take judicial notice of certain matters (see s. 54 and s. 55). That bicycles made by the respondent are known in Uganda as “Raleigh” bicycles is not a matter which could properly be the subject of judicial notice; it is a matter of the private

knowledge of the registrar, and as such cannot be a substitute for evidence, see Phipson on Evidence, (9th Edn.) p. 4 and p. 20.

There was, however, other evidence to the same effect, and this was contained in the statutory declaration of Mr. Harrison, paras. 3 to 6 of which are as follows:

- “3. My company’s goods are being marketed under the name ‘Raleigh’ and the Raleigh Monogram consisting of a Heron’s Head device containing the words ‘The Raleigh’.
- “4. My company’s goods have been exported to the Uganda Protectorate since on or about the year 1916, and were in fact one of the first makes of bicycles to be imported into the Uganda Protectorate.
- “5. I have been informed and verily believe that the type of bicycle manufactured by my company has become known among the trade and the general purchasing public as a ‘Raleigh’.
- “6. I have been informed and verily believe that among the African population of the Uganda Protectorate, the main users of bicycles in the Protectorate, the word ‘Raleigh’ is normally pronounced ‘Lale’ due to the fact that the letter ‘R’ is normally pronounced ‘L’ in the vernacular languages in the Protectorate.”

At the proceedings before the registrar it was objected, on behalf of the applicants, that paras. 5 and 6 were inadmissible as offending against the Evidence Ordinance, being mere hearsay, and against O. 17, r. 3 of the Civil Procedure Rules, which regulates the contents of affidavits. As to the Evidence Ordinance, from s. 2 of that Ordinance, which I have already referred to, it is clear that the Ordinance does not apply “to affidavits presented to any court or officer”; and the term “affidavit” includes, by virtue of the definition in s. 2 of the Interpretation Ordinance (Cap. 1), a declaration. Consequently the objection founded on the Evidence Ordinance was without substance. The registrar, however, upheld the objection to the declaration on the ground that it contravened O 17, r. 3 of the Civil Procedure Rules. Here, with respect, he was in error. The Civil Procedure Ordinance, and the rules thereunder, apply only to “proceedings in the High Court and in all subordinate courts”; see s. 1 of the Ordinance and the preliminary paragraphs preceding the Civil Procedure Rules (Vol. 6 p. 637). The registrar is clearly not the High Court and, equally clearly, is not a subordinate court, because the latter term is defined in s. 2 of the Civil Procedure Ordinance to mean a court constituted under the Subordinate Courts Ordinance (Cap. 4). Consequently O. 17, r. 3 of the Civil Procedure Rules, which says that affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove (except on interlocutory applications, on which statements of his belief may be admitted provided that the grounds thereof are stated) has no application to proceedings before the registrar; and, in my view, he was entitled to take the whole of Mr. Harrison’s declaration into account, and ought to have done so. The result is that he did have before him evidence as to the respondent’s bicycles being known as “Raleigh”, even though he preferred to make use of his own personal knowledge on that point.

As to the weight of the evidence—and no contrary evidence was adduced by the appellant—in relation to s. 14 (1) and s. 15 (1) of the Trade Marks Ordinance, 1952, the general position is conveniently summarised in Kerly on Trade Marks, (7th Edn.) p. 613, where the learned author, in considering the equivalent provisions—i.e., s. 11 and s. 12 (1)—of the Trade Marks Act, 1938, of the United Kingdom says:

“In such cases the onus is on the applicant to satisfy the registrar that the trade mark applied for is *not* likely to deceive or cause confusion, so that refusal to register does not involve the conclusion that the resemblance is such that either an infringement action or a passing off would succeed. In

cases in which the tribunal considers that there is doubt as to whether deception is likely the application should be refused.”

A further point relating to the evidence was taken by Mr. Sparrow, who appeared for the appellant company. This was that the Ordinance requires that evidence before the registrar is to be by statutory declaration unless he otherwise directs (s. 54), whereas the respondent had, in the case of Mr. Stuart, filed an affidavit. No objection on this score was taken before the registrar, and in any event I regard it as the barest technicality not effecting the merits of the case.

The next two grounds of appeal are as follows:

“That the learned registrar having found that the appellants’ trade mark was to be deemed capable of distinguishing the appellants’ goods under s. 13 (2) of the Trade Marks Ordinance, 1952, was wrong in law in applying the provisions of s. 14 of the said Ordinance to the question of whether the appellants’ trade mark was likely to deceive or cause confusion with the respondents’ or in seeking to apply the said section at all.

“. . . That the learned registrar was wrong in law in considering the provisions of s. 15 of the Ordinance in relation to the applicants’ application for registration of their trade mark.”

The registrar dealt at length with these contentions, and rejected them. In my opinion he was clearly right. Section 13 (1) of the Trade Marks Ordinance (which is in similar terms to s. 10 (1) of the Trade Marks Act, 1938, of the United Kingdom) provides that

“in order for a trade mark to be registrable in Part B. of the register it must be capable, in relation to the goods in respect of which it is registered or proposed to be registered, of distinguishing goods with which the proprietor of the trade mark is or may be connected in the course of trade from goods in the case of which no such connection subsists”. . . .

Sub-section (2) of this section of the Ordinance contains a proviso (which, of course, is not in the equivalent English section) as follows:

“Provided always that any mark which has been registered in Part B. of the register kept in the United Kingdom under the Trade Marks Acts, 1909-1938, shall be deemed to be capable of distinguishing goods within the meaning of sub-s. (1) of this section.”

The effect of this provision is that the registrar does not have to—and may not—inquire into the question of “capability of distinguishing” in the case of a mark already registered in the United Kingdom register, but is required to assume that the mark is “capable of distinguishing”. Consequently, such mark is, by virtue of sub-s. (1) of s. 13, “registrable”. But that is a very different thing from saying that it is thereby mandatory on the registrar to enter it in the register, any more than he must automatically register a mark to which that proviso does not apply but which he has found to be inherently, or in fact, “capable of distinguishing”. Otherwise it would be difficult to see the purpose of s. 14 and s. 15, which are the equivalents of s. 11 and s. 12 of the English Act, and impose a prohibition on the registration of marks of a certain character. If an authority is required for this proposition, it is to be found in *Imperial Tobacco Company of Great Britain and Ireland v. Pasquali* (1), [1918] 2 Ch. 207, in which Swinfen Eady, M.R. observed at p. 222 as follows:

“Section 11 contains a prohibition as to what it shall not be lawful to register, and it follows upon s. 9, which provides for the essentials of a registrable trade mark. Section 9 provides that a registrable trade mark must contain or consist of at least one of certain essential particulars, and

then it details them, five in number. Then s. 11 provides that it shall not be lawful to register as a trade mark or part of a trade mark any matter the use of which would by reason of its being calculated to deceive or otherwise be disentitled to protection in a court of justice, or would be contrary to law or morality. It will be observed that that is a prohibition, an enactment against registration—"It shall not be lawful to register as a trade mark"—and in my opinion that section is a qualification upon s. 9. Section 9 points out what a registrable trade mark must contain or consist of, and unless it contains or consists of one or other of the essentials there enumerated it is not a registrable trade mark, and it is only registrable trade marks that are entitled to registration. No prohibition is required against anything which does not come within s. 9, because there is no authority to register it. But even if a mark comes within one or other of the sub-s. of s. 9 that alone is not necessarily sufficient to entitle it to registration, because it may offend against s. 11. Even if a mark does contain or consist of one or more of the essentials enumerated in s. 9, still it is not lawful to register it if the mark, or part of it, contains any matter the use of which is calculated to deceive, or it is otherwise disentitled to protection in a court of justice, or would be contrary to law or morality, or any scandalous design."

That, I think, disposes of the appellant's contention that the registrar ought not to have considered s. 14 and s. 15 of the Ordinance in relation to this particular application.

I shall take the next two grounds of appeal together. They are:

"The learned registrar having found under s. 15 of the Ordinance that there was obviously no possibility of the appellants' trade mark being deceived or confused with the respondents' registered trade mark erred in law in purporting to find that there was likely to be deception or confusion under s. 14 of the Ordinance.

". . . That there was no, or no sufficient evidence before the learned registrar on which he could find that the appellants' trade mark was likely to deceive or cause confusion under s. 14 of the Ordinance and the learned registrar not himself constituting a court of justice."

Sections 14 (1) and 15 (1) of the Ordinance are in the following terms:

- "14. (1) It shall not be lawful to register as a trade mark or part of a trade mark any matter the use of which would, by reason of its being likely to deceive or cause confusion or otherwise, be disentitled to protection in a court of justice, or would be contrary to law or morality, or any scandalous design.
- "15. (1) Subject to the provisions of sub-s. (2) of this section, no trade mark shall be registered in respect of any goods or description of goods that is identical with a trade mark belonging to a different proprietor and already on the register in respect of the same goods or description of goods, or that so nearly resembles such a trade mark as to be likely to deceive or cause confusion."

The registrar has, in para. 17 of his decision, dealt with s. 15 of the Ordinance as follows:

"I have now to consider whether the word 'Lale' is identical with or so nearly resembles Trade Mark No. 361 of the opponents as to be likely to deceive or cause confusion. I find under the provisions of s. 15 of the Ordinance that the word 'Lale' is not identical with Trade Mark No. 361 nor does it so resemble it as to be likely to deceive or cause confusion. In the one case there is the word 'Lale' by itself; in the other case, there is a

device of a heron's head and the words 'The Raleigh'. On looking at the two marks side by side, there is clearly and obviously no possibility of the two marks being likely to deceive or cause confusion."

It is clear from the last sentence of this passage that the registrar was considering only a visual comparison between the two marks. But

"the resemblance between the two marks must be considered with reference to the ear as well as to the eye";

see Kerly on Trade Marks, (7th Edn.) p. 626, citing *City Chemical Co. Ltd's Application* (2), (1937) 54 R.P.C. 182 at p. 185. It would, I think, have been open to the registrar to consider whether the similarity of sound was such that s. 15 prohibited registration. But it was under s. 14 that he found he must reject the application. From what I have already said, it was clearly the registrar's duty to consider whether s. 14 was applicable. Sub-section (1) of this section is identical with s. 11 of the Trade Marks Act, 1938, and Mr. Sparrow relies on a note on that section in Halsbury's Statutes, (2nd Edn.), volume 25, at p. 1189 as follows:

"This is a general section and enables any person who in fact has a trade mark in use, though not a registered one, to oppose registration of a trade mark which has a resemblance to his trade mark so great as to be calculated to deceive."

If I understood the argument right, it was that our s. 14 was irrelevant to the present case because it was not one of opposition by the owner of an unregistered mark. But I think it quite clear that the section is not restricted to cases of that kind. Further, Mr. Sparrow said that the words "disentitled to protection in a court of justice" had reference to passing-off actions, and that there was not sufficient material before the registrar to establish that the mark would be so disentitled in such a case. This proposition, however, is directly opposed to the passage I have already cited from Kerly, p. 613, that

"refusal to register does not involve the conclusion that the resemblance is such that either an infringement action or a passing off would succeed".

And the general nature of this section was emphasised in *Bass, Ratcliff & Gretton Ltd. v. Nicholson & Sons Ltd.* (3), [1932] A.C. 130, where Lord Warrington of Clyffe said (at p. 146):

"This is a perfectly general provision, its object being to keep off the register any matter the use of which would be disentitled to protection in a court of justice. A mark may be so disentitled as calculated to deceive for other reasons than that it closely resembles or is identical with another mark, as for example if it makes a false representation as to the nature or quality of the goods. On the other hand a mark identical with or closely resembling another mark may be so used as not to be calculated to deceive and may thus be entitled to protection, of a limited character it may be, in a court of justice. That this may be so is recognised in the Act itself (s. 21 dealing with honest concurrent user), and before the Act circumstances can easily be imagined in which as against a wrongdoer a trader would be entitled to protection for his mark notwithstanding that another trader may have used the same mark under such circumstances as in like manner to be entitled to protection."

And at p. 151 Lord Russell of Killowen said as follows:

"Section 11 prohibits the registration of three things only—namely: (1) any matter the use of which would be disentitled to protection in a court of justice; (2) any matter the use of which would be contrary to law or

morality; and (3) any scandalous design. An instance is given under the first head of a reason for withholding from particular matter the protection of the court—namely, ‘its being calculated to deceive’: but it is to be observed that the likelihood of deception which is contemplated by s. 11 need not necessarily flow from any resemblance between the matter proposed to be registered and other matter, or another mark. It might flow from something contained in the matter proposed to be registered, as, e.g., a misleading description of the goods upon or in connection with which the matter was intended to be used. In short, s. 11 (so far as relevant) is a prohibition in general terms of the registration of matter the use of which would not be protected in a court of justice.”

Having regard to those explanations, I think It was open to the registrar to find that, by reason of its being likely to deceive or cause confusion, the mark would be disentitled to protection in a court of justice.

The final ground of appeal, contained in para. 7 of the appellant’s memorandum, has been covered by what I have already said in relation to the other grounds.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

For the appellant:

H Sparrow

Hunter & Greig, Kampala

For the respondent:

REG Russell

Russel & Co, Kampala

Sheikh Mohamed Bashir v The Commissioner for Lands [1959] 1 EA 1018 (PC)

Division:	Privy Council
Date of judgment:	1 December 1959
Case Number:	17/1959
Before:	Lord Cohen, Lord Denning and Lord Jenkins
Sourced by:	LawAfrica
Appeal from:	E.A.C.A. Civil Appeal No. 76 of 1957 on appeal from H.M. Supreme Court of Kenya—Rudd, J

[1] *Landlord and tenant – Crown lease containing terms that building should be erected by specified time – Whether term is a covenant or condition – Whether court can grant relief against forfeiture – Crown Lands Ordinance (Cap. 155), s. 3, s. 5, s. 14, s. 15, s. 16, s. 17, s. 21, s. 36, s. 37, s. 38, s. 39, s. 47, s. 63, s. 64, s. 76, s. 77, s. 83, s. 84, s. 86, s. 157 (K.)—Registration of Titles Ordinance (Cap. 160), s.*

1 (2), s. 2, s. 20, s. 21 (K.)—*Crown Lands Ordinance*, 1902, s. 12, s. 13, s. 14, s. 15, s. 16, s. 18 (K.)—*Conveyancing Act*, 1881, s. 14.

Editor's Summary

By a grant under the Registration of Titles Ordinance, the Governor, in 1952, granted to the appellant a plot of land for ninety-nine years, subject to the payment of rent and the provisions of the Crown Lands Ordinance and certain special conditions, one of which required the appellant to erect an hotel on the plot within three years. The grant was executed by the Governor only. In 1955 the respondent began an action against the appellant for possession of the plot on the grounds that the appellant had not built the hotel, as stipulated and that his failure to do so was a breach of condition which terminated the

grant. The trial judge held that the special conditions were covenants within the meaning of s. 83 of the Crown Lands Ordinance, and accordingly that he had power to and should grant relief against forfeiture. The Court of Appeal set aside this decision and decreed that the title of the appellant had been extinguished in 1955 and that the respondent was entitled to possession of the land. On further appeal

Held –

- (i) the special conditions which all related to things which the grantee was to do after the grant was made were not conditions precedent; moreover, clear words would be necessary to justify the imputation to the legislature of an intention that “building conditions” mentioned in s. 14 and s. 16 of the Crown Lands Ordinance should not take effect as covenants but as conditions of defeasance.
- (ii) on construction of the grant, the special conditions must be treated as covenants for the purpose of s. 83 of the Crown Lands Ordinance and accordingly the trial judge had jurisdiction to grant relief against forfeiture.
- (iii) whether relief should be granted to the appellant should be determined with reference to the principles upon which the English Courts exercised power to grant relief as between subject and subject at the date the Crown Lands Ordinance, 1915, came into force.

Appeal allowed. Case remitted to Court of Appeal to hear the claim for relief against forfeiture.

[**Editorial Note:** See also *The Commissioner for Lands v. Sheikh Mohamed Bashir*, [1958] E.A. 45 (C.A.).]

Case referred to in judgment

- (1) *Dedhar v. Commissioner of Lands*, [1957] E.A. 104 (C.A.).

Judgment

Lord Jenkins: This case concerns a Crown Grant dated January 8, 1953, and made by the Governor of Kenya (acting by the respondent Commissioner of Lands) whereby a town plot in Nairobi was granted by the Governor to the appellant, Sheikh Mohamed Bashir, for the term of ninety-nine years from September 1, 1952, subject to the progressive rent therein mentioned and subject also to the provisions of the Crown Lands Ordinance (Cap. 155) and to a number of stipulations referred to in the grant as, and therein set out under the heading of “Special Conditions”.

The “Special Conditions” comprised twelve numbered paragraphs of which the first was in these terms:—

- “1. The grantee shall erect complete for occupation within thirty-six months of the commencement of the term an hotel building of approved design on proper foundations constructed of stone burnt-brick or concrete with roofing of tiles or other permanent materials approved by the Commissioner of Lands and shall maintain the same (including the external paintwork) in good and substantial tenantable repair and condition. The building shall be of at least six storeys and the cost of construction shall be at least shillings seven million.”

The grant was made by the Governor in exercise of his powers under the Crown Lands Ordinance of 1915 (Cap. 155) and was in the form prescribed for a Crown Grant of land for a term of years by s. 21 of and form B (1) in the First Schedule to the Registration of Titles Ordinance of 1919 (Cap. 160).

The form so prescribed is that of a deed poll as distinct from a deed inter partes, but it is not now disputed that, albeit made in this form and executed only by the Governor and not by the appellant, the grant constituted in law a lease from the Governor to the appellant for the term and at the rent therein mentioned, and was subject to all provisions of the relevant Ordinances applicable to such leases.

The appellant admittedly failed to erect any buildings on the plot within the period of thirty-six months prescribed by para. 1 of the “Special Conditions”, and founding himself on this default the Commissioner by a plaint dated November 16, 1955, began the present proceedings claiming (in effect) possession of the plot and mesne profits on the ground that the stipulation contained in para. 1 of the “Special Conditions” was a condition of the lease constituted by the grant, the non-fulfilment of which entitled him to treat the lease as avoided; or alternatively, in case it should be held contrary to his contention that the stipulation in question was a covenant as distinct from a condition, a declaration of forfeiture of the lease and damages for breach of covenant.

In order to appreciate the materiality of the distinction between these alternative claims, it is necessary to consider s. 83 of the Crown Lands Ordinance. That section provides as follows:

“83. If the rent or royalties or any part thereof reserved in a lease under this Ordinance shall at any time be unpaid for the space of thirty days after the same has become due, or if there shall be any breach of the lessee’s covenants, whether express or implied by virtue of this Ordinance, the Commissioner may serve a notice upon the lessee specifying the rent or royalties in arrear or the covenant of which a breach has been committed, and at any time after one month from the service of the notice may commence an action in the Supreme Court for the recovery of the premises, and, on proof of the facts, the Supreme Court shall, subject to relief upon such terms as may appear just, declare the lease forfeited, and the Commissioner may re-enter upon the land.

“In exercising the power of granting relief against forfeiture under this section the court shall be guided by the principles of English law and the doctrines of equity.”

It will be seen that if the stipulation contained in para. 1 of the “Special Conditions” was a covenant within the meaning of this section, it was open to the Commissioner at any time after one month from the service of the prescribed notice (which he had in fact served on September 29, 1955) to take proceedings under this section for a declaration of forfeiture of the lease; but that if he took that course his claim was liable to be defeated by a successful prayer for relief on the part of the appellant. It will be seen further that on the footing that the stipulation in question was a covenant within the meaning of s. 83 it was only by invoking that section that the Commissioner could assert a claim to forfeiture for its breach.

On the other hand, if the Commissioner could succeed in making good his primary contention that the stipulation in question was a condition, as distinct from a covenant within the meaning of s. 83, he was in a far stronger position. He had then no need to ask the court for a declaration of forfeiture of the lease, for that was automatically brought about through the non-fulfilment of the condition, without any need for an express proviso for re-entry, and the court would have no jurisdiction to grant the appellant relief under s. 83, inasmuch as that section would be inapplicable.

By his defence, the appellant admitted the alleged breach of covenant, but contended that the “Special Conditions” were, and were to be construed as, covenants. He alleged various facts and circumstances on which he relied as

disqualifying the Commissioner from claiming forfeiture (a contention not now maintained) and claimed that the action should be dismissed or alternatively that he should be granted relief under s. 83.

Rudd, J., who tried the case at first instance in the Supreme Court of Kenya, held (by a judgment dated March 4, 1957) that the “Special Conditions” were covenants within the meaning of s. 83, and accordingly that he had jurisdiction to grant relief under that section, which (by a decree dated May 2, 1957) he proceeded to do.

On appeal by the Commissioner to the Court of Appeal for Eastern Africa (Sir Kenneth O’Connor, P., Sir Ronald Sinclair, C.J., Kenya, and Forbes, J.A.) that court by an order dated March 24, 1958, allowed the appeal, set aside Rudd, J.’s decree of May 2, 1957, and substituted therefore a declaration that the title of the appellant to the land in question had been extinguished as from November 16, 1955 (the date of the plaint), with consequential directions as to possession and mesne profits.

From that order of the Court of Appeal for Eastern Africa the appellant now appeals to this board.

As appears from the foregoing, the substantial question in the appeal is whether the “Special Conditions” set out in the grant were, as the appellant contends, “covenants” within the meaning of s. 83, so as to give the court power to grant relief from forfeiture under that section, or were, as the Commissioner contends, conditions of defeasance as distinct from “covenants” and were therefore outside the scope of s. 83; the Commissioner being accordingly entitled to assert the forfeiture entailed under the general law by breach of a condition of defeasance, without thereby exposing himself to a claim for relief on the part of the appellant under s. 83.

By the expression “condition of defeasance” their lordships mean a condition of the kind described, and contrasted with a covenant, in the following passage from the judgment of Sir Kenneth O’Connor, P., which their lordships are content to adopt:

“At common law, a condition is a qualification annexed to an estate, whereby the latter shall either be created (condition precedent), enlarged, or defeated (condition subsequent), upon its performance or breach. The main distinction between a condition subsequent for the cesser of the term of a lease upon the happening of a certain event and a lessee’s covenant is that (subject to any right of relief from forfeiture given to the lessee) upon breach of a condition the lessor may re-enter, because the estate of the lessee is determined; whereas a breach of covenant only gives him the right to recover damages (or to obtain an injunction) unless the right to re-enter is expressly reserved to him by the lease. *Foa Landlord and Tenant*, 7th Edn., p. 311, and p. 312.”

The “Special Conditions” were clearly not conditions precedent. They all related to things which the grantee was to do or refrain from doing after the grant had been made. The question is whether they were conditions subsequent, the non-fulfilment of which brought the term to an end without any necessity for an express proviso for re-entry, or were obligations in the nature of covenants the breach of which (in the absence of any express proviso for re-entry) could only afford the Commissioner grounds for relief in the shape of damages or injunction unless he chose to avail himself of the statutory provision for forfeiture contained in s. 83 and succeeded in repelling any claim to relief under that section.

To these alternatives must be added the third possibility that the “Special Conditions” might combine in themselves the dual character of covenants and conditions of defeasance, as being agreements not only enforceable as such against the lessee but also constituting conditions on the due performance of

which the continuance of the term was made to depend. This combination of covenant and condition is commonly brought about by the usual express proviso of re-entry, with which this case is not directly concerned, as the grant contains no such proviso. It would however also be brought about by any form of words importing an intention that a given stipulation should possess this dual character.

Their lordships will later revert to this third possibility, in the meantime treating the classification of covenants on the one hand and conditions of defeasance on the other as exhaustive.

The point at issue turns upon the true construction of the grant, which must be construed in the light of the relevant legislation.

The Ordinances immediately relevant are the Crown Lands Ordinance (Cap. 155 of 1915) and the Registration of Titles Ordinance (Cap. 160 of 1919). But it is also proper to refer to the earlier Crown Lands Ordinance of 1902 which though replaced by the Ordinance of 1915 was relied on in argument by Mr. Cross (for the Commissioner) as showing that while the appellant's argument might well have prevailed under the Ordinance of 1902, the Ordinance of 1915 made a radical change in the law, with the effect of investing stipulations such as the "Special Conditions" with the character of conditions of defeasance as distinct from the character of "covenants" which they previously bore.

The Ordinance of 1902 provided for the inclusion of implied covenants in leases of Crown Lands. Some of these covenants were to be included in all leases (see s. 12 and s. 13). These were ordinary covenants by lessor and lessee which no doubt were regarded as universally appropriate. Other lessees' covenants which might not be appropriate in all cases were to be implied in all leases except where expressly varied or excepted (see s. 14). By s. 15 the covenants by the lessee therein set out were to be implied in all building leases unless expressly varied or excepted. By s. 16 a similar provision was made for the implication of certain lessees' covenants in leases of agricultural land.

Section 18 (1) was in terms closely resembling those of the present s. 83, omitting the second paragraph which was introduced in 1915.

Under the 1902 Ordinance the difficulties which have now arisen with respect to the application of s. 83 could hardly have arisen with respect to s. 18 (1), for effect would have been given to stipulations such as the "Special Conditions" by means of express or implied covenants indubitably falling within s. 18 (1).

The Crown Lands Ordinance of 1915, however, wholly repealed the 1902 Ordinance and introduced new and different provisions with respect to leases. Section 3 of the 1915 Ordinance empowers the Governor (by para. (i)) to

"grant, lease or otherwise alienate. . .and Crown lands for any purpose and on any terms and conditions as he may think fit";

(by para. (ii)) to

"wholly or partially remit. . .all or any of the covenants agreements or conditions contained in any lease agreement or licence. . .";

and (by para. (iii)) to

"extend. . .the time to the purchaser lessee or licensee for performing the conditions contained in any agreement lease or licence liable to revocation for such period and upon such terms and conditions as he may think fit."

Section 5 provides for the appointment of a Commissioner of Lands to administer the Ordinance.

Part III of the Ordinance deals with the letting of town plots, to which category the plot now in question belongs. Section 13 provides that leases of town plots may be granted for any term not exceeding ninety-nine years. By

s. 15 it is provided that leases of town plots shall, unless the Governor shall otherwise order in any particular case or cases be sold by auction. By s. 14, before any town plot is disposed of under s. 15, the Commissioner is required to

“determine (a) the rent which shall be payable in respect of such plot; . . . (c) the building conditions to be inserted in the lease of the plot; and (d) the special covenants, if any, which shall be inserted in the lease.”

Section 16 requires notice to be given of the place and time of sale, and such notice is required to state (*inter alia*)

“(e) the building conditions and the special covenants, if any, to be inserted in the lease to be granted in respect of any plot;” . . .

The lease in the present case was not in fact sold by auction, but the sections dealing with that method of disposal were relied on by Mr. Cross for their use of the expression “building conditions” in contrast to the expression “special covenants”. On the other hand s. 17 (also dealing with sales by auction) uses the expression “terms and conditions of the sale” in which “conditions” clearly does not mean “conditions of defeasance”. Section 21 provides that in every lease of a town plot there is to be implied “a covenant by the lessee not to divide the plot and assign any portion thereof”. It is interesting to note that an express stipulation to the same effect appears as number 5 of the “Special Conditions” in the present case. Sub-s. (2) of s. 21, which enables applications for leave to subdivide to be made, provides that

“no such application shall be entertained unless the building conditions (if any) in the lease have been complied with.”

Sub-s. (3) of the same section provides that new leases granted under sub-s. (2) shall be granted “on the same terms and conditions as the original lease”. Other examples of implied covenants are to be found in various sections which need not to be referred to in detail. See, for example, s. 36, s. 37, s. 38 and s. 39. Section 47 under the heading of “Part V—Disposal of Land for Special Purposes” implies covenants (a) not to assign, sub-let etc. without previous consent, and (b) not to use the land leased for any purpose other than the purpose or purposes specified in the lease. It is not clear that the plot now in question falls within Part V, but there is some significance in the fact that here again the “Special Conditions” include (as No. 4) a stipulation restricting user of the premises to

“hotel purposes only except that shops may be constructed on the ground floor”,

and (as No. 7), a stipulation against disposal of the land until Special Condition No. 1 has been complied with. Section 63 and s. 64 contain references to the grant of leases

“upon such conditions as may be specified in such leases or as may be prescribed”

(s. 63) and “upon such conditions as” the Governor “may deem expedient” (s. 64).

Section 76 provides for an implied covenant for quiet enjoyment for the benefit of the lessee “paying the rent and fulfilling the conditions” contained in the lease. Section 77 provides for implied covenants and conditions in every lease or licence by the lessee or licensee (putting it shortly) (a) to pay the rent and royalties thereby reserved and (b) to pay the taxes charged on the land or the buildings thereon.

Their lordships have already referred to the terms of s. 83. By s. 84

provision is made for the forfeiture of a licence for (*inter alia*) any breach of the conditions of the licence express or implied. By s. 86 the acceptance by or on behalf of the Crown of any purchase money or any rent or other payment is not to be held to operate as a waiver by the Crown of any forfeiture accruing by reason of the breach of any covenant or condition annexed to any sale lease or licence of or respecting Crown land. Section 157 provides procedure under which possession may be obtained against any person in occupation of Crown land whose right title or interest has expired or been forfeited, but this clearly cannot have been intended to override s. 83.

Having considered all the various references to “covenants”, “conditions” and “terms” which are to be found in the 1915 Ordinance their lordships are unable to hold that this enactment draws any clear cut or consistent distinction between the word “covenant” as meaning an obligation laid on the lessee which he is to be contractually bound to observe or perform and the word “condition” as meaning a stipulation which the lessee may fulfil or not as he chooses but which if not fulfilled is to operate as a condition of defeasance. Mr. Cross did not seek to maintain that the word “conditions” was throughout the Ordinance used in the sense just stated, and admitted that it was sometimes simply used as equivalent to “terms”. But he argued that in s. 14 and s. 16 “the building conditions to be inserted in the lease” contrasted as it was with “special covenants” did mean “conditions” in the technical sense of conditions of defeasance, so that the “building conditions” when inserted in the lease could only be framed as “conditions” in that sense and could not be imposed as obligations in the nature of covenants. Their lordships find it impossible to accept this view. It appears to them that the expression “building conditions” means simply conditions as to building in the sense of the terms, or requirements, or stipulations, as to building which the lessee is to be bound to observe and perform under the lease. In their lordships’ judgment clear words would be necessary to justify the imputation to the legislature of an intention that the “building conditions” should not take effect as covenants but merely as conditions of defeasance, which would involve a radical departure from the commonly accepted practice. Their lordships find no words in the Ordinance clearly enjoining acceptance of this construction of the Ordinance, and they decline to adopt it.

Accordingly, as the law stood between the enactment of the 1915 Ordinance and the enactment of the Registration of Titles Ordinance, 1919, there was nothing to prevent “building conditions” under s. 14 and s. 16 of the former from being so framed as to operate as covenants on the part of the lessee. It is to be observed, however, that the special conditions in the present case were not strictly “building conditions” within s. 14 and s. 16, because the lease was not sold by auction, and moreover that the “Special Conditions” were not confined to building. But this, if anything, assists the appellant’s case, for it is not suggested that it was not open to the Governor (apart from any restriction to be spelt out of s. 14 and s. 16 of the Ordinance where applicable) to impose such stipulations (whether by way of condition or covenant) as he thought fit.

On the other hand, their lordships find it impossible to collect from the various references to covenants and conditions in other parts of the Ordinance any sufficient indication to justify the view that the words “lessee’s covenants” in s. 83 mean lessee’s covenants and conditions so as to bring within its scope mere conditions of defeasance. But they see no reason for excluding covenants which are also conditions, as constituting agreements or promises by the lessee to perform given stipulations and at the same time making their performance a condition of the continuance of the lease. Indeed (as Rudd, J., has pointed out) the provision for forfeiture in s. 83 itself has the effect of turning all covenants into conditions in this sense.

Their lordships should next state that in their opinion it is plain that under the Ordinance of 1915 the proper form of lease was an ordinary lease inter partes.

The next stage in the inquiry is to consider whether the “Special Conditions” in the present case if inserted just as they stand in a lease of the plot granted between 1915 and 1919 would have operated as lessee’s covenants or merely as conditions of defeasance.

This depends on the true construction of the hypothetical document. One must assume that the words of demise expressed the demise to be made “subject to the following special conditions” and that the lease went on to set out under the heading “Special Conditions” the twelve numbered paragraphs set out in the actual grant with which this case is concerned, but, like the actual grant, contained no statement in so many words that the grantee covenanted, or agreed, or promised to perform or observe such conditions.

The special conditions in question as set out in the present grant (omitting No. 1 to which reference has already been made) were in these terms:

“Special Conditions

- “2. The building shall not be erected until plans (including block plans showing the positions of the buildings and a system of drainage for disposing of sewage surface and sullage water) drawings elevations and specifications thereof shall have been approved in writing by the Local Authority and the Commissioner of Lands.
- “3. The grantee shall properly connect the drainage and sewage systems with any town systems when in the opinion of the Commissioner of Lands and the Local Authority the latter systems are so far completed as to enable the grantee so to do.
- “4. The land and buildings shall be used for hotel purposes only except that shops may be constructed on the ground floor.
- “5. The grantee shall not subdivide the land.
- “6. The buildings shall conform to a building line prescribed by the Local Authority.
- “7. The grantee shall not sell, transfer, sublease or otherwise alienate or part with the possession of the land nor enter into any charge (other than with the consent of the Commissioner of Lands for the raising of a loan for building purposes) or agreement of sale in respect thereof until Special Condition No. 1 has been complied with.
- “8. The grantee shall pay to the Commissioner of Lands on demand such sum as the Commissioner may estimate to be the proportionate cost of constructing all roads, drains and sewers serving the land.
- “9. The grantee shall pay such rates, taxes, charges, duties, assessments or outgoings of whatever description as may be imposed, charged or assessed by any Government of Local Authority upon the land or the buildings erected thereon including any contribution or other sum paid by the Governor in lieu thereof.
- “10. The Governor or such person or authority as may be appointed for the purpose shall have the right to enter upon the land and lay and have access to water mains service pipes and drains, telephone or telegraph wires and electric mains of all descriptions whether overhead or underground and the grantee shall not erect any building in such a way as to cover or interfere with any existing alignments of main or service pipes or the telephone or telegraph wires and electric mains aforementioned.

- “11. The main entrance to the building shall be set back to provide for the setting down of vehicular passengers on the land and similar provision shall be made for tradesmen’s vehicles.
- “12. The water supply system of the building shall include storage for at least twenty-four hours’ requirements.”

These conditions must be construed as a whole, and the mere fact that they are described as conditions is by no means conclusive of their character. It will be seen that they relate to a number of different matters of varying importance, all of which according to ordinary conveyancing practice would be made the subject of covenants with a suitable proviso for re-entry on breach. It will be seen further that they are for the most part expressed in such a way as to impose an imperative obligation on the lessee to perform and observe them. Paragraph 1 provides that “The grantee shall erect . . .” “and shall maintain . . .” Paragraph 2 is in the passive, but imposes restrictions on the doing of that which the grantee is obliged to do under No. 1, i.e. the erection of the building. Then by No. 3 “The grantee shall connect . . .” No. 4 is expressed in the passive as is usual in the case of a restriction as to user.

Then comes No. 5 “The grantee shall not subdivide the land”. No. 6 relates to the building line, and may be said to concern the way in which the grantee is to carry out his obligation under No. 1. By No. 7 “The grantee shall not sell . . .”. By No. 8 “The grantee shall pay to the Commissioner . . .”. By No. 9 “The grantee shall pay such rates, taxes” etc. By No. 10 “. . .the grantee shall not erect” etc. No. 11 and No. 12 again refer to the characteristics of the building which the grantee “shall erect” under No. 1. Their lordships therefore construe the special conditions as plainly designed to make it obligatory on the grantee to observe and perform them, as distinct from merely providing a list of stipulations which the grantee could comply with if he chose, but non-compliance with which would work a forfeiture. This view is strongly re-inforced by the inclusion of the provisions in No. 8 and No. 9 for the payment of the sums therein mentioned. It could hardly be intended that these provisions were not to give the Commissioner the right to sue the grantee for the amount mentioned in No. 8, or any sum which the Commissioner might have had to spend in respect of the matters mentioned in No. 9. Again, it would be surprising if the Commissioner was not to be entitled to restrain by injunction a subdivision of the land in breach of No. 5. The same observation applies to the restriction as to user contained in No. 4. The provision as to the repair of the building in No. 1 calls for similar comment. It would be surprising if the Commissioner was to be unable to sue for damages in the event of the grantee’s failure to repair.

All in all, this set of stipulations appears to their lordships to include provisions wholly unsuitable for treatment merely as conditions of defeasance as distinct from covenants; and, inasmuch as the question turns on the intention of the parties to be collected from the document as a whole, this is a circumstance of considerable importance.

For these reasons their lordships are of opinion that in a lease inter partes under the 1915 Ordinance and before 1919 the special conditions would have constituted covenants within the meaning of s. 83 of that Ordinance.

It remains to consider whether this conclusion as to the effect of the “Special Conditions” if they had appeared in a lease inter partes between 1915 and 1919 holds good with respect to those same conditions when included as they actually are in the grant now under consideration, being a grant operating as a lease but made as a deed poll in the form B (1) prescribed by the Registration of Titles Ordinance of 1919.

This Ordinance provides by s. 1 (2) that

“except so far as is expressly enacted to the contrary no Ordinance in so

far as it is inconsistent with this Ordinance shall apply or be deemed to apply to land whether freehold or leasehold which is under the operation of this Ordinance”.

By s. 2 “grant” is defined as meaning (*inter alia*)

“any . . . lease . . . for a period exceeding one year made by and on behalf of the Crown . . .”

By s. 20

“all land which is comprised in any grant issued subsequent to the commencement of this Ordinance shall be subject to this Ordinance and shall not be capable of being transferred, . . . or otherwise deal with except in accordance with the provisions of this Ordinance and every attempt to transfer, . . . or otherwise deal with the same except as aforesaid shall be null and void and of no effect”.

By s. 21

“grants shall be issued in duplicate in form B (1) or B (2) in the First Schedule, as the case may be, . . . The grant in duplicate shall be delivered out of the land office to the registrar of the registration district in which the land is situated who shall register the grant . . . and thereafter deliver one of the duplicates to the Commissioner of Lands for issue to the grantee, and retain the other to be bound up in the register as hereinafter directed”.

As has already been stated form B (1) is the form prescribed for a grant of land by the Crown for a term of years, or in other words a Crown Lease, and the present grant was made in that form, viz. as a Deed Poll and not as a Deed inter partes.

It is argued on the Commissioner’s side that a deed in this form (the use of which is made obligatory by s. 21 of the 1919 Ordinance) could not contain any covenants on the part of the lessee, inasmuch as he not only did not execute but was not even expressed to be a party to the grant. The effect of this argument, were it to prevail, would be far-reaching. It would be impossible for the Commissioner to impose any express covenants on a lessee of Crown land, although the 1915 Ordinance clearly authorises this. By parity of reasoning it would be impossible for any covenants on the part of such lessee to be implied. If it is indispensably necessary that the lessee should be a party to and execute the lease in order to be fixed with a covenant or obligation to do or abstain from doing what the lease expressly says he shall do or abstain from doing, then it must surely be equally necessary that he should be a party to and execute the lease in order to be fixed with a covenant to do or abstain from doing what the lease by statutory implication says he shall do or abstain from doing. Section 83 of the 1915 Ordinance would thus in effect be wholly abrogated, except in cases of non-payment of rent.

The abolition of covenants and substitution of conditions of defeasance would prevent the Commissioner from enforcing the terms of the lease except by forfeiture, which might well be against his interest.

On the other hand the lessee would be liable to suffer forfeiture without any claim for relief, however trifling the breach of condition and however valuable to him the lease might be.

Their lordships would not, unless constrained to do so, attribute these sweeping and untoward changes in the law to a form scheduled to what may be described as a procedural Ordinance.

It will be remembered that the form of grant B (1) is expressed to be subject to “the provisions and conditions contained in the said Ordinance” (i.e. for

present purposes the Ordinance of 1915). The effect of that language is reproduced in the present grant by the words

“and subject also to the provisions of the Crown Lands Ordinance (Chapter 155)”.

These words appear to their lordships to import into the document itself a reference to s. 83 of the 1915 Ordinance, and also to the covenants implied by s. 21 (1) and s. 77 the implication of which postulates a document in which covenants are capable of being implied. It would appear further that there are no express covenants in the document to which s. 83 could apply unless the special conditions are treated as covenants for the purposes of that section.

Their lordships’ conclusion on this by no means easy question is that on accepting the lease and going into possession under it (as he undoubtedly did) the appellant contracted obligations to observe and perform the special conditions which amounted to covenants for the purposes of s. 83.

Reverting to the possibility that the special conditions might be regarded as possessing the dual character of covenants and conditions their lordships would say that in their opinion a stipulation of that combined character would nevertheless be a covenant within the meaning of s. 83 and the remedy by way of forfeiture (subject to relief) conferred by s. 83 would (quoad forfeiture) be exhaustive and exclude any other mode of enforcing forfeiture for breach of the stipulation in question.

It follows in their lordships’ view that Rudd, J., did have jurisdiction to make the decree of May 2, 1957, relieving the appellant from forfeiture.

There remains the question whether, given the jurisdiction to grant relief, the learned judge was right in holding that this was a case in which relief from forfeiture should be granted and if so whether the terms on which he granted relief were terms on which he could properly grant it in the exercise of his discretion.

This aspect of the case was included in grounds 2, 3 and 4 of the Commissioner’s Memorandum of Appeal to the Court of Appeal for Eastern Africa but as that court decided in his favour on ground 1 (want of jurisdiction) it was unnecessary for it to consider grounds 2, 3 and 4, and it refrained from doing so. In connection with these grounds the Commissioner applied to the Court of Appeal to adduce further evidence bearing upon the question whether or not it would be just to grant relief, and tending to show that the present appellant was no longer financially able to build an hotel.

There was some discussion before their lordships as to the principles upon which the court should exercise its discretionary jurisdiction to grant relief against forfeiture in cases in which (subject to any relief the court may think fit to grant) the Commissioner is shown to be entitled to a declaration of forfeiture under s. 83. This turns on the words “subject to relief upon such terms as may appear just” in the first paragraph of the section, in conjunction with the second paragraph which provides that

“In exercising the power of granting relief under this section the court shall be guided by the principles of English law and the doctrines of equity”.

It appears to their lordships that the effect of the second paragraph of s. 83 is that where a case for forfeiture (subject to any relief the court may think fit to grant) has been made out under the first paragraph of the section, the court, in determining whether relief should be granted and if so on what terms, is to be guided by the principles upon which the English courts exercised their power of granting relief as between subject and subject under the relevant English statute law in force at the date when the Ordinance came into operation, and by the doctrines of equity. In their lordships’ opinion the reference to

English law must extend to statute law, inasmuch as relief from forfeiture is

virtually the creature of statute, and the statute law referred to must be the statute law in force at the date when s. 83 became law, inasmuch as there are no words in the second paragraph to give the reference an ambulatory effect, and *prima facie* a Kenya Ordinance could hardly be taken, in the absence of some indication to the contrary, to adopt in advance future English legislation of unknown content. This means, in effect, that the court is to be guided (which does not mean necessarily bound) by the principles laid down by s. 14 (2) of the Conveyancing Act, 1881, and the decisions of the English courts under that section, so far as applicable to a case under s. 83, which (apart from requiring a bare notice of the breach) does not include the preliminary steps prescribed by s. 14 (1) as necessary in order to make the forfeiture enforceable; and that the court should also have regard to the doctrines of equity. This accords with the view expressed in the case in the Court of Appeal for Eastern Africa of *Dedhar v. Commissioner of Lands* (1), [1957] E.A. 104, (C.A.) a case which is also noteworthy in that it was assumed without argument that a "Special Condition" in a post 1919 Crown Lease of a town plot was a covenant within the meaning of s. 83. For the reasons given in the judgment of Sir Kenneth O'Connor, P., (at p. 152 and p. 153 of the record) their lordships cannot accept the argument that the second paragraph of s. 83 does not import a reference to s. 14 of the Act of 1881 because that Act did not bind the Crown in England.

The view their lordships have taken as to the application of s. 83 makes it unnecessary for them to discuss the question whether the appellant could otherwise have made good a claim to relief under the pure doctrines of equity on the ground of accident or surprise.

Their lordships would express their indebtedness to the full and careful judgments of Sir Kenneth O'Connor, P., and Rudd, J., from which they have derived much assistance.

For the reasons above stated their lordships are of opinion that this appeal should be allowed, and the Order of the Court of Appeal for Eastern Africa dated March 24, 1958, should be discharged and that the case should be remitted to the Court of Appeal for Eastern Africa to hear and determine the grounds of appeal contained in 2, 3 and 4 of the Commissioner's Memorandum of Appeal to that court, and also the Commissioner's application to adduce fresh evidence bearing upon these grounds.

Their lordships will humbly advise Her Majesty accordingly.

The Commissioner must pay the costs of this appeal and of the hearing in the Court of Appeal. The order as to costs made in the Supreme Court will not be disturbed.

The costs of the further hearing will be in the discretion of the Court of Appeal.

Appeal allowed. Case remitted to Court of Appeal to hear the claim for relief against forfeiture.

For the appellant:

Dingle Foot QC (of the English Bar), *Swaraj Singh* and *Miss J Bisschop* (of the English Bar)
TL Wilson & Co, London

For the respondent:

Geoffrey Cross QC, *JG le Quesne* (both of the English Bar) and *HG Sherrin* (Crown Counsel, Kenya)
Charles Russell & Co, London

The City Brewery Limited v Chhaganlal Jeraj Ganatrar and Odhavji Jeraj

Ganatrar
[1959] 1 EA 1030 (HCU)

Division: HM High Court of Uganda at Kampala
Date of judgment: 1 October 1959
Case Number: 724/1958
Before: Sir Audley Mckisack CJ
Sourced by: LawAfrica

[1] Guarantee – Construction – Interest stated in schedule but not in body of bond – Whether guarantor liable to pay interest – Default in instalment by principal debtor – Whether delay in notifying default to guarantor discharges liability – Indian Contract Act, 1872, s. 134 and s. 137.

Editor's Summary

By a bond dated July 8, 1956, the second defendant guaranteed payment by the principal debtor of a sum of Shs. 20,284/-. Under the bond the principal debtor was to pay monthly instalments of Shs. 1,250/- each. He paid six instalments up to December, 1956, and the amount remaining unpaid as at March 31, 1958, was Shs. 18,269/90 of which Shs. 15,298/69 represented principal and Shs. 2,971/21 interest. On March 25, 1958, the plaintiff gave notice for the first time to the second defendant of the principal debtor's default and claimed payment from him. The defendant contended that his liability on the bond had been discharged. The two issues before the court were, firstly, whether interest was included in the amount payable by the defendant under the terms of the bond and, secondly, whether the conduct of the plaintiff had been such that the defendant's liability under the bond had been totally discharged. By cl. 1 of the bond the amount of indebtedness was stated as Shs. 20,284/-; by cl. 3 the defendant had "agreed to guarantee the payment directed under the bond, and all the incidents to such payment", and cl. 4 (b) provided interest at 9 per cent. In the schedule to the bond, interest was shown as Shs. 2,586/21 and it was to this that the defendant objected to on the ground that the bond did not direct payment of this item but only to payment of future interest as provided by cl. 4 (b). Clause 4 (e) provided when proceedings could be commenced in default of an instalment.

Held –

- (i) reading cl. 1 and cl. 4 (b) and the schedule together a reasonable construction of the bond was that the debt included the interest already accrued due on the sum specified in cl. 1 as well as future interest, and cl. 3 was effective to include that item in the amount guaranteed by the defendant.
- (ii) clause 4 (e) did not say in terms that the plaintiff must give notice of a default within a specified period, nor was such a requirement to be implied; what the clause did was to specify two conditions precedent to the commencement of proceedings to recover any instalment: firstly, that the instalment shall have remained unpaid for a period of three days from the due date for payment, and secondly, that three days shall have elapsed from the posting of a notification to the guarantor.

Judgment for the plaintiff.

Cases referred to in judgment

- (1) *Midland Counties Motor Finance Co. Ltd. v. Slade*, [1951] 1 K.B. 346; [1950] 2 All E.R. 821.
- (2) *Dawson v. Law* (1854), 23 L.J. Ch. 434.

Judgment

Sir Audley Mckisack CJ: This is a suit upon a guarantee, the defendant, Odhavji J. Ganatrar, having entered into a bond, dated July 8, 1956, guaranteeing payment by the principal debtor (his brother) of the amount specified in the bond. Under the terms of the bond the principal debtor was to pay instalments of Shs. 1,250/- each on July 8, 1956, and the eighth day of each succeeding month. He paid six of these instalments only, in the months of July to December, 1956, and then ceased payment altogether. The amount remaining unpaid as at March 31, 1958, was, according to the plaintiff, Shs. 15,690/21 for principal, and Shs. 3,042/60 for interest, but it has since been agreed that the correct figures are Shs. 15,298/69 for principal, and Shs. 2,971/21 for interest, total Shs. 18,269/90. It is not, however, admitted by the defendant that, if he is liable at all, he is liable for the whole of that sum, and I shall deal with that later. It is common ground that on March 25, 1958, by a letter bearing that date, the plaintiff gave notice to the defendant of the principal debtor's default, and claimed payment from the defendant. The defendant contends that his liability on the bond has been discharged, and that he is not indebted to the plaintiff for any sum.

No evidence was called, and the parties confined themselves to argument on two issues; the first is whether an item for Shs. 2,586/21 is included in the amount payable by the defendant under the terms of the bond; and the second is whether the conduct of the plaintiff has been such that the defendant's liability under the bond has been totally discharged.

The bond is in the following terms:

"Bond

"Entered into this 8th day of July, 1956, between Chhaganlal Jeraj Ganatrar trading as "The New Azad Sweet Mart" of Mbale, Uganda, hereinafter called the debtor, of the first part,...Odhavji, of Mbale, Uganda, of the second part, hereinafter called the guarantor, and The City Brewery Limited, of Kingston Road, Nairobi, Kenya, hereinafter called the creditor of the third part, witnesseth as follows:

- "1. That the debtor is indebted to the creditor in the sum of Shs. 20,284/- (Twenty thousand two hundred and eighty four) an agreed amount due and owing as the price of goods sold and delivered to the debtor, at his request.
- "2. That the debtor has requested the creditor to grant him indulgence and extended time for payment.
- "3. That the guarantor has agreed to guarantee the payment directed under the bond, and all the incidents to such payment.
- "4. Now in consideration of such debt and such indulgence and such guarantee, it is agreed as follows:
 - "(a) That the debt be paid by instalments of Shs. 1,250/- (Twelve hundred and fifty) per month, the first of such payments being payable on the due execution of these presents, and the further payments on the same day of each succeeding month.
 - "(b) That the debt carry interest at 9 per cent. or the current bank rate for advances whichever be the greater.
 - "(c) That payment be made to the creditor's representative at Kampala whose address is notified to the debtor and the guarantor.
 - "(d) That any commission charged by the bank on cheques if payable otherwise than in Kampala, be added to the current payment or chargeable to the debt.

- “(e) That in the event of any instalment being due and unpaid for a period of three days from due date, the creditor having notified the guarantor at his last known address, may three days after the posting of such notification, commence proceedings against either the debtor or the guarantor or both without further notice for the amount then due.
- “(f) That if the guarantor shall suffer civil distress to be levied upon him for an amount exceeding any one instalment accruing due hereunder, or apply to be declared bankrupt or be so declared, in such case the creditor may immediately demand payment of the full amount due on the bond from either or both parties.
- “(g) That no further indulgence granted by the creditor hereunder shall in any way affect his rights under this bond.
- “(h) That the cost and stamp duty on this bond estimated at Shs. 320/- shall become part of the debt and recoverable hereunder.
- “(i) That provided the debtor observe all the terms agreed to herein and pay the debt, the guarantor be discharged absolutely and that otherwise the guarantee do remain in full force and effect.

“Signed, sealed and delivered by the said debtor, the said guarantor and the said creditor, the day and the year first above written.

“In the presence of:

(Sgd.) Chhaganlal Jeraj Ganatrar

(Sgd.) Odhavji Jeraj.

(Sgd.) M. C. Ghelani.

M. C. Ghelani, B.A., LL.B.,

Advocate.

P.O. Box 242, Mbale.

“Schedule

Principal	Shs. 20,284.00
Interest at 9 per cent	2,586.21
Fees on Bond	200.00
Stamp Duty	120.00
Total	Shs. 23,190.21

I hereby certify that the contents hereof were first read over and explained by me to the executant(s) herein and they fully appeared to understand the same.

(Sgd.) M. C. Ghelani

M. C. Ghelani.”

The disputed item is the one in the schedule which reads: “Interest at 9 per cent. . . . Shs. 2,586/21”. The schedule is not mentioned in the body of the bond and Mr. Ghelani, for the defendant, relies on cl. 1 and cl. 3 of the bond as showing that the defendant is not liable for this item. His argument is as follows. By reason of cl. 3 the defendant is only liable for payments directed under the bond and incidents to payment so directed; the bond does not “direct” payment of this item, which can only relate to interest in respect

of the period ending on the date of execution of the bond, and therefore conflicts with cl. 1. The bond only directs payment of future interest (cl. 4 (*b*)). Consequently, this item in the schedule is meaningless.

I am unable to agree with this contention. One cannot reject a provision as meaningless if there is a reasonable alternative construction. Reading cl. 1 and cl. 4 (*b*) and the schedule together I find that a reasonable construction of the bond is that the debt includes the interest already accrued due on the sum

specified in cl. 1, as well as future interest, and cl. 3 is effective to include that item in the amount guaranteed by the defendant. The plaintiff accordingly succeeds on the first issue.

As to the second issue, I understand that Mr. Ghelani relies on cl. 4 (*e*) of the bond and on the fact that, although the last instalment was paid in December, 1956, it was not until March 25, 1958, that the defendant was given notice of the principal debtor's default or any steps to enforce payment were initiated. Mr. Ghelani argues that cl. 4 (*e*) is, in effect, a requirement that the plaintiff must give the defendant notice of any default by the principal debtor promptly upon the expiry of a period of three days from the date on which the instalment should have been paid. He says that this notice should have been given either immediately on the expiry of the three days or, at any rate, before the next following instalment became due for payment. I agree that, if this is the true meaning of this clause, then it is clear that the plaintiff has not complied with it, and it may well be that the defendant's liability is discharged. Mr. Ghelani referred me to *Midland Counties Motor Finance Co. Ltd. v. Slade* (1), [1951] 1 K.B. 346, in which a contract of guarantee contained a provision that the contract should not be avoided by the creditor's giving time to the principal debtor or granting him any other indulgence; but there was a proviso that the creditor was to inform the guarantor when any payment or instalment should be more than thirty days overdue; it was held that, as this proviso had not been satisfied in respect of an instalment, the contract of guarantee was avoided at common law by the company's having granted the principal debtor an extension of time for the payment of the instalment. But I do not agree with Mr. Ghelani's construction of cl. 4 (*e*). It certainly does not say in terms that the plaintiff must give notice of a default within a specified period, nor do I consider that such a requirement is to be implied. What this clause does is to specify two conditions precedent to the commencement of proceedings to recover any instalment. The conditions are, firstly, that the instalment shall have remained unpaid for a period of three days from the due date for payment and, secondly, that three days shall have elapsed from the posting of a notification to the guarantor. If those two conditions are satisfied, then the plaintiff is entitled to sue in respect of the instalment and the proceedings may be against the debtor or the guarantor, or both, and no further notice is required. That seems to me quite a different thing from a provision requiring notice of default of an instalment within a specified time (irrespective of the commencement or contemplated commencement of proceedings). Consequently, apart from the question of a binding agreement between creditor and principal debtor (with which I shall now deal), the *Midland Counties Motor Finance* case (1) does not, to my mind, appear to be on all fours with the present case. I do not consider there has been any breach of cl. 4 (*e*). Nor do the other cases cited to me on behalf of the defendant assist him. They merely show that, where there is a binding agreement between the creditor and the principal debtor whereby the debtor is given time, or the terms of the original contract are varied, then the guarantor is discharged. As I understand it, one of Mr. Ghelani's arguments is that the principal debtor in the instant case was given time by the plaintiff by reason of no steps being taken about the debtor's default until the notification of March 25, 1958, to the defendant. But here it is quite clear that there was no binding agreement to give time. Mr. Ghelani also argues that the plaintiff has "wilfully shut his eyes" to the debtor's default and he cites para. 856 of Chitty on Contracts, Vol. 2 (21st Edn.) p. 466, which reads:

"If the principal's default were committed with the connivance of the creditor, or if the creditor wilfully shut his eyes to the default which the principal was about to commit, this would discharge the surety."

The case, however, which is cited as the authority for that proposition—*Dawson v. Laws* (2) (1854), 23 L.J. Ch. 434—shows that the mere inaction of the creditor is not sufficient to discharge a surety. The final part of the headnote to the report of that case is:

“To discharge a surety for the due performance of duties, there must be on the part of the obligee such an act of connivance or gross negligence amounting to a wilful shutting of the eyes to the fraud, or something approximating to it.”

And at p. 473 of Chitty on Contracts it is stated:

“It is clear that mere gratuitous forbearance by the creditor, without any binding agreement to refrain from taking proceedings, cannot discharge the surety at law or in equity; for his situation, and his right in equity, even before he is actually dandified, to compel the principal to exonerate him, are not thereby prejudiced.”

Regard must also be had to the Indian Contract Act, which is in force in this country. The relevant sections are s. 134 and s. 137, which are as follows (omitting the illustrations to s. 134):

“134. The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

“137. Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.

“Illustration

“B. owes to C. a debt guaranteed by A. The debt becomes payable. C. does not sue B. for a year after the debt has become payable. A. is not discharged from his suretyship.”

The last-mentioned section is very relevant to the instant case. As I have said, this is not a case where there is a requirement for notice of default within a limited period, and there has been no binding agreement between the creditor and the principal debtor which would affect the guarantor’s rights.

Consequently, there will be judgment for the plaintiff against the defendant Odhavji J. Ganatrar for the full amount claimed, which is Shs. 18,269/90, with costs and interest as follows:

- (a) at 9 per cent. on Shs. 15,298/69 from the institution of the suit to the date of this judgment; and
- (b) thereafter at the rate of 6 per cent. on the decretal amount.

Judgment for plaintiff.

For the plaintiff:

FJ Macken

FJ Macken, Kampala

For the defendants:

MC Ghelani

MC Ghelani, Kampala

Riziki Binti Abdulla and Faiza Binti Abdulla v Sharifa Binti Mohamed Bin Hemed and others

[1959] 1 EA 1035 (CAM)

Division: Court of Appeal at Mombasa
Date of Judgement: 10 December 1959
Case Number: 5/1959
Before: Forbes V-P, Gould and Windham JJA
Sourced by: LawAfrica
Appeal from: H.M. Supreme Court of Kenya–Edmonds, J

[1] Mohamedan law – Wakf – Adopted daughters and their issue named as beneficiaries – Whether words “divided” and “take” constitute absolute gifts of income – No specific mention that income was for maintenance and support of beneficiaries – Illusory nature of gift to religion and charity – Whether court has jurisdiction to declare wakf void ab initio or order wakf property to revert to settlor’s estate – Whether adopted child included in the word ‘family’ in s. 4 (1) (a) of Wakf Commissioners Ordinance, 1951 – Meaning of “either wholly or partly” – Wakf Commissioners Ordinance, 1951, s. 3 (1), s. 4, s. 4 (1) (a), s. 13, s. 16, s. 18 and s. 21 (K.) – Mussalman Wakf Validating Act of India, 1913, s. 3.

[2] Evidence – Wakf – No specific mention in deed that gift of income was for maintenance and support of beneficiaries – Whether extraneous evidence admissible to prove intention of settler – Indian Evidence Act, 1872, s. 91.

[3] Judgment – Judicial decision as authority – When a decision is per incuriam.

Editor’s Summary

By a written instrument dated November 3, 1942, one, Khadija binti Suleman bin Hemed, after reciting that she was making the wakf “in consideration of my natural love and affection for my adopted daughters” who were the appellants and the other beneficiaries therein mentioned declared a wakf of immovable property owned by her, appointed trustees and provided by cl. 3 that “the free balance of the income of the wakf property shall be divided each month” between the two appellants equally and that on the death of either, her share should be “divided” equally among her sons and daughters and their issue, while failing them later beneficiaries should “take” specified shares. There was no suggestion that such income must be devoted solely, or even partly, to the maintenance and support of the beneficiaries concerned. The respondents, who were blood-relatives of the settlor and entitled to succeed to her estate upon her intestacy, filed a plaint claiming a declaration that the wakf was void ab initio on a number of grounds and asking for an account of the income that had been paid out under it. The settlor and also all the parties to the suit were Mohamedans of the Shafi sub-sect of the Sunni sect and the appellants, who were the settlor’s adopted daughters, were not related to her by blood or marriage. The trial judge decided against the validity of the wakf on the ground that the income was not given for the “maintenance and support of any person including the family, children, descendants or kindred of the maker” within the meaning of s. 4 (1) (a) of the Wakf Commissioners Ordinance, 1951, and further held that the wakf should be declared null and void ab initio and that the wakfed properties should be declared to “belong to or form part of the intestate estate of the settlor”. On appeal it was submitted that at least so

far as the two appellants themselves were concerned the courts should have regard to extraneous circumstances in order to show that the purpose of the wakf was to maintain and support them; that a case on which the trial judge relied was decided per incuriam; that even if the disposition to the appellants' issue was bad, the gift of the wakf income to the appellants only for their respective lives was, taken by itself, a good disposition

by reason of its falling within s. 4 (1) (a) of the Ordinance, that the income should therefore be paid to them until their respective deaths and that the residue should then be paid to the Wakf Commissioners to be administered by them for charitable purposes as provided in the Ordinance; that by reason of s. 21 of the Ordinance, neither the Supreme Court nor this court had jurisdiction to declare a wakf to be void ab initio or to order the wakf property to revert to the settlor or her heirs, but that the court's jurisdiction was limited to declaring whether or not the wakf was valid.

Held –

- (i) in order to admit evidence of attendant circumstances, the ambiguity with regard to the settlor's intention must be one which lies in the terms of the wakf deed itself; in the present case extraneous evidence to show that the settlor intended her dispositions to be limited to the maintenance and support of the appellants or the succeeding beneficiaries was inadmissible and there was nothing on the face of the wakf deed itself to indicate that such was her intention.
- (ii) the judgment of this court in the case of *Sheikha binti Ali and Another v. Halima binti Said and Others* could not even remotely be brought within the ambit of a judgment delivered per incuriam and the Supreme Court was right in holding itself bound by it: *Sheikha binti Ali and Another v. Halima binti Said and Others*, [1958] E.A. 623 (C.A.) approved and explained.
- (iii) an adopted child, not related by blood to the settlor, can not be included in the word "family" in s. 4 (1) (a) of the Ordinance; consequently, the disposition in favour of the children of the appellants and those children's issue prevented the wakf from falling within the saving provision of the same sub-section notwithstanding that the appellants were the adopted daughters of the settlor and resided with her at the time of the creation of the wakf.
- (iv) the wakf failed to come within the saving provisions of s. 4 of the Ordinance for two independent reasons, namely: (a) because the wakf income had not been shown to have been left either expressly or by implication for the "maintenance and support" of the beneficiaries; *Sheikha binti Ali and Another v. Halima binti Said and Others*, [1958] E.A. 623 (C.A.) followed; and (b) because the dispositions following those to the appellants themselves for life were not in favour of "any person including the family, children, descendants or kindred of the maker" for the purposes of s. 4 (1) (a): *Amina binti Abdulla and Another v. Sheha binti Salim* (1953), 21 E.A.C.A. 12 followed.
- (v) as the wakf failed to bring itself within the protective mantle of s. 4, it was ab initio because by reason of the disposition of income to the children and remoter issue of the first beneficiaries, from generation to generation, before the ultimate gift over to the charitable beneficiaries, the chances of those charitable beneficiaries benefiting were so remote that the necessary charitable intent was illusory and the wakf was accordingly no true wakf: *Said bin Muhamed bin Kassim el-Riyani and Others v. The Wakf Commissioner, Zanzibar* (1946), 13 E.A.C.A. 32; *Fatima binti Salim Bakhshuwn and Another v. Mohamed bin Salim Bakhshuwn* (1949), 16 E.A.C.A. 11; [1952] A.C. 1, and *Sheikha binti Ali and Another v. Halima binti Said and Others*, [1958] E.A. 623 (C.A.) followed.
- (vi) an instrument which did not disclose or give effect to a genuine intention to benefit religion or charity was no wakf at all and must be deemed to be void ab initio leaving no foundation to support what might otherwise have been a good disposition, namely, a gift of income for life to a named beneficiary.

- (vii) according to the basic principle underlying wakfs, there was no question of any beneficiary acquiring a vested interest in the wakfed property at all; the only vesting of anything is the implied vesting of the corpus of the wakf

in the Almighty, the mutawalli or trustee being no more than the manager of the wakf.

- (viii) the English rule of perpetuities did not apply to wakfs but limitations in favour of beneficiaries from generation to generation made a wakf bad because the indefinite postponement of the religious or charitable gift over, made the religious or charitable intent illusory: *Saadat Kamel Hanum v. Attorney-General*, Palestine (1939), A.I.R. P.C. 185.
- (ix) as the purported wakf was illusory by reason of the remoteness of the charitable gift over, there should be no payment of income to the first beneficiaries, to whom the income had been directed to be paid for life and the corpus should immediately revert to the settlors' estate.
- (x) s. 21 did not deprive the court of the jurisdiction to declare a wakf to be void ab initio or to order the wakf property to revert to the settlor or his heirs, and it did not cover an instrument which has been declared to be void ab initio for lack of any genuine religion or charitable object but would seem to be designed to ensure that where a genuine intention to benefit religion or charity has been shown by the settlor by dedicating property to the Almighty by a wakf deed, that intention shall not be defeated by any difficulty, even illegality, not going to the root of the dedication, but shall be given effect to cy pres.

Appeal dismissed.

Cases referred to in judgment

- (1) *Sheikha binti Ali and Another v. Halima binti Said and Others*, [1958] E.A. 623 (C.A.).
- (2) *Fatima binti Salim Bakhshuwen and Another v. Mohamed bin Salim Bakhshuwen* (1949), 16 E.A.C.A. 11; [1952] A.C. 1.
- (3) *Zainuddin Hossain v. Muhammad Abdur Rahim* (1933), A.I.R. Cal. 102.
- (4) *Shaikh Muhammad Ibrahim v. Bibi Miriam* (1929), 8 Pat. 484.
- (5) *Kiriri Cotton Co. v. R. K. Dewani*, [1958] E.A. 239 (C.A.).
- (6) *Morelle Ltd. v. Wakeling*, [1955] 1 All E.R. 708.
- (7) *Leigh v. Norbury*, 33 E.R. 321.
- (8) *Amina binti Abdulla and Another v. Sheha binti Salim* (1953), 21 E.A.C.A. 12.
- (9) *Humble v. Bowman* (1878), 47 L.J. Ch. 62.
- (10) *Muhammad Umar Khan and Another v. Muhammad Niaz-ud-din Khan* (1911), 39 I.A. 19.
- (11) *Ismail Haji v. Umar Abdulla* (1942), A.I.R. Bom. 155.
- (12) *Mubarik Ali v. Ahmed Ali* (1933), A.I.R. Lah. 414.
- (13) *Said bin Muhamed bin Kassim el-Rirami and Others v. The Wakf Commissioner, Zanzibar* (1946), 13 E.A.C.A. 32.
- (14) *Hayes v. Hayes*, 38 E.R. 822.
- (15) *Saadat Kamel Hanum v. Attorney-General*, Palestine (1939), A.I.R. P.C. 185.
- (16) *Abul Fata Mahomed Ishak v. Russomoy Dhur Chowdhry* (1894), 22 I.A. 76.

(17) *Mohamed Abdalla Mfaume and Others v. Salim Ismail and Another*, Kenya Supreme Court (Mombasa) Civil No. Case 476 of 1958 (unreported).

(18) *The Wakf Commissioner v. The Public Trustee*, [1959] E.A. 368 (C.A.).

December 10. The following judgments were read by direction of the court:

Judgment

Windham JA: This is an appeal against a judgment and decree of the Supreme Court of Kenya, at Mombasa, dated October 28, 1958, declaring a wakf to be null and void ab initio and the wakfed properties to form part of

the intestate estate of the maker of the wakf (settlor). The two appellants, who were the second and third defendants in the court below, were beneficiaries under the wakf and were de facto the adopted daughters of the settlor. The eight respondents, who were the plaintiffs below, were blood-relatives of the settlor, entitled as “sharers” and “residuaries” to succeed to her estate upon her intestacy.

The settlor, and also all the parties to the suit, were Mohamedans of the the Shafi sub-sect of the Sunni sect. By a written instrument dated November 3, 1942, and registered on December 3, 1942, the settlor declared, or purported to declare, a wakf of certain immovable property owned by her in Mombasa. She appointed herself as the first trustee (or mutawalli) of the wakf, and after her death her cousin the first defendant and thereafter such person as he or the beneficiaries should appoint. After reciting that she was making the wakf

“in consideration of my natural love and affection for my adopted daughters Riziki binti Abdulla and Faiza binti Abdulla and the other beneficiaries hereinafter mentioned”,

and after declaring the wakf, appointing the successive trustees as aforesaid, and providing that from the monthly income they should first defray all expenses of maintaining and administering the property and then pay one-tenth of the balance into a reserve fund, she made beneficial provisions, of which cl. 3 and cl. 6 of the wakf deed contain everything material to this case, both in the court below and before us on appeal. Clause 3 and cl. 6 read as follows:

“3. The free balance of the income of the wakf property shall be divided each month between my said adopted daughters in equal shares and upon the death of one or other of my said adopted daughters, her share shall be divided equally among her sons and daughters and their issue per stirpes, brothers taking the same share as sisters, and, failing issue of either of my adopted daughters, the half share of the income that would have gone to such issue shall be divided (first) equally among my sisters Shariffa, Kalathumi, Rukiya and Mwana Wa Sheh each of whom and, failing her, her issue shall take one part (second) the surviving adopted child or her issue per stirpes who shall take one part and (third) the children of my late brother Seif bin Mohamed El-Busaid including his adopted child, and, failing any of such children, their issue per stirpes who shall take one part equally among them.

.....

“6. If the beneficiaries so appointed shall die out or fail, the income of the wakf shall be devoted to assisting poor Mohamedans, promoting the Mohamedan faith, educating Mohamedan children, maintaining and assisting impoverished mosques and other charitable purposes of which the prophet would approve.”

The settlor died on April 11, 1952, and the first defendant proceeded to administer the wakf in accordance with its provisions until, on February 10, 1958, the plaint was lodged, claiming a declaration that the wakf was void ab initio on a number of grounds and asking for an account of the income that had been paid out under it. At the trial, learned counsel for the respondents abandoned any claim to accounts of income received and distributed before July 31, 1957, none having been distributed since that date.

Before considering the question of the validity of the wakf I would here record, as undisputed facts, that the settlor’s adopted daughters, the first and second appellants, were adopted and brought up by her from infancy, that they were not related to her by blood or marriage, that they were respectively

twelve and five years old in 1942 when the wakf was made, that they married at the ages of thirteen and nineteen respectively, and that they both have issue living. It is also conceded that no legal form or ceremony of adoption was gone through in their case, and that in any event adoption, as such is not recognised by Mohamedan law and confers no rights of inheritance under that law.

It will be convenient at this point to set out the provisions of s. 4 of the Wakf Commissioners Ordinance, 1951. The section reads as follows:

“4.(1) Every wakf heretobefore or hereafter made by any Muslim which is made, either wholly or partly, for any of the following purposes, that is to say:

- (a) for the maintenance and support, either wholly or partly, of any person including the family, children, descendants or kindred of the maker; or
- (b) if the maker of the wakf is an Ibathi or Hanafi Mohamedan, for his own maintenance and support during his lifetime,

is declared to be a valid wakf if:

- (i) it is in every other respect made in accordance with Muslim law; and
- (ii) the ultimate benefit in the property the subject of such wakf is expressly, or, in any case in which the personal law of the person making the wakf so permits, impliedly, reserved for the poor or for any other purposes recognized by Muslim law as a religious, pious or charitable purpose of a permanent character:

Provided that the absence of any reservation of the ultimate benefit in property the subject of a wakf for the poor or any other purpose recognised by Muslim law as a religious, pious or charitable purpose of a permanent character shall not invalidate the wakf if the personal law of the maker of the wakf does not require any such reservation.

“(2) No wakf to which sub-s. (1) of this section applies shall be invalid merely because the benefit in the property reserved by such wakf for the poor or any religious, pious or charitable purpose is not to take effect until after the extinction of the family, children, descendants or kindred of the maker of the wakf.”

The main grounds, upon any one of which the respondents contended in the court below that the wakf was invalid, grounds which were substantially embodied in framed issues, were: (1) that the settlor, during her lifetime used the income from the wakf properties for her own benefit or, in the phrase familiar in Mohamedan law, that she had “eaten out of the wakf”: (2) that the income was not given for the

“maintenance and support of any person including the family, children, descendants or kindred of the maker”,

within the meaning of s. 4 (1) (a) of the Wakf Commissioners Ordinance, 1951, and that accordingly the wakf, which but for the saving provisions of that section would be bad, was not saved by the section: (3) that even if the income of the wakf was impliedly given for the “maintenance and support” of any of the above categories of persons, those categories, while they would include the appellants under the head of “any person”, would not cover the appellants’ children and the latter’s issue, who are among the subsequent beneficiaries under the wakf, and that accordingly the wakf was bad in respect of at least

some of its dispositions and must therefore be declared null and void ab initio: (4) that the ultimate gift over to charity “is not of a permanent character or is void for uncertainty”. The grounds which I have numbered (1) and (4) were not strongly pressed.

The learned trial judge, after hearing some evidence, and much argument and reference to Mohamedan law and to judgments of the courts of India, of this court, and of the Privy Council, decided against the validity of the wakf on the issue which I have numbered as (2), and which in the framed issues was issue No. 5 (a); he accordingly found it unnecessary to decide on the other grounds upon which the wakf was argued to be invalid. In so deciding, the learned trial judge, in a brief judgment, followed a recent decision of this court on the same point upon what he considered to be indistinguishable facts, namely *Sheikha binti Ali and Another v. Halima binti Said and Others* (1), [1958] E.A. 623 (C.A.), holding that that case:

“has confirmed the judgement of Mayers, J., which decided issue 5 (a) in the present suit in favour of the plaintiffs—that issue being the same in the former case. Judgment in the instant case must therefore be in conformity with the decision of E.A.C.A. and the plaintiffs in this case must succeed.”

The learned judge proceeded to enter judgment as prayed in paras. (1) and (2) of the prayer in the plaint, namely that the wakf should be declared null and void ab initio, that the wakfed properties should be declared to “belong to or form part of the intestate estate of the settlor”, and that entries in the Register of Land Titles and on all certificates of title relating to the wakf should be cancelled and deleted.

Sheikha binti Ali's case (1) concerned a wakf of a number of properties made in 1946 by a Mohamedan of the Shafi sub-sect in which he directed that “the income” of the wakfed properties should be “utilised in the manner hereinafter set out”, and there followed a direction that the income of one of those properties should be

“paid to Sheikha and Fatuma, daughters of Ali bin Khamis during their lifetime only”.

After further directions for the payment of income of other of the wakfed properties towards specified religious purposes, there followed a direction that the income from one of the properties should

“solely be paid to my sister Mwana Kavani binti Mwidau during her lifetime and after her death to her two daughters Sheikha binti Ali and Fatuma binti Ali during their lifetime only”.

Then came a direction that the income from yet another of the properties should be “paid to” his wife for life, and that thereafter it should “go to” his nephew for life and after his death, to his children and grandchildren, and so on from generation to generation, and, failing all descendants of the settlor, that the benefit of the wakf should go to his “poor relatives” and thereafter to the “poor and beggar Mohamedans of Mombasa”.

At the trial of *Sheikha binti Ali's* case (1) at first instance, the Supreme Court of Kenya, in Mombasa, in Civil Case No. 9 of 1957, declared that the above wakf was void ab initio, on the ground that, apart from the saving provisions of s. 4 of the Wakf Commissioners Ordinance, 1951, it would be bad by reason of the remoteness of the ultimate gift to charity, following the decision of this court in *Fatima binti Salim Bakhshuwn and Another v. Mohamed bin Salim Bakhshuwn* (2) (1949), 16 E.A.C.A. 11, upheld by the Privy Council, eo nomine, in (1952) A.C. 1, which I shall hereinafter refer to as *Bakhshuwn's* case. It is

to be observed that s. 4 (2) of the Ordinance, which provides in effect that a wakf shall not be held to be void merely because it postpones indefinitely the religious or charitable gift over, applies only to wakfs to which s. 4 (1) applies. The Supreme Court went on to hold that the wakf did not fall within s. 4 (1) and was not saved by it, because para. (a) of s. 4 (1) requires that, to be saved, the purpose of the wakf must be for the “maintenance and support” of the person or categories of persons therein mentioned, whereas the wakf in that case merely provided that the income should be “paid to” or should “go to” the beneficiaries named, without any indication that it should be used only, or even partly, for their maintenance and support. This court, in *Sheikha binti Ali’s* case (1) upheld the decision of the Supreme Court. In the judgment of Briggs, V.-P., the point at issue was stated thus:

“This was an appeal from a judgment and decree of the Supreme Court of Kenya declaring certain wakfs of land in Mombasa to have been void ab initio and granting consequential relief. The facts are set out in detail in the judgment appealed from, and it is not necessary to repeat them. Many issues were raised in the suit, but the learned trial judge based his decision on one point only, that the successive life-interests created by the wakf deed in favour of various individuals living and unborn offended against the perpetuities rule, and were not saved by the provisions of s. 4 (1) (a) of the Wakf Commissioners Ordinance (No. 30 of 1951), since they were not trusts merely for the ‘maintenance and support’ of those individuals, but were absolute gifts to them of the income of the fund from time to time. It was conceded by the appellants that, if the learned judge was right on this point, his decision as a whole must stand. Accordingly we heard argument first on this point and, being of opinion that it was rightly decided, found it unnecessary to consider any of the other issues raised on the appeal. There was a cross-appeal, to which reference will be made later.

“It was submitted for the appellant that, although a wakf, in order to come within the provisions of s. 4 (1) (a), must have as its purpose the ‘maintenance and support’ of individual beneficiaries, those words need not be used, and the purpose might appear by implication. This may be conceded; but in the present case the gifts are in form absolute gifts of income, with no indication in the wording of the deed as to the object of the gifts or as to any restriction on disposal of the income. The appellant’s counsel conceded that, if it was apparent from the wording that the money was intended to be applied to purposes not within the true meaning of ‘maintenance and support’, for example, to gambling, an intended wakf might be bad; but he argued that, where income was given simpliciter to persons within the scope of s. 4 (1) (a), it was, or should be deemed to be, given for their ‘maintenance and support’, and the trusts should therefore be valid.”

After considering the arguments advanced, the judgment approved the

“general proposition that an absolute gift of income is something wider than, and different in kind from, a gift for maintenance and support”,

and it concluded in the following words:

“For these reasons and for the further reasons given on this point by the learned trial judge, we were of opinion that the life-interests given by the wakf deed were not within the permitted purpose of maintenance and support of the wakif’s family, that the wakf was consequently not validated by the provisions of s. 4 of the Ordinance and that it was rightly held void as being in breach of the rule against perpetuities.”

Subject to consideration of a submission advanced for the appellants and based on s. 16 and s. 21 of the Wakf Commissioners Ordinance, 1951, with

which I will deal later, I am of opinion that the court below, in the instant case, was right in holding itself bound by the above judgment of this court in *Sheikha binti Ali's* case (1), and that we too ought to follow it, unless it can be shown either (a) that it is distinguishable on facts, or (b) that it was reached *per incuriam*, both of which contentions have been advanced on the appellants' behalf.

As regards the first contention, this court, in *Sheikha binti Ali's* case (1), conceded that

“although a wakf, in order to come within the provisions of s. 4 (1) (a), must have as its purpose the ‘maintenance and support’ of individual beneficiaries, those words need not be used, and the purpose might appear by implication”.

It is submitted that such purpose, though it was held not to be implied in that case, does appear by implication in the instant case. The judgment in that case, however, continues:

“but in the present case the gifts are in form absolute gifts of income, with no indication in the wording of the deed as to the object of the gifts or as to any restriction on disposal of the income.”

Confining ourselves for the moment to the actual words of the dispositions in the wakf deed which was the subject of that case and those in the wakf deed in the instant case, respectively, I can find no material difference between the two, whereby a gift for “maintenance and support” might be held to be implied in the latter though not in the former. In the instant case the direction is that the “free balance of the income of the wakf property shall be divided each month” between the two appellants equally, and that on the death of either, her share shall be “divided” equally among her sons and daughters and their issue, while failing them, later beneficiaries shall “take” specified shares. There is no suggestion that such income must be devoted solely, or even partly, to the maintenance and support of the beneficiary concerned. The words “divided between” or “divided among” are quite as free from restriction regarding user as were the words “paid to”, which were the words used in the wakf that was the subject of *Sheikha binti Ali's* case (1).

It is argued, however, that, at least so far as the two appellants themselves are concerned, the court below ought to have had, and that this court ought to have, regard to extraneous circumstances in order to show that the purpose of the wakf was to maintain and support the appellants; in particular the facts that the appellants were adopted by the settlor in infancy, their paternity being unknown, and that they were brought up by the settlor. From these and other circumstances it is argued that the gift to them of the income of the wakfed property for life must manifestly have been for the purpose of maintaining and supporting them. The first point for decision is to what extent, if at all, evidence of such circumstances is admissible to interpret, or supplement, the terms of the wakf. It was observed in *Zainuddin Hossain v. Muhammad Abdur Rahim* (3) (1933), A.I.R. Cal. 102, in a passage at p. 105 cited in Saxena's Muslim Law, (3rd Edn.) at p. 118, that:

“The essential principle is that the intentions of the wakif have to be gathered primarily from the terms of the deed itself, though attendant circumstances may be looked into if the intention is not apparent or clear from such terms, and subsequent circumstances may also be considered if they throw light on such intention.”

In order to admit evidence of such attendant circumstances, however, the ambiguity with regard to the settlor's intention must be one which lies in the terms of the wakf deed itself. In the present case there is, to my mind, no such

ambiguity or lack of clarity as to intention in the provisions of the wakf that the income shall be “divided” each month between the appellants and their issue. Such a direction, assuming it for the moment to be contained in a valid and enforceable deed, would have to be carried out in favour of a beneficiary who was already wealthy and in no need of complete or even partial maintenance and support, just as much as in the case of one who was indigent; and there is nothing in the wakf deed to suggest that the settlor’s intention was other than that expressed on the face of it, namely that the income should be paid monthly to the appellants for the rest of their lives, for them to spend it as they liked. In fact, although this can have no bearing on the settlor’s intentions in 1942 when she made the wakf, one of the appellants married, and thereby presumably became independent of any need of maintenance or support otherwise than by her husband, within a year of the making of the wakf, and the other some thirteen years later. But that is beside the point. The position as I conceive it, regarding the admission of extraneous evidence to show that the settlor intended something different from the absolute gift of income which she made in the wakf deed, is in conformity with the provisions of s. 91 of the Indian Evidence Act concerning the exclusion of oral by documentary evidence. As was said in *Shaikh Muhammad Ibrahim v. Bibi Miriam* (4) (1929), 8 Pat. 484, at p. 489, in a passage quoted in Monir’s Law of Evidence, (3rd Edn.), at p. 649:

“It is true that a valid wakf can be created without writing; but when the terms of a disposition of property have been reduced to the form of a document, under s. 91 of the Evidence Act no evidence can be given in proof of the terms of such disposition except the document itself or secondary evidence thereof.”

Finally, there was no suggestion in the judgment of this court in *Sheikha binti Ali’s* case (1) that extraneous evidence would have been admissible to show that the settlor in that case, by his direction that the income should be “paid to” the beneficiaries concerned, intended that it should be devoted to their maintenance and support. On the contrary, the learned vice-president in his judgment was careful to say that there was no indication “in the wording of the deed” to show by implication that the settlor’s object was their maintenance and support.

For these reasons I would hold that extraneous evidence to show that the settlor intended her dispositions to be limited to the maintenance and support of the appellants or the succeeding beneficiaries is inadmissible, and that there is nothing on the face of the wakf deed itself to indicate that such was her intention. I accordingly find nothing to distinguish the present case from *Sheikha binti Ali’s* case (1) on the facts.

I turn to the alternative ground on which it is urged for the appellants that *Sheikha binti Ali’s* case (1) ought not to be followed, namely that it was decided by this court per incuriam. The suggestion that it was so decided is based on the submission that, while this court certainly had the terms of s. 4 of the Wakf Commissioners Ordinance before it, the judgment indeed being based on the meaning of the words “maintenance and support” in s. 4 (1) (a), the attention of the court was not specifically directed to, nor did the court in its judgments specifically refer to, the presence and significance of the words “either wholly or partly”, which appear twice in the first five lines of s. 4 (1). It is submitted that had this court considered those words it would, or at least might, have decided differently. If such a contention were to prevail, few appellate judgments would survive the plea of per incuriam. A court must be presumed to have duly considered the effect of each word or phrase in a section which it is construing, without making specific reference to such word or phrase in its judgment, and without the necessity of such word or phrase having been

specifically referred to in argument. The expression “per incuriam”, when applied to judicial decisions, is one which has a defined and limited scope, as was recently pointed out by this court in *Kiriri Cotton Co. v. R. K. Dewani* (5), [1958] E.A. 239, (C.A.) where at p. 246 the following passage from the judgment of Sir Raymond Evershed, M.R., in *Morelle Ltd. v. Wakeling* (6), [1955] 1 All E.R. 708, at p. 718, was quoted:

“As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam must, in our judgment, consistently with the stare decisis rule which is an essential feature of our law, be, in the language of Lord Greene, M.R., of the rarest occurrence.”

Having in mind the above observations, there is nothing in the judgment of this court in *Sheikha binti Ali's* case (1), or in the arguments which were or were not there advanced to the court, which in my view brings it even remotely within the ambit of a judgment delivered per incuriam. I would accordingly hold that the stare decisis rule applies, and that the learned judge of the Supreme Court in the instant case was right in holding himself bound to follow that decision.

Since the submission that that judgment was delivered per incuriam, however, was bound up with the meaning and effect of the words “either wholly or partly” which appear twice in the first five lines of s. 4 (1) of the Wakf Commissioners Ordinance, 1951, I think this would be a convenient point at which to consider the respective meanings of those phrases in the two places where they occur. The first few lines of s. 4 read as follows:

“4.(1) Every wakf heretofore or hereafter made by any Muslim which is made, either wholly or partly, for any of the following purposes, that is to say:

- (a) for the maintenance and support, either wholly or partly, of any person including the family, children, descendants or kindred of the maker; or
- (b)”

As a matter of pure construction I would interpret the two phrases “either wholly or partly” as follows. Where the phrase first occurs, I would interpret it to mean that if a wakf was made partly for a purpose falling within paras. (a) or (b), and partly for a purpose not falling within either of those paragraphs, then the whole wakf would be saved; but it would only be saved if both that part which fell within paras. (a) or (b) and also that part which fell outside them, satisfied the remainder of s. 4 (1), namely the conditions following the words “is declared to be a valid wakf if . . .” Where the words “either wholly or partly” next occur, namely within para. (a), I would interpret them to mean, what in my view they grammatically must mean, having regard to their position in the sentence, the same as if para. (a) had read:

“for the entire or partial maintenance of any person including the family, children, descendants or kindred of the maker.”

In short, a gift of income would satisfy para. (a) if the whole of it was to be applied towards the maintenance and support of the beneficiary, whether or not it was enough to maintain and support him without being supplemented

from some other source. If only a portion of the gift of income was to be applied towards the maintenance and support of the beneficiary the gift would still fall within para. (a), but this would be by virtue of the words “either wholly or partly” where those words first occur in the section, as the gift would then be partly for the purpose set out in para. (a).

Applying s. 4 (1), as so interpreted, to the instant case, I am unable to find anything in the terms of the wakf deed which would bring it within para. (a).

Subject to what I shall have to say later regarding s. 16 and s. 21 of the Wakf Commissioners Ordinance, 1951, I would therefore hold that the learned judge of the Supreme Court rightly held the wakf to be void ab initio, following this court’s decision in *Sheikha binti Ali’s* case (1), where a similar order was made. But before passing to those sections I will deal with an alternative ground on which the respondents have urged that the wakf should be declared void, a ground which the court below did not find it necessary to consider. This contention touches that part of the wakf deed which provides for the wakf income to be paid, after the deaths of the appellants, to their respective “sons and daughters and their issue per stirpes”. It may be observed that the expression “issue”, in the absence of any indication to show that it is confined to “children”, means, according to the trite rule of interpretation of dispositions inter vivos or by will, lineal descendants from generation to generation and not merely children: see *Leigh v. Norbury* (7), 33 E.R. 321, and the many decisions on the point considered in Jarman on Wills, (8th Edn.), Vol. 3, at p. 1581 et seq. Now the appellants, it is conceded, were not relatives of the settlor, either by blood or by marriage. True, the gift of income to them for life was not invalidated by that fact, because each of them was a “person” for the purpose of the words “any person” in para. (a) of s. 4 (1) of the Wakf Commissioners Ordinance, 1951. But it was held by this court in *Amina binti Abdulla and Another v. Sheha binti Salim* (8) (1953), 21 E.A.C.A. 12, in considering the validity of a wakf of a Shafi Mohamedan of a nature very similar to that in the present case, that the words “any person”, in the phrase “of any person including the family, children, descendants or kindred of the maker”

in s. 4 (1) (a), cover a stranger (i.e. one who is not related to the settlor) but do not cover the children or descendants of that stranger. The income from the wakf in that case was to be distributed to two strangers for life, and thereafter the share of income of each was to be distributed to their “respective children and children’s children from generation to generation”. There was the usual ultimate gift over to charity. It was held (a) that the whole wakf would, prior to 1951, have been bad because of the remoteness of the charitable gift over, by reason of the decision of this court in 1949, upheld in the Privy Council, in *Bakhshuwen’s* case (2); (b) that if the wakf had fallen within s. 4 (1) (a) of the Wakf Commissioners Ordinance, 1951, then the defect of remoteness would have been cured by s. 4 (2) of that Ordinance, which applies to wakfs falling within s. 4 (1); (c) that the wakf did not fall within s. 4 (1) by reason of the gift of income, after the death of the two “strangers”, to their children and descendants, because “any person” in s. 4 (1) (a) does not include the descendants of a stranger; (d) that therefore, and notwithstanding that the gifts for life to the two strangers themselves did fall within s. 4 (1) (a), the whole wakf was bad ab initio by reason of the decision in *Bakhshuwen’s* case (2), which decision still applied to wakfs not saved by s. 4 of the Wakf Commissioners Ordinance, 1951; (e) that accordingly the order of the court below that the wakf was bad ab initio, and its consequential order that the wakfed property should be delivered up to the personal representative of the deceased settlor’s husband, must be upheld. It is to be noted that in *Bakhshuwen’s* case (2), as in both *Amina binti Abdulla’s* (8) and the instant case, the settlor was of the Shafi sub-sect.

Amina binti Abdulla's case (8) was thus almost on all fours with the present case, with regard to the essential facts and the essential terms of the wakf deed. Appreciating this, Mr. Nazareth for the appellants has sought to argue that, while the descendants of the two appellants cannot be brought within s. 4 (1) (a) if the appellants be considered under the category of "any person", that is to say as strangers, their descendants would be brought within it, as indeed they would, if the appellants be considered as members of the settlor's "family" for the purpose of para. (a). It is accordingly argued that, as adopted daughters of the settlor who were brought up by her as if they had been her own true daughters, the appellants must be considered as members of her family, according to the ordinary and popular meaning of that word. It is not seriously contested by the respondents that the word "family" can in certain contexts and circumstances be used in a wide sense so as to include an adopted child treated as one of the family—even a child (as in the case of the appellants) who has not been legally adopted; certainly it has been held to include an illegitimate child: *Humble v. Bowman* (9) (1878), 47 L.J. Ch. 62. But the question is whether the word can be so construed in a section of an Ordinance dealing with Mohamedan wakfs. I think that in this context it must be construed to mean what it would mean to a Mohamedan, in connection with the disposition of his property. And in that context it must be noted that the Mohamedan law does not recognise even legal adoption as a mode of filiation or as conferring any right of inheritance: see (Saxena's Muslim Law, 3rd Edn.) at p. 304, p. 305 and p. 406, and *Muhammad Umar Khan and Another v. Muhammad Niaz-ud-din Khan* (10) (1911), 39 I.A. 19. See also Mulla's Principles of Mohamedan Law, (14th Edn.) at p. 293. It is true that it has been laid down by the courts in India that the word "family" in s. 3 of the Mussalman Wakf Validating Act of that country, which corresponds to s. 4 of the Wakf Commissioners Ordinance, 1951, is intended to be used in its broad and popular sense, and has been construed to cover collateral relations by blood or marriage if they have in fact been living in the settlor's house and maintained by him: see Saxena (op. cit.) at p. 455 and p. 456, and Mulla (op. cit.) at p. 183. The position is expounded clearly and at length in the judgment in *Ismail Haji v. Umar Abdulla* (11) (1942), A.I.R. Bom. 155, at p. 155 and p. 156. But in none of these cases has an adopted child who is not at the same time a blood-relation been held to qualify as a member of the settlor's "family" for the purpose of the section; still less the descendants of such an adopted child. The only case to which I have been referred, or of which I am aware, in which an adopted child has been held to be a member of the settlor's "family" for the purpose of the validating section is *Mubarik Ali v. Ahmed Ali* (12) (1933), A.I.R. Lah. 414. In that case the child was the settlor's nephew, and the question for decision was whether such a blood-relation, although not a direct descendant of the settlor, could be held to be a member of his family by reason of his having been adopted by the settlor and residing with and being dependent on him. It was held that he could. But the fact of his being a blood-relation was essential to the decision, and there was no suggestion that the mere fact of adoption and dependence would have qualified him if he had been no relation of the settlor's at all. The judgment in *Ismail Haji v. Umar Abdulla* (11) sums up the decisions regarding the scope of the word "family" in the following words:

- "The result of the decisions thus appears to be that the word 'family' as used in Act 6 of 1913 would include
- (1) all those persons residing in the same house as the settlor and dependent upon him for maintenance and
 - (2) all those connected with the settlor through a common progenitor or by ties of common lineage."

In so far as that summary may seem to lay down that a person residing with

and dependent on the settlor is a member of the latter's "family" although not related to him by blood or marriage, it goes, in my view, beyond the decided authorities. But in any case that summary would not include the unborn children and issue of such a person, since they would not be residing with or dependent upon the settlor; and such are the persons with whom we are at present concerned in the instant case. The appellants themselves, as I have already said, would in any event qualify by virtue of the words "any person" which appear in s. 4 (1)(a) of the local Ordinance, though not in the corresponding Indian provision. Indeed a later passage from the judgment in *Ismail Haji v. Umar Abdulla* (11) seems to make it clear that an adopted child, not being related by blood, could not be included in the word "family" in s. 3 of the Indian Act of 1913; for at p. 157 the following passage occurs in the judgment:

"The Act only permits Mussalmans to create wakfs for the benefit of the members of their family, their children and their descendants, and in order to come within the purview of the Act, every person benefited by the wakf, however remote in time from the settlor himself, must be in a position to trace his descent from a progenitor common to himself and the settlor."

I would therefore hold that the disposition in favour of the children of the appellants and those children's issue prevents the wakf from falling within the saving provision of s. 4 (1) (a), notwithstanding that the appellants are the adopted daughters of the settlor and resided with her at the time of the creation of the wakf.

Accordingly, in my view, the wakf fails to come within the saving provisions of s. 4 for two independent reasons; first because the wakf income has not been shown to have been left, either expressly or by implication, for the "maintenance and support" of the beneficiaries, following the decision of this court in *Sheikha binti Ali's* case (1); secondly, because the dispositions following those to the appellants themselves for life are not in favour of

"any person including the family, children, descendants or kindred of the maker"

for the purpose of s. 4 (1) (a), following the decision of this court in *Amina binti Abdulla's* case (8). Unless, therefore, I am wrong not only in one but in both these conclusions, the wakf, following the decision in each of those judgments, fails to bring itself within the protective mantle of s. 4 of the Wakf Commissioners Ordinance, 1951, and is bad ab initio. It is bad ab initio because, as clearly laid down in *Amina binti Abdulla's* case (8), which was quoted and followed on the point in *Sheikha binti Ali's* case, if a wakf does not fall within s. 4, then its validity will depend on the law in force immediately before the enactment of that Ordinance, namely the Muslim law as modified by judicial decision, including the decision in the *Bakhshuwen* case (2). And the wakf in the instant case must be void ab initio on the same ground on which the wakf was declared void in *Bakhshuwen's* case (2), following *Said bin Muhamed bin Kassim el-Riyami and Others v. The Wakf Commissioner, Zanzibar* (13) (1946), 13 E.A.C.A. 32, namely on the ground that, by reason of the disposition of income to the children and remoter issue of the first beneficiaries, from generation to generation, before the ultimate gift over to the charitable beneficiaries, the chances of those charitable beneficiaries benefiting are so remote that the necessary charitable intent is illusory and the wakf is accordingly no true wakf. The limitations in the instant case to the appellants' "sons and daughters and their issue per stirpes" effect, as we have seen, a disposition of the income to their lineal descendants from generation to generation until they become extinct; and they are thus of exactly the same nature as were those in *Bakhshuwen's* case (2).

It has been argued by Mr. Nazareth for the appellants, in the alternative, that even if the disposition to the appellants' issue is bad, the gift of the wakf income to the appellants themselves for their respective lives is, taken by itself, a good disposition by reason of its falling within s. 4 (1) (a) of the Ordinance of 1951; that the income should be therefore paid to them until their respective deaths; and that the residue should then be paid, not to the heirs of the settlor (the plaintiff-respondents) but to the Wakf Commissioners, to be administered by them for charitable purposes as provided in the Wakf Commissioners Ordinance, 1951. This raises more than one question.

First, it is suggested that there is no decision of this court on the question what is to happen if a wakf is only partially defective—whether the wakfed property reverts to the settlor or his heirs, or whether it falls to be administered by the Wakf Commissioners under the Ordinance. But that is not so, although it is true that the suggestion that the Wakf Commissioners should administer it does not seem to have been advanced to this court until now. Whether or not the wakf in the present case can be called only partially defective, and I do not concede that it can, the decision in *Amina binti Abdulla's* case (8) was concerned with just such a wakf, there being in that case, as in this, nothing illegal in the first disposition of income to the two appellants for life, taken by itself. And in that case, as we have seen, the decision of the court was that the wakf was void ab initio and that the corpus and income should be paid over to the personal representative of the deceased settlor's husband, without the income being paid to the appellants for the remainder of their respective lives. On the principle of stare decisis alone, I would hold that a similar order should be made in the present case, as was in fact made by the court below. But, quite apart from previous authority, it seems to me that such an order is correct. Both in *Amina binti Abdulla's* case (8) and in *Sheikha binti Ali's* case (1) the wakf was declared void ab initio on the ground that, since it was not protected by s. 4 (2) of the Ordinance of 1951, the decision in *Bakhshuwen's* case (2) applied to it, whereunder the ostensible intention of the settlor ultimately to devote the income to a religious or charitable purpose was shown to be an illusory one, a camouflage for family aggrandisement, by reason of the dispositions from generation to generation which preceded it. Since a genuine intention (not an illusory one) to benefit religion or charity, put into operation by effective provisions to that end, is a necessary pre-requisite to every wakf under what may be called non-statutory Anglo-Muslim law, it follows, as I see it, that an instrument which does not disclose or give effect to such an intention is no wakf at all, and must be deemed to be void ab initio, leaving no foundation to support what might otherwise have been a good disposition, namely a gift of income for life to a named beneficiary. It is argued that, since the decision in *Bakhshuwen's* case (2) was in effect a decision that the English rule against perpetuities must be applied to wakfs, any vested interest conferred by the instrument before the dispositions offending against that rule must remain unaffected; and it is suggested that the disposition in favour of the appellants for life is such a vested interest. The exposition of the rule against perpetuities in *Cheshire's Modern Real Property*, (7th Edn.), at p. 273 and p. 274 is relied on, and such decisions as *Hayes v. Hayes* (14), 38 E.R. 822, whereunder vested life interests to persons in being, preceding the offending dispositions, have been allowed to stand. The answer to this contention is, I think, threefold. First, according to the basic principle underlying wakfs, which is recognised by the Mohamedan law, there is no question of any beneficiary acquiring a vested interest in the wakfed property at all. The only vesting of anything is the implied vesting of the corpus of the wakf in the Almighty, the mutawalli or trustee being no more than the manager of the wakf: vide Mulla (op. cit.) at p. 161. Secondly, as was pointed out by the Privy Council in *Saadat Kamel Hanum v. Attorney-General, Palestine* (15)

(1939), A.I.R. P.C. 185, at p. 189, the rule against perpetuities does not apply to wakfs. Limitations in favour of beneficiaries from generation to generation make a wakf bad, not by reason of any infringement of the rule against perpetuities as such, but because the indefinite postponement of the religious or charitable gift over, effected by such limitations, makes the religious or charitable intent illusory or, in other words, shows that there was in reality no such intent at all. Thirdly, such a contention would run counter to what was ordered by the Privy Council in *Abul Fata Mahomed Ishak v. Russomoy Dhur Chowdhry* (16) (1894), 22 I.A. 76, and followed in *Bakhshuwen's* case (2), namely that where the purported wakf was illusory by reason of the remoteness of the charitable gift over, there should be no further payment of income to the first beneficiaries, to whom the income had been directed to be paid for life, but that the corpus should immediately revert to the settlors or to their successors in title. In *Bakhshuwen's* case (2) their lordships of the Privy Council accepted that it was Mohamedan law which determined the rights of the parties, stating in their judgment at p. 14:

“Their lordships do not doubt that the judge was correct in saying that the rights of the parties are governed by Mohamedan law . . .”

I turn lastly to a submission advanced for the appellants which appears to have been raised before this court for the first time, though it was recently raised before, and considered by, the Supreme Court in Mombasa in *Mohamed Abdalla Mfaume and Others v. Salim Ismail and Another* (17), Kenya Supreme Court (Mombasa) Civil Case No. 476 of 1958 (unreported). Briefly the submission, which has been argued as an additional ground of appeal, is that by reason of the terms of s. 21 of the Wakf Commissioners Ordinance, 1951, neither the Supreme Court nor this court has jurisdiction to declare a wakf to be void ab initio or to order the wakf property to revert to the settlor or his heirs, but that the court's jurisdiction is limited to declaring whether or not the wakf is valid. Although this contention is based on s. 21, the provisions of that section and of s. 16 of the same Ordinance are at once so parallel and so seemingly irreconcilable that it will be convenient to set them both out. They read as follows:

- “16. (1) Subject to the provisions of sub-s. (2) of this section all property the subject of any wakf which is under the control of the Wakf Commissioners shall be administered by the Wakf Commissioners in accordance with the intentions of the maker of the wakf if such intentions are lawful according to Muslim law and are capable of being carried into effect, and whether such intentions are ascertainable by reference to tradition or by reference to any other evidence lawfully obtainable.
- “(2) In any case where in the opinion of the Wakf Commissioners the intentions of the maker of a wakf are unlawful or unascertainable or are incapable of being carried out or where any surplus revenue remains after fulfilling the intentions of the maker of the wakf the Wakf Commissioners shall, in the case of a wakf Khairi, apply the property the subject of the wakf or any surplus property or revenue therefrom, as the case may be, for such benevolent or charitable purposes on behalf of Muslims as appear to the Wakf Commissioners proper, and in the case of wakf Ahli, shall apply such property or surplus property or revenue as aforesaid in such manner as the Wakf Commissioners think fit for the benefit of the beneficiaries of the wakf.”

.....

- “21. (1) If, in respect of any wakf—
- (a) the intentions of the maker—
 - (i) are unlawful or unascertainable, or
 - (ii) are incapable of being carried into effect, or
 - (iii) cannot reasonably be carried into effect; or
 - (b) the beneficiaries are unascertainable; or
 - (c) any surplus revenue remains after making the payments required by s. 20 of this Ordinance and after carrying into effect the intentions of the maker of the wakf,

the Wakf Commissioners shall pay into the surplus fund created under s. 18 of this Ordinance the proceeds of sale of any such property the subject of a wakf as is mentioned in paras. (a) and (b) of this section and any such surplus revenue as is mentioned in para. (c) of this sub-section.

- “(2) The Wakf Commissioners shall have power to place on deposit in any bank or to invest in and upon such investments and securities as are allowed by law for the investment of trust funds any moneys standing to the credit of the Surplus Fund and income derived therefrom shall be paid to the credit of the General Administration Fund.”

Of these two sections it is clear that s. 16 can have no application to the present case, because (a) the wakf is not “under the control of the Wakf Commissioners”, as required by sub-s. (1), but is being administered by the first defendant as a private mutawalli; (b) it cannot be said that “in the opinion of the Wakf Commissioners” the intentions of the maker of the wakf are unlawful, as provided in sub-s. (2), since the Commissioners have expressed no opinion on that point and are not parties to the suit. Mr. Nazareth did argue that by virtue of s. 3 (1) of the Wakf Commissioners Ordinance, 1951, (which provides that every wakf made by or for the benefit of any Muslim shall be administered in accordance with the provisions of the Ordinance) read with the Ordinance as a whole (which deals almost exclusively with administration of wakfs by the Wakf Commissioners) it should be held that all property the subject of any wakf must be “under the control” of the Wakf Commissioners. With respect I am quite unable to accept this argument. It is contrary to the natural meaning of the words in s. 16, and s. 13 (which enables the Wakf Commissioners to call upon trustees of wakfs to produce evidence of proper administration of their trusts) clearly contemplates wakfs where the wakf property is not “under the control” of the Wakf Commissioners, the Wakf Commissioners merely having a supervisory capacity to ensure proper administration. But it is submitted that s. 21, which is expressed to be applicable to “any wakf”, applies, since “the intentions of the maker” of the wakf are “unlawful”, within the meaning of sub-s. (1) (a) (i) of that section, and that accordingly, the Supreme Court (or this court) having declared them to be unlawful, the court has exhausted its jurisdiction in the matter, and that the consequences of such declaration follow automatically from what is laid down or implied in the remainder of the section, namely that the Wakf Commissioners shall take over the administration of the wakf from the mutawalli, shall sell the property, and shall pay its proceeds into the Surplus Fund created under s. 18 of the Ordinance. That fund, as was recently held by this court in *The Wakf Commissioner v. The Public Trustee* (18), [1959] E.A. 368 (C.A.), is not a re-creation of the Bait-ul-Mal, which was the ancient administrative machinery for the distribution of property for the benefit of Islam, but it does set up new machinery for carrying out substantially the same objects, namely in the words of s. 18 (2),

“such benevolent or charitable purposes for the benefit of Muslims as the Wakf Commissioners may consider proper.”

Since the wakf in the present case, for reasons which I have given, manifestly does not fall within the scope of s. 16, I do not propose to deal with the question, which becomes irrelevant, of how to reconcile that section with s. 21, in cases where a wakf is “under the control of” the Wakf Commissioners, and where it would thus appear at first sight to fall both within s. 16(2) and also within s. 21(1), whose provisions regarding the disposal of the wakf property are in direct conflict. The question before this court is whether s.21(1) is applicable to the wakf in the present case, with the result that the corpus of the wakfed property would not revert to the heirs of the settlor but would be sold by the Wakf Commissioners and the proceeds paid into the Surplus Fund.

On the principle of stare decisis alone, having in view the decisions of this court in *Amina binti Abdulla* (8) and *Sheikha binti Ali* (1), I would hold that the corpus of the wakf must revert to the settlor’s heirs. But since in neither of those cases was s. 21 adverted to, either by counsel or in the judgments of this court, I think it proper to consider whether s. 21 is applicable to a case such as the present, where, on the authority of *Bakhshuwun’s* case (2), the religious and charitable objects of the settlor have been held to be illusory. In the first place, I can find nothing in s. 21, or elsewhere in the Ordinance, which deprives the Supreme Court, or this court, of jurisdiction to make such a finding, or to hold in consequence that the wakf is void ab initio. Very clear language is required in a statute to deprive a court of jurisdiction hitherto vested in it, and the Wakf Commissioner’s Ordinance contains no such language. That being so, the position is that the settlor has been held never to have had any genuine intention to benefit the religious or charitable purposes of Islam; and the wakf has accordingly been held no wakf at all. It seems to me that the words “any wakf” at the beginning of s. 21 would not cover a disposition that has been declared to be no wakf. Nor would such a conclusion render the provisions of s. 21 (1) a dead letter when applied to a wakf in which “the intentions of the maker are unlawful”. For a wakf might contain a disposition of a kind unlawful under Mohamedan law, or even unlawful under the general law of the land but not under Mohamedan law, without being no true wakf at all; as for instance if it disposed of the income for the maintenance and support of a stranger for life, and after his death to the stranger’s (as yet unborn) children for life, and after the death of the survivor of those children, to specified religious purposes. In such a wakf the second disposition would be bad, but the religious object would not be indefinitely postponed and therefore not illusory. It may be that such a wakf would fall within s. 21, though I do not venture to decide the point, since there are other difficulties in the interpretation of the section which may fall to be decided on another occasion. But, whatever s. 21 does cover, I would hold that it does not cover an instrument which has been declared to be void ab initio for lack of any genuine religious or charitable object, and thus to be no wakf at all. The section would seem to be designed to ensure, rather, that where a genuine intention to benefit religion or charity has been shown by the settlor, put into effect by dedicating property to the Almighty by a wakf deed, that intention shall not be defeated by any difficulty or even illegality not going to the root of the dedication, but shall be given effect to, cy pres, by ensuring that the proceeds of the property shall be paid into a fund to be similarly devoted to “benevolent and charitable purposes for the benefit of Muslims”.

I would for these reasons dismiss the appeal and uphold the order of the court below. With regard to costs, and bearing in mind this court’s ruling on the point in *Amina binti Abdulla’s* case (8), at p. 15, I would order that the costs of all parties below, taxed as between solicitor and client, be paid out of the wakfed property, and that the respondents have their costs of this appeal, taxed on the same footing, paid out of the same property.

Forbes V-P: I agree with the reasoning and conclusions of the learned Justice of Appeal and have nothing to add. The appeal is dismissed and an order for costs will be made in the terms proposed by the learned Justice of Appeal.

Gould J.A: I also agree.

Appeal dismissed.

For the appellants:

JM Nazareth QC and AJ Kanji

Bryson & Todd, Mombasa

For the respondents:

NM Budhdeo and KM Pandya

Narshidas M Budhdeo, Mombasa

Re Tanganyika National Newspapers Limited
[1959] EA 1057 (HCT)

Division: HM High Court of Tanganyika

Date of judgment: 27 October 1959

Case Number: 57/1959

Before: Crawshaw J

Sourced by: LawAfrica

[1] *Charity – Trust to ensure publication of newspapers – Objects educational – Trustees required to ensure objective dissemination of news and matters of public interest – Whether trust is charitable – Charitable Uses Act, 1601.*

[2] *Charity – Trust to ensure publication of newspapers – Objects educational – Proposal to transfer management of papers to parties not bound by trust – Whether scheme ultra vires the trust – Cy pres doctrine.*

Editor's Summary

In 1958 a company was incorporated in Tanganyika to manage and publish three vernacular newspapers which had previously been published for the Government of Tanganyika by its Public Relations Department. The Government subscribed at par for 44,000 shares of Shs. 20/- each which were the only shares issued and these were transferred to trustees appointed by a deed dated March 12, 1958, who were to ensure the continued publication of the journals. The deed also provided that the main function of the papers was to disseminate fairly and impartially news and other matters of public interest with fair

comment thereon and generally to spread information and stimulate thought among the people of Tanganyika. The company having made substantial losses tried to arrange for continued publication of the papers in association with a Kenya company and an agreement was prepared recording the arrangements between the parties upon the terms of which the trustees then sought the approval of the court and, if the court were to hold the proposed agreement to be ultra vires the trustees, authority to settle a scheme whereby the trustees could enter into the agreement.

Held –

- (i) the trust establish could be regarded as being substantially for the purpose of advancing education in the sense of the second class of charitable trusts referred to in the *Income Tax Commissioner v. Pemsel* (1891) A.C. 531.
- (ii) the proposed agreement was contrary to the terms of the trust deed and the cy pres doctrine did not apply.

Judgment accordingly.

Cases referred to in judgment

- (1) *Income Tax Commissioner v. Pemsel*, [1891] A.C. 531.
- (2) *Re Strakosch*, [1949] 2 All E.R. 6.
- (3) *Whicker v. Hume* (1858), 7 H.L. Cas. 124.
- (4) *Re MacDuff* (1896), 2 Ch. D. 451.
- (5) *Royal Choral Society v. Commissioners of Inland Revenue*, [1943] 2 All E.R. 101.
- (6) *Re Shaw*, [1957] 1 All E.R. 745.

Judgment

Crawshaw J: Prior to February 3, 1958, the Government, through its Public Relations Department, published three newspapers, Mambo Leo, Baragumu and Mwangaza. On February 3, 1958, the Government caused to be incorporated a company called Tanganyika National Newspapers Ltd. (hereinafter called the Tanganyika Company) having a capital of £60,000 divided into shares of Shs. 20/- each, the intention being that the

company should take over the management and publication of the newspapers. Of the 60,000 shares the Government subscribed 44,000, the remaining 16,000 being still unissued. The 44,000 shares were transferred to certain trustees of whom one is Mr. Page-Jones, the managing director of the company, upon certain trusts contained in a deed dated March 12, 1958, executed by His Excellency, the then Governor.

It was hoped that the Tanganyika Company would be profit making, but for various reasons given by Mr. Page-Jones in his affidavit the Tanganyika Company has in fact made a very substantial loss, and publication of the paper Mwangaza has had to be discontinued. The trustees in January, 1959, sought the advice of the managing director of African Newspapers Limited, of Southern Rhodesia, whose opinion it was that the existing arrangements with a local company for the printing of the papers (for the Tanganyika Company had no printing facilities of its own) and for revenue from advertisements was bound to be commercially unsuccessful. Thereupon other arrangements were sought by negotiation with other printing and publishing concerns, as a result of which there was a proposed agreement (hereinafter referred to as the proposed agreement) between the Tanganyika Company and a company registered in Kenya called African Newspapers (Nation Series) Limited (hereinafter called the Kenya Company).

The application to this court is in the following terms:

1. Whether the plaintiffs as the present trustees of the above-mentioned trust and as the directors of and, subject to the terms of the said trust, the shareholders of all the "issued shares" in the Tanganyika Company should approve and act upon the proposed agreement and,

"if the proposal is considered to be ultra vires the powers of the trustees under the trust, that a scheme be settled or otherwise the plaintiffs be authorised to enter into the proposed agreement."

From this it would seem that the trustees are also the present directors of the Tanganyika Company, and it is assumed therefore that there is no conflict of views. The original directors were largely different.

The proposed agreement, which was to last for a minimum period of three years, provides, in broad terms, that the Tanganyika Company shall continue to be the proprietors of its newspapers and that the Kenya Company shall "undertake entire responsibility for the printing and managing" of them, although the Tanganyika Company shall have the right to appoint the editor. The Tanganyika Company are to sell to the Kenya Company their movable assets such as a motor vehicle, office furniture and so on at a price of £989. The Tanganyika Company undertakes to subscribe for up to 11,000 but not less than 10,000 shares of Shs. 20/- each in the Kenya Company when called upon to do so by the Kenya Company, and on doing so will be entitled to appoint a director.

From an affidavit by a director of the Kenya Company it would appear that the Kenya Company publishes newspapers and journals, although only one is mentioned. The company does not do its own printing, but I am informed by Mr. Page-Jones that it has a controlling interest in another company registered in Kenya called East African Printers (Boyd's) Ltd. (hereinafter referred to as Boyd's), who are printers. The intention is that Beauchamp Printing Co. Ltd. (hereinafter referred to as Beauchamp), of Arusha, should be taken over and, *inter alia*, do the printing of the Tanganyika Company's newspapers. The relevant part of the proposed agreement reads:

"And whereas through East African Printers (Boyd's) Limited the managers (i.e. the Kenya Company) have facilities for printing newspapers

and journals in Kenya and with a view to providing for the managers similar facilities for printing newspapers and journals in Tanganyika the managers have jointly with the proprietors (i.e. the Tanganyika Company) procured that East African Printers (Boys) Limited will forthwith incorporate in Tanganyika a private company under the name 'Tanganyika National Printers (Beauchamps) Limited' for the purpose of acquiring the business of Beauchamp Printing Company Limited, Arusha, Tanganyika, together with the works premises occupied by that company but owned by the shareholders and whereas the proprietors have agreed to provide half the cost of acquisition of the business and premises of Beauchamp Printing Company Limited through Tanganyika National Printers (Beauchamps) Limited wherein the investment of the parties shall be represented partly by shares and partly by loan."

The amount required to be contributed by the Tanganyika Company is not more than £17,000 and not less than £15,000.

The attorney-general was represented on the hearing of this application by Mr. Denison, and the first issues were:

1. Is the trust a charity?
2. If so, does the proposed agreement come within the terms of the trust?
3. If not within the trust deed, what if any modification to the trust deed or to the agreement?

As to the first issue the trust deed provides that the trustees shall stand possessed in perpetuity of the shares in the Tanganyika Company

"upon trust to exercise their powers as members of the company:

- (a) to ensure the continued publication by the company of the three newspapers for as long as may be practicable;
- (b) subject thereto to promote the publication by the company of other newspapers, magazines, books or pamphlets, whether in the Swahili language or in any other language used by any substantial section of the people of Tanganyika;
- (c) to ensure that the main function of all such newspapers, magazines, books or pamphlets is the dissemination fairly and impartially of items of news and other matters of public interest together with fair comment thereon;
- (d) without prejudice to the generality of the last foregoing paragraph to ensure that undue prominence is not given in any such newspaper, magazine, book or pamphlet to the views of any school of thought or party or section of the community and that nothing is published in any such newspaper, magazine, book or pamphlet which shows religious or racial bias or is likely to arouse or exacerbate religious or racial strife; and
- (e) generally, to ensure that all the activities of the company are directed towards the spread of information and the stimulation of thought amongst the people of Tanganyika."

It is agreed that if the purposes of the trust are not charitable the trust fails, as offending against the rule against perpetuities.

Mr. Fraser Murray for the trustees has endeavoured to persuade me that in the circumstances as they are in this territory the purposes of the trust are charitable. Mr. Denison has adopted a more neutral approach, and, whilst supporting the trust, he has given reasons why it may not be. It is not an easy decision to come to. I have been referred to many authorities and have perused others, and if some of them appear difficult to reconcile it is because the borderline

is not and cannot be sharply defined. Each case must be judged on its own facts. It has been said that the term “charity” is probably incapable of definition, but that the legal significance is narrower than the popular. At the same time, very wide interpretations have been given by the courts, and an attempt at classifying the charities into four divisions was made in the *Income Tax Commissioner v. Pemsel* (1), [1891] A.C. 531.

Mr. Murray’s submission is that the present trust comes within the second definition of trusts, for the advancement of education. Education in itself is not sufficient, it must also be charitable within the intendment of the preamble to the Statute of Elizabeth, the Charitable Uses Act, 1601. To determine whether this is so is not always easy, for, as Roxburgh J. said in re *Strakosch* (2), [1949] 2 All E.R. 6,

“It is obvious that as time passed and conditions changed common opinion as to what was properly covered by the word charitable also changed.”

That case also shows that it is not sufficient that the disposition should merely be of benefit to the community, it must also be charitable in the sense of the preamble. A gift for the advancement of education, without specifying the nature of education, would be good, for it would be presumed that it was meant for education of a charitable nature.

There can be little doubt, I think, that the provision of a newspaper in Kiswahili to provide for
“the dissemination fairly and impartially of items of news and other matters of public interest”

is to the benefit of the community, or at least to a substantial section of it; the question is whether it is charitable in the legal sense. In *Whicker v. Hume* (3) (1858), 7 H.L. Cas. 124 the trust was

“for the benefit, advancement, and propagation of education and learning in every part of the world.”

Lord Justice Knight Bruce in referring to these terms used the expression, “education in learning”. Commenting on the case Rigby, L.J., said in re *MacDuff* (4) (1896), 2 Ch. D. 451 at p. 472:

“I say nothing about the wide extent of the gift in *Whicker v. Hume*, because there is no doubt now that the extensive nature of the gift as regards the range of the objects is no objection to it; but the gift was for advancement of education and learning, and the objection was taken by counsel who were impeaching the validity of the gift that education is no doubt a charitable purpose within the Statute of Elizabeth, but learning is not—that is to say, that the promotion of abstract learning would not be a charitable purpose. That was dealt with by Lord Chelmsford and Lord Cranworth, and both of them point out that, reading the word ‘learning’ as you find it in that will in connection with education, it must be taken as equivalent to teaching, and, therefore, as a certain branch of education; and I rather gather from their judgments, and from the pains which they take to draw out and to elucidate the meaning of the word ‘learning’ in that will, that if they could not have put that interpretation upon it they would have doubted, at any rate, as to whether the advancement of learning as an abstract matter would be a charity at all. The Lord Chancellor, Lord Chelmsford, goes with great pains into the matter, and deals with the word ‘learning’; and he says that the word in that will was used in the sense of teaching and instruction, ‘and, in that sense, it appears to me’, he says, ‘that the case which was cited by the respondents,

and which is printed in the respondent's case, of the *President of the United States of America v. Drummond*, may be applicable, where Lord Langdale decided, that a gift to the United States of America, to found, at Washington, under the name of the "Smithsonian Institution, an establishment for the increase of knowledge among men", was a valid charity.' The lords evidently doubted whether a gift for the increase of knowledge would be a good charitable gift, unless it was understood to mean a gift for teaching and education. Yet the increase of knowledge would unquestionably in these days be taken to be a purpose of general utility, and the doubt of the noble lords appears to me to be strongly in favour of the view taken by Lord Langdale that 'purposes of general utility' will not make a good charitable gift."

I have set this out in extensor, as it seems to me that it shows the principles involved and the dangers which exist in trusts of this nature which are in such general terms. Not that the instant trust mentions the words charity, education, learning or the like; one is asked merely to deduce that the purposes are educational and charitable. There can be no doubt that the newspapers with which we are concerned are intended to increase knowledge, and are for purposes of general utility, but in the face of authority can it be said that the purposes are (a) educational and (b) charitable or, at least, beneficial to the community and charitable.

Education was not regarded as limited to "teaching" in the *Royal Choral Society v. Commissioners of Inland Revenue* (5), [1943] 2 All E.R. 101. The society was formed for the advance of choral singing in London. Lord Greene in considering whether this was a charitable purpose said at p. 105:

"If the people who are providing the performance are really genuinely confining their objects to the promotion of aesthetic education by presenting works of a particular kind, or up to a particular standard, it seems to me that that is just as much education (and, in fact, having regard to the subject-matter the best available method of education) as lecturing or teaching in a class, or anything of that kind. The solicitor-general referred to a number of cases in which he said it was established that education in the charitable context is limited to teaching in that narrow sense. In my opinion, those cases do not establish any such proposition. I should be very sorry to think that they did. The matters that were being dealt with in those cases have nothing to do with aesthetic education or the cultivation and improvement of public taste in music or the other arts."

Lord Greene was, of course, considering aesthetic education only and his observations are only of help in the instant case in that they recognise that education need not necessarily be confined to "teaching" in any narrow sense. Aesthetic education is, of course, a well recognised charitable object.

The ordinary newspaper does not I think set out to be educational, but merely, as the name implies, to give to the public the latest news with comment thereon on any matters which the particular publishers think the public would be interested to hear, the type of and emphasis on any news depending no doubt to some extent on the type of public for which the particular paper sets out to cater for. Also there are normally leading and other articles which I suppose can be said to stimulate thought in those who read them. Such newspapers increase knowledge, but I am doubtful if it can be said that in general they are educational, at least in a charitable sense. Harman, J., in *Re Shaw* (6), [1957] 1 All E.R., 745 (at p. 752 G) commenting on the speech of Rigby, L.J., in the *MacDuff* case (4) said,

"In my opinion, if your object be merely the increase of knowledge, that is not in itself a charitable object unless it be combined with teaching or education."

Mr. Murray has submitted that the position is different in respect of the Tanganyika Company's newspapers. As I understand him he argues that they provide matter for a section of the African population, many of whom can read Kiswahili but no other language, their purpose being to bring to them, fairly and impartially, news and other matter of public interest with fair comment thereon which otherwise, in the circumstances pertaining in Tanganyika, they would have no or little opportunity of obtaining. He says, and Mr. Denison I think agrees with him, that this is not only highly desirable and of great benefit, but is also educational in a people who may be said to be largely ignorant of world events, and indeed of events in their own country. There is no doubt, I think, that in a country such as this where development, political and economic, is comparatively recent and is moving apace, it is most important that the people should be kept informed of what is happening and why, and of the processes of government administration, if misunderstanding and disaffection is to be avoided. For these reasons, peculiar to such territories as this, I am inclined to think that the trust can be regarded as being substantially for the purpose of advancing education in the sense of the second class of charitable trusts. If it is stretching the use of these words too much for inclusion in that class, then in my opinion the purposes come within the fourth division of "trusts for other purposes beneficial to the community" within the intention of the Statute of Elizabeth. This may be a borderline case and, as Harman, J., said in *Re Shaw* (6),

"It is hard to ascertain what are the limits of purposes held to be beneficial to the community in a way the law regards as charitable."

It has been suggested that future policy might result in the newspapers' news and comment, while still carrying out the terms of the trust, becoming largely concerned with matters which clearly could not possibly be regarded as charitable, such as sport, the reporting of sordid court cases, and unimportant information of a nature to be found in certain newspapers elsewhere. In my opinion, however, if such matters were to form a substantial part of the newsprint of the Tanganyika Company's newspapers, it would be outside the terms of the trust, for the trust was expressly created to take over and continue the publication of the newspapers which were up to that time being managed by the Public Relations Office. The intention of the trust was clearly, I think, that the principles which had guided the publication of the newspapers previously should be continued, and those principles should not be hard to prove and in fact are no doubt well known.

Judgment accordingly.

For the trustees:

WD Fraser Murray and VM Mathew

For the attorney-general:

WN Denison (Crown Counsel, Tanganyika)

For the applicants:

Fraser Murray, Thornton & Co., Dar-es-Salaam

For the respondent:

Attorney-General, Tanganyika

**The Collector v Kassam Shivji Bhimji and Two others (Respondents in Civil
Appeal No 58 of 1959)**

**The Collector v Ahmed Bin Rahim and Three others (Respondents in Civil
Appeal No 60 of 1959)
[1959] 1 EA 1063 (CAN)**

Division: Court of Appeal at Nairobi
Date of judgment: 9 December 1959
Case Number: 60/1959
Before: Forbes V-P, Gould and Windham JJA
Sourced by: LawAfrica
Appeal from: H.M. Supreme Court of Kenya–Edmonds, J

[1] Compulsory purchase – Amount of compensation – Existence of railway line in vicinity of land acquired – Re-alignment of railway line in prospect – No evidence produced by objectors to challenge Collector’s award – Burden of proving award incorrect – Indian Land Acquisition Act, 1894, s. 18, s. 23, s. 24, s. 26 (2) – Civil Procedure Ordinance, s. 2, s. 66 and s. 75 (K.).

[2] Practice – Compulsory purchase – Appeal – Whether award of court on reference by Collector is a decree or order – Whether leave to appeal from award necessary – Indian Land Acquisition (Amendment) Act, 1921 – Civil Procedure (Revised) Rules, 1948, O. XLII, r. 1 (K.).

Editor’s Summary

The Government of Kenya had compulsorily acquired certain land and the Collector, in arriving at his awards, had regard primarily to the prices lately fetched by other plots in that vicinity and to a lesser extent to a railway line in the vicinity which made access to these plots awkward. When the Collector made his awards, it was known that the railway line would be re-aligned but not when this would be. The land owners objected to the awards and the matter was referred to the Supreme Court in terms of s. 18 of the Indian Land Acquisition Act, 1894. At the hearing the only material evidence was that of the Collector himself to the effect that in his assessment he did provide for the potentially enhanced value which re-alignment of the railway might produce, but no evidence was called to show that the Collector was wrong as to the quantum of compensation. The trial judge increased the valuations, holding that while the Collector was correct in diminishing the value of the plots because of the railway line, he had penalised the land rather too heavily. On appeals which were consolidated it was submitted on behalf of the Collector that the onus was upon the objectors to show that he was wrong and that they had failed to discharge that onus and that the trial judge had, in effect, substituted his own opinion for that of the Collector.

Held –

- (i) the onus of proof that the Collector was wrong in his valuations lay generally on the objectors,

though it was not a heavy onus.

- (ii) the trial judge was quite entitled to differ from the Collector upon a matter of principle and in that case was bound to act upon his own view; he did not, however, differ in principle but on the quantum to be allowed as the result of the application of an accepted principle.
- (iii) the allowance of the increase by the trial judge was not the result of a legitimate deduction from the evidence before him but of the probability of the early removal of the railway.
- (iv) to be a factor in the market value of the plots in question the imminent removal of the railway would have to be fairly generally known, for it would be the knowledge of the intention of the railway authorities to take that early step, and not the existence of the intention, which would affect the minds of willing vendors and purchasers.

- (v) the trial judge should have been guided by the principle that it rested upon the objectors to show that the Collector's award was wrong; they did not show that he had erred in principle and called no evidence whatever to show that he was wrong as to quantum; the award, therefore, should not have been disturbed.

At the hearing of the appeals, counsel for the respondent in Civil Appeal No. 60 of 1959 submitted that the court had no jurisdiction to entertain the appeals as s. 26 (2) of the Indian Land Acquisition Act, 1894, provides that "every such award shall be deemed to be a decree", despite which documents drawn up in these proceedings had been headed "Order" and were ordered as orders.

Held –

- (i) the objection could not be entertained since by s. 2 of the Civil Procedure Ordinance a judgment is appealable notwithstanding a formal decree has not been drawn up, and if under the applicable law the decision of a court should be embodied in a decree, the Appellate Court would look at the substance rather than the form of the document to decide if it should be treated as a decree.
- (ii) sub-s. 2 of s. 26 of the Indian Land Acquisition Act, 1894, does not apply in Kenya since it was only enacted in 1921.

Per Gould J A: No leave was applied for in the present case or, as far as I know, in previous appeals from decisions under this Act, and no point was taken on this by counsel for the various respondents in these appeals. It may be that this is a matter to which further consideration will have to be given if and when occasion arises.

Appeal allowed. Objection overruled.

Cases referred to in judgment

- (1) *Fink v. Secretary of State for India* (1907), 34 Cal. 599.
- (2) *Pramatha Nath Mullick v. Secretary of State for India* (1929), 57 I.A. 100.
- (3) *Revenue Divisional Officer and Land Acquisition Officer v. Valia Raja* (1944), A.I.R. Mad. 539.
- (4) *Assistant Development Officer v. Tayaballi Allibhoy Bohori* (1933), A.I.R. Bom. 361.
- (5) *Samiullah v. Collector, Aligarh* (1946), A.I.R. P.C. 75.
- (6) *Musa Mubiru Luwala v. The Collector for Western Uganda Railway Extension*, [1959] E.A. 848 (C.A.).

December 9. The following judgments were read by direction of the court:

Judgment

Gould JA: These are consolidated appeals by the Collector appointed under the provisions of the Land Acquisition Act, 1894, of India, as applied to Kenya, from the decision of a judge of the Supreme Court increasing awards made by the Collector in respect of three plots of land. These plots were portions of a larger block of land compulsorily acquired by the Government of Kenya pursuant to a notice published in the Official *Gazette* of May 29, 1956, and the awards in question were in respect of compensation to the owners of the plots as assessed by the Collector under the Land Acquisition Act. Details of the plots are:

1. Plot No. 150, s. V, Mombasa Mainland North, comprising 2.10 acres, the property of Haji Abdulrahim Juma and Alimohamed Essa;
2. Plot No. 273, s. V, comprising 0.89 of an acre, the property of Kassam Shivji Bhimji; and
3. Portion of Plot No. 149, s. V, comprising 14.63 acres, the property of Ahmed Bin Rahami Shamsa Binti Rahami and Nasser Alibhai Hasham Abdulla Suleman Damji.

The system of valuation adopted by the Collector was described by the learned judge in his judgment as follows:

“For the purpose of determining the values of land acquired under the acquisition, the Collector adopted a zoning system of valuation, dividing the land acquired into five zones. Zone (1) comprised land situate within 100 feet of the Magongo Road and was valued at £900 an acre; Zone (2) comprised land situate more than 100 feet and less than 350 feet from that road and the land in this zone was valued at £800 per acre; Zone (3) extends from a depth of 350 feet to 850 feet from the road and the land comprised therein was valued at £725 per acre; the land in Zone (4) was that between Zone (3) and the railway line and was valued at £650 per acre; Zone (5) comprised the balance of the land of the acquisition situate north of the railway line as it then existed and was valued at £450 per acre.”

All three plots now under consideration fell within Zone 5. The judgment continues:

“In determining the value to be placed on the land within Zone (5), the Collector had regard primarily to the prices fetched at sales of plots in that vicinity within the two years immediately preceding the acquisition, but a factor which also influenced him in deciding that the land therein was of considerably less value than that in the zones south of the railway line was the existence of that line and the considerable difficulty of access to those plots in Zone (5) from the main Magongo Road. The onus is upon the two objectors of establishing that there is a preponderance of probability that the Collector was wrong in his valuation.”

The only question in these appeals relates to the importance attached to the railway line above mentioned by the Collector in arriving at the amounts of his awards in relation to Zone 5, having regard to the fact that land for realignment of the railway had been acquired by a notice in the Official *Gazette* dated May 13, 1954, some two years prior to the acquisition of the plots in question. The learned judge, having stated that the Collector had conceded that the principal limiting factor to the value of the land north of the railway line was the fact of the existence of that line and the consequent difficulty of access, continued:

“As to the question whether the Collector made an adequate allowance for the fact that the railway was to be re-aligned (the land for the realignment was acquired by a notice in the *Gazette* of May 13, 1954), he answered that the property sales which he considered and which I have enumerated in this judgment, took place after May 13, 1954, when the fact of the intended re-alignment was known, and that, despite the apparent absence of any effect of the future re-alignment upon the prices fetched in those sales, he did include in assessing the value at £450 per acre an element relating to the potentially enhanced value which such re-alignment might cause. In a reference heard immediately subsequent to the instant reference, the Collector went further in answer to a question by the court and stated that, had no line existed at all, he would have continued the parallel boundary lines of his zones to embrace the land to the north of the line.

This would have had the effect of placing Plot 150 in Zone (4) and Plot 273 in Zone (3). At the time the Collector made his awards, it was not known when the railway line would be taken up. It might have been a matter of years or of months. The Collector was therefore in my view correct in diminishing the value of the land in Zone (5) to some extent, but at the same time I think he penalised that land rather too heavily. Although the sales of other plots which guided his awards were not apparently affected by the prospect of the railway line being removed, there is no evidence that the parties involved in the sales realised the potential increase in the value of their land. They could have been so aware, but I do not think that those sales should be regarded too rigidly as a standard of comparison. Velinker in this work 'The Law of Compulsory Land Acquisition and Compensation' says at p. 97: 'It is fair that the owner deprived of his property should be recouped on a liberal scale'. The Collector has clearly been to great pains to make his awards as fair in all the circumstances as possible, and in coming to a conclusion different from his as to the appropriate value to be given in the ultimate event of the removal of the railway line, I mean no disparagement or criticism of his work."

The learned judge then considered the figures and increased the basic valuations of plot 150 and plot 149 by £50 per acre and of plot 273 by £200 per acre. In addressing argument to this court in support of his contention that these increases were unjustified, Mr. Gledhill, for the Collector first drew attention to relevant portions of the Land Acquisition Act (1894). Section 23 enumerates certain matters which are to be taken into consideration in determining the amount of compensation but the only two here relevant are firstly that the market value is to be ascertained as at the date of publication of the relevant notice and secondly that a sum equal to fifteen per cent. of such market value is to be added in every case in consideration of the compulsory nature of the acquisition. Section 24 provides (*inter alia*) that any increase to the value of the land acquired, likely to accrue from the use to which it will be put when acquired, shall not be taken into consideration. The position as to the burden of proof before the learned judge is set out in Aggarawala's Compulsory Acquisition of Land In India and Pakistan (3rd Edn.), p. 159 as follows:

"The burden of proving in the first instance that the Collector's award whether it is in the matter of valuation or of apportionment (as the case may be) is wrong, is on the objector. The onus proving the value of land acquired lies upon the claimant and to establish the value and selling prices of neighbouring places, it is necessary for him to adduce evidence of numerous or at least sufficiently numerous instances of sales of land in similar conditions and for similar purposes in the neighbourhood. The burden, however, must vary according to the nature of the enquiry made by the Collector. If no evidence has been taken by the Collector and if no reasons have been given in his decision to support his conclusion the claimant has a very light burden to discharge. The ipse dixit of a Collector has very little weight and is not *prima facie* evidence of the correctness of his award. The failure of the Collector in making a reference under s. 18 of the Act to state the grounds on which the amount of compensation was determined as required by s. 19, cl. (d) makes it incumbent on the Collector to justify the award before the Special Judge. The party claiming enhanced compensation is more or less in the position of the plaintiff and must produce evidence to show that the award is inadequate. If he has no evidence the award must stand, and if he succeeds in showing *prima facie*, that the award is inadequate the Government must support the award by producing evidence."

A number of authorities were quoted on this subject but there is no real dispute as to the law which appears to be fairly stated in the passage just quoted. A passage from the judgment in *Fink v. Secretary of State for India* (1) (1907), 34 Cal. 599 at p. 605 and p. 606 may be set out with advantage:

“But before entering into a consideration of the evidence on these points, we think it desirable to say something on the question of the burden of proof discussed before us. In appeal from original decree No. 264 of 1905, in which we delivered judgment on April 12, we have held that though the claimant must, on a reference under s. 18 of the Act, begin, and thus start a case showing that the Collector’s award should not be accepted, the onus of proof varies according to the probative value of the enquiry made by the Collector under s. 11 of the Act. Section 14 gives the Collector powers to summon witnesses, and to compel the production of documents, and to make an enquiry in the same way as a civil court would do in such a case. He is, also, bound, when a reference is made to the judge, to state the grounds on which his award of compensation was based. If, however, he makes no enquiry or gives no grounds for his valuation, the burden of proof on the claimant is nominal. The Special Judge must decide according to the weight of evidence, irrespective of the question of onus probandi and without throwing on the claimant an undue share of it.”

The objectors called Mr. A. A. Jagani as an expert witness but his evidence, which was not in any event regarded by the learned judge as carrying weight, did not touch the point now in issue. The only evidence therefore was that of the Collector himself, which, as appears from one of the passages from the judgment already quoted, was to the effect that he did include an element in his assessment of £450 per acre in respect of the potentially enhanced value which might arise from the re-alignment. Mr. Gledhill, for the Collector, has argued from this position that the onus was upon the objectors to show that the Collector was wrong, that they failed to do so from their own evidence and that the objectors did not elicit enough from the Collector to show that he was wrong. In effect then the learned judge has substituted his own opinion of the amount which should be allowed under this head, for that of the Collector.

As far as the onus of proof is concerned I would agree that it lay generally upon the objectors, though it was not a particularly heavy one. The Collector based his valuation largely upon consideration of the prices at which plots in the area had actually been sold in the two years prior to the acquisition of the land by the Government; a list of the transactions relied upon was published in the *Official Gazette* on the same date as the awards. There is no evidence as to the extent of his inquiries but there is no effective challenge to the accuracy of the figures relied upon, and the method adopted, a comparison of genuine and earlier sales in the locality, is probably the best method of ascertaining the market value—see Aggarawala, p. 189. The general onus was, therefore, on the objectors.

The learned judge quoted the Collector as saying that,

“despite the apparent absence of any effect of the future re-alignment in the prices fetched in those sales, he did include in assessing the value at £450 per acre an element relating to the potentially enhanced value which such re-alignment might cause.”

The judge had earlier found that none of the relevant plots in Zone 5 had sold for more than £400 per acre during the preceding two years. It seems therefore that the Collector made an additional allowance of at least £50 per acre, and more if he took an average of the sales as his basic figure. There is perhaps a difficulty here for although in one of the records in the cases under appeal

the Collector is recorded as having said that if the railway were to have stayed where it was indefinitely he would have reduced his valuation from £450 to “about £400”, he had also earlier stated that he had made an allowance for a general rise in values of roughly 7½ per cent. per annum. If that is so his basic starting point was somewhat below £400. The important matter, however, is that it must be accepted that an allowance was made by the Collector for the likelihood of the removal of the railway at some unknown date.

The approach of the learned judge was that the Collector was, in his view, correct in diminishing the value of the land in Zone 5 to some extent by reason of the presence of the railway, and the fact that when the awards were made it was not known when it would be taken up—whether it would be months or years. Nevertheless he considered that the land had been penalised too heavily, and came to a different conclusion

“as to the appropriate value to be given in the ultimate event of the removal of the railway line.”

The question is whether the learned judge was entitled to do this in the absence of any evidence which challenged that of the Collector. The jurisdiction being exercised by the court is a special one, limited by s. 18 of the Land Acquisition Act, and it arises when a specific objection has been taken to the award; the court’s function is to enquire into the objection and to make an award itself after hearing the evidence: *Pramatha Nath Mullick v. Secretary of State for India* (2) (1929), 57 I.A. 100; *Revenue Divisional Officer and Land Acquisition Officer v. Valia Raja* (3) (1944), A.I.R. Mad. 539. There are four possible grounds of objection stated in the section and the present objectors relied (so far as this appeal is concerned) upon one of them—an objection to the amount of compensation awarded. The court’s duty therefore was to hear the evidence and make an award. In so doing it was plainly sitting as a court and exercising judicial functions and I think it is worth while to set out, at some length, a passage from the judgment in *Assistant Development Officer v. Tayaballi Allibhoy Bohori* (4) (1933), Bom. A.I.R. 361 at p. 363 and p. 364, in which the relative functions of the Collector and the courts are referred to:

“The acquiring officer’s award is of course strictly speaking not an award at all but an offer. It is based on enquiry and inspection and the officer responsible for it is usually a man of experience and local knowledge. He may take evidence, but he is not bound to do so, and his proceedings are administrative rather than judicial. But if his award is not accepted and the matter is taken into court, the proceedings are thenceforward judicial in character. The party claiming enhanced compensation is more or less in the position of a plaintiff and must produce evidence to show that the award is inadequate. If he has no evidence the award must stand; and if he succeeds in showing *prima facie* that the award is inadequate, then Government must support the award by producing evidence. It is no doubt true that the valuation of immovable property is not an exact science. As Macleod, C.J., said in his judgment in *Frenchman v. The Assistant Collector, Haveli*, (p. 786 of 24 Bom. L.R.):

‘... the very best efforts of an expert or a court to fix a market value for a property like this can never amount to much more than a quasi scientific guess, which the court should in the case of compulsory acquisition temper with liberality.’

“But I can call in aid the general tenor of the judgments of that learned judge in land acquisition cases to support me when I say that the court is bound to treat the matter judicially as far as possible and it should only guess when science or common sense will not point to a definite conclusion. The judge ought to be liberal in the sense that he should not be too meticulous

or pedantic in dealing with the evidence. The value of property should not be unduly depreciated in order that Government may acquire as cheaply as possible, and seeing that an exact calculation to annas and pies is usually impossible, the court is justified in taking a broad view as favourable to the owner as the evidence permits. But, as in the case of any other judicial proceedings, the findings must be based upon evidence and legitimate deductions from it, and if there is an appeal, both the evidence and legitimate deductions are subject to reconsideration by the Appeal Court. No doubt the party appealing must satisfy this court that the judgment appealed from is wrong, and for the reasons which I have indicated, it may be more difficult to do that in land acquisition appeals than in other cases. But the same principles must apply as in ordinary appeals. It is not necessary to show, as Mr. Coyajee for the respondents suggested, that the judgment is perverse. It is enough to show that it is inconsistent with the evidence or based upon unsound deductions.”

Certain observations in the judgment of the Privy Council in *Samiullah v. Collector, Aligarh* (5) (1946), A.I.R. P.C. 75 at 77 are of interest, though they should be read in the light of the question there in issue, which related to the effect of an agreement between the interested parties:

“It is clear therefore that the land acquisition officer, in awarding the amount of compensation under s. 11, is performing a statutory duty, a duty the exercise of which, in cases where land is to be acquired for a public purpose, concerns the public, since it affects the expenditure of public money. In assessing compensation he is bound to exercise his own judgement as to the correct basis of valuation, and his judgment cannot be controlled by an agreement between the parties interested. On a reference under s. 18 the district judge must also exercise his own judgment and consider, amongst other things, whether the award of the land acquisition officer was based on a correct principle. If in this case the district judge considered that the market value of the land to be acquired could be better ascertained by basing it upon a sale of neighbouring land in which the conditions closely resembled those affecting the land to be acquired, rather than by taking an average of prices obtained on a large number of sales in which the conditions were less similar, he was entitled and bound to act upon his own view. In appeal the judges of the High Court were free to disagree with the district judge if they thought him wrong, but this they do not appear to have done. They held that the district judge was not free to act upon his own view because it conflicted with the agreement between the parties.”

The learned judge was therefore quite entitled to differ from the Collector upon a matter of principle and in that case was bound to act upon his own view; he did not, however, differ in principle but on the question of the amount to be allowed as the result of the application of an accepted principle. I have been unable to find in the records of the hearings any evidence upon which the learned judge might have relied in forming his own estimate—the expert called by certain of the objectors in fact, had augmented his valuation (which was rejected) on the expectancy of the continued existence of the railway and the likelihood of railway sidings being permitted. The increase allowed by the learned judge, on the other hand, had relation to the probability of the early removal of the railway.

With respect, I cannot see that the allowance of the increase was the result of a legitimate deduction from the evidence. The fact that the railway was actually removed some nine months after the acquisition must be disregarded, for the value of the land had to be determined at the date of the acquisition

when all that was known was that the removal at some future date was intended. It is true that the factor in question could be described as imponderable and no more than “a quasi scientific guess” could be attempted in assessing it. In that lies the only difficulty I have experienced in arriving at a decision, and I do not propose to go so far as to say that a court could never substitute its own such guess for that of the Collector; that might be a proper course if the assessment of the latter were manifestly unreasonable and the matter was one which was not susceptible to being resolved by evidence. That was not the position in the present case. To be a factor in the market value of the plots in question the imminent removal of the railway would have to be fairly generally known, for it would be the knowledge of the intention of the railway authorities to take that early step, and not the existence of the intention, which would affect the minds of willing vendors and purchasers. It cannot be supposed that no evidence of such knowledge could have been found by the objectors and placed before the court. It makes no difference that if that had been done it might have been difficult for the objectors to explain why the price actually obtained did not (as appears to have been accepted) reflect that knowledge. Alternatively an expert could have been produced who had addressed his mind to the matter in question and could express an opinion upon it to set against that of the Collector. I think in the circumstances that the learned judge should have been guided by the principle that it rested upon the objectors to show that the Collector’s award was wrong; they did not show that he erred in principle and, on the point in issue, called no evidence whatever to show that he was wrong as to quantum. I consider that in the result the award should not have been disturbed. For these reasons I would allow the appeals with costs and (so far as the questions at issue in these appeals are concerned) restore the awards of the Collector. The Collector should also have the costs of the proceedings in the court below.

Reference should be made to an objection taken by Mr. Trivedi, who appeared for two of the respondents in Civil Appeal No. 60/1959. It was his contention that this court had no jurisdiction to entertain the appeals as, in his submission, every award is a decree, and the documents drawn up in these cases had been headed “Order” and worded as orders. We did not allow the objection for a number of reasons. One is that by virtue of s. 2 of the Civil Procedure Ordinance a judgment is appealable notwithstanding the fact that a formal decree has not been drawn up. Secondly, if under the applicable law it is proper to embody the decision of a court in a decree we should deem it proper to look at the substance of the document actually drawn up rather than its form, in deciding whether it should be treated as a decree. Mr. Trivedi’s main reason for saying that the court’s decision should be embodied in a decree was that s. 26 (2) of the Land Acquisition Act, 1894, specifically provides that “every such award shall be deemed to be a decree”. That sub-section, however, is not in force in Kenya as it was enacted only in 1921 by the Land Acquisition (Amendment) Act of that year. Neither is it in force in Uganda and in a case from that territory recently decided by this court (*Musa Mubiru Luwala v. The Collector for Western Uganda Railway Extension* (6), [1959] E.A. 848 (C.A.)) it was held that the award of the High Court upon a reference under the Land Acquisition Act, 1894, was an order. The law in Kenya enabling appeals to be brought to this court from orders, is contained in s. 66 and s. 75 of the Civil Procedure Ordinance and O. XLII, r. 1, of the Civil Procedure (Revised) Rules, 1948. Under those provisions leave to appeal from an order is required unless the order is one of the classes in which an appeal as of right is provided. No leave was applied for in the present case or, as far as I know, in previous appeals from decisions under this Act, and no point was taken on this by counsel for the various respondents in these appeals. It may be that

this is a matter to which further consideration will have to be given if and when occasion arises.

Forbes V-P: I agree. The appeals are allowed with costs. The orders of the Supreme Court are set aside and the awards of the Collector are restored. The appellant must have his costs of the proceedings in the Supreme Court.

Windham JA: I also agree.

Appeal allowed. Objection overruled.

For the appellant:

J Gledhill

Gledhill & Co, Nairobi

For the respondents in Civil Appeal No. 58 of 1959:

AC Satchu

Satchu & Satchu, Mombasa

For the first and second respondents in Civil Appeal No. 60 of 1959:

HD Trivedi

UK Doshi & Doshi, Mombasa

For the third and fourth respondents in Civil Appeal No. 60 of 1959:

HV Anderson

Atkinson, Cleasby & Co, Mombasa

Walji Jetha Kanji and others v Elias Freed [1959] 1 EA 1071 (CAM)

Division:	Court of Appeal at Mombasa
Date of judgment:	18 December 1959
Case Number:	20/1959
Before:	Forbes V-P, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya–Edmonds, J

[1] *Building contract – Contract specifying amount for labour but subject to final check of measurement of building area – Whether contract is entire contract or lump sum contract – Whether cause of action accrues before final check of measurement.*

[2] *Building contract – Alleged defective work – Onus of proof – Completion required within certain*

date – Additional work ordered later – Waiver – Indian Contract Act, 1872, s. 63.

Editor's Summary

The appellants sued the respondents for money due under a building contract and for additional work. By the contract the respondents agreed to pay the appellants Shs. 98,450/- for their work and labour, and "interim advance payments" amounting to Shs. 91,000/- were to be paid at stages of the work. It was also stipulated that "on completion of all works and after occupation certificate obtained" a sum of Shs. 15,000/- would be payable and "on completion of six months maintenance period" a sum of Shs. 7,450/-. The payment of Shs. 15,000/- was "subject to a final check measurement of the building and may be subject to adjustment as a result of the final check". In his defence the respondent denied liability stating that the building work was not completed to his satisfaction, that the payment on completion of all works and after occupation certificate obtained was subject to a final check measurement of the building which had never been made, and that the building was not completed in time. He also counterclaimed for loss of rent due to delay in completion of the building and for defective work. The appellants in reply alleged that the delay was mainly due to the failure of the respondent, whose responsibility it was, to supply materials when required and because the respondent ordered additional work. The Supreme Court dismissed a substantial part of the plaintiffs'

claim partly on the ground that it was premature as no final check measurements had been made; partly on the ground of defective work and partially allowed the respondents' counterclaim for loss of rent and defective work. On appeal it was argued *inter alia* for the appellants that on a true construction of the contract measurement of the completed blocks was not a condition precedent to payment of Shs. 15,000/-; that the trial judge discussed "measurement contracts" without defining what he meant by that phrase, that this was an entire contract subject to a right of adjustment on the basis of area; that there had never been any request for measurement put forward by the respondent in correspondence prior to the filing of the plaint, that it was never suggested that less work had been done than was set out in the plan; that, therefore, the minimum amount payable was Shs. 15,000/- and that if measurement was a condition precedent it had been waived by the respondent.

Held –

- (i) the contract was an "entire" contract and one in which the price was to be ascertained subsequently on a fixed basis, namely, a final payment per square foot of the actual area of the completed building, therefore, the action was not maintainable until such area had been ascertained by measurement of the building;
- (ii) the onus was on the appellants to establish the amount to which they were entitled under the contract and this they had failed to do;
- (iii) the onus was on the appellants to show that they were not responsible for defects in the concrete work of the canopies;
- (iv) it is well established that where a lump sum contract is substantially completed, liability cannot be repudiated on the ground that work, though substantially performed, is in some respects not in accordance with the contract;
- (v) the defects established were not such that the respondent could reasonably withhold approval of the building as a whole: the most he would have been entitled to do was to retain out of the last instalment the value of the defects;
- (vi) though the effect of ordering the additional work was to set the time at large, the appellants were still under an obligation to complete the work within a reasonable time;
- (vii) in the circumstances of this case, s. 63 of the Indian Contract Act did not enter into the matter, nor did the question of waiver arise.

Appeal allowed in part.

Cases referred to in judgment

- (1) *H. Dakin & Co. Ltd. v. Lee*, [1916] 1 K.B. 566.
- (2) *Hoening v. Isaacs*, [1952] 2 All E.R. 176.
- (3) *Dodd v. Churton*, [1897] 1 Q.B. 562.

December 18. The following judgments were read by direction of the court:

Judgment

Forbes V-P: This is an appeal from a judgment of the Supreme Court of Kenya.

The appellants are building contractors. By a contract in writing dated June 25 1955, they undertook to erect for the respondent on his land at Mombasa, with materials to be supplied by the respondent, a block of twelve flats and a block of twelve garages and boys' W.C.s, comprising a total area of approximately 17,900 square feet. The contract specified, *inter alia*, that

“the total area of 17,900 square feet is subject to final check on completion of the building”;

that the appellants agreed to build

“the said block of flats, garages and boys’ W.C.s completely and entirely in accordance with the plans and specifications referred to above and to the satisfaction of the owner [i.e. the respondent] and the Municipal Board of Mombasa”;

and that the respondent agreed

“to pay to the contractor [i.e. the appellants] the sum of shillings five and cents fifty per square foot (Shs. 5/50) of building”.

In para. 45 of “terms and conditions” set out in the contract provision was made for the respondent to make “interim advance payments” to the appellants at various stages of the work. Only the two last instalments provided for are material to this case, and the provision regarding these reads as follows:

“10. On completion of all works and after occupation certificate obtained	Shs. 15,000/-
11. On completion of six months maintenance period	Shs. 7,450/-
Approximate total amount of Contract	Shs. 98,450/-

“Note: The payment of item number ten above will be subject to a final check measurement of the building and may be subject to adjustment as a result of the final check.”

Provision, which was in the following terms, was also made in the “terms and conditions” for alterations:

“43. Alterations.—The owner shall have the right to direct the contractor to effect such alterations or amendments as he considers necessary providing that any alteration or amendment shall not effect major structural alterations.”

Finally, para. 46 of the “terms and conditions” provided that:

“The time of completion of this contract shall be nine months from the date of signing this agreement.”

This meant that the date for completion under the contract was March 25, 1956. In fact, the building was handed over on August 22, 1956. An “occupation certificate” had been duly obtained.

In March, 1958, the appellants as plaintiffs filed a suit against the respondent claiming payment of a sum of Shs. 27,236/- under the contract, together with interest thereon and the costs of the suit. The sum of Shs. 27,236/- claimed was made up as follows:

Amount alleged unpaid in respect of instalments payable under the contract up to date of completion	Shs. 13,000/-
Amount of last instalment payable six months after completion alleged to be unpaid	Shs. 7,450/-
Amount alleged due but unpaid in respect of additional work	Shs. 6,786/-
Total:	Shs. 27,236/-

In his defence the respondent admitted the contract, but denied that the work had been “completed according to the reasonable satisfaction of the defendant”. He claimed that the tenth payment under the

terms of the contract was to be made subject to a final check measurement of the building and that

no such check measurement had ever been made. He denied that he had ordered any additional work, and, in the alternative, alleged that the charge for extra work was excessive and unreasonable. He alleged that the work had not been completed in accordance with the terms of the contract and specified a number of alleged defects. And he alleged that the building was not completed on March 26, 1956, and was handed over in an uncompleted condition on or about August 22, 1956. He counterclaimed for:

“(i)	Damages for loss of use and loss of rent for five months at Shs. 8,000/- per month	Shs. 40,000/-
(ii)	Wages of one carpenter for fitting steel windows to building	Shs. 600/-
(iii)	Damages for use of incorrect bricks for front decoration as in plan at Shs. 2/50 per sq. ft.	Shs. 5,000/-
(iv)	Damages for replacing the terrazzo on the two staircases at 50 cents per sq. foot	Shs. 500/-
(v)	Loss of material due to plaintiffs’ error in placing the foundation of the recess in the Lounge	Shs. 200/-
(vi)	Loss of material amounting to 150 wooden squares 4 × 2 podes owing to plaintiffs’ negligence	Shs. 2,000/-
(vii)	Loss of material being 10 tons of cement wasted	Shs. 2,200/-
(viii)	Loss of material being concrete blocks completely cracked and thus damaging the strength of the building	Shs. 5,000/-
(ix)	Loss due to badly made concrete canopies	Shs. 3,000/-
(x)	The cost of replastering engaging masons and using extra materials.....	Shs. 4,000/-
(xi)	The cost of labour which the defendant was compelled to engage to assist in the levelling of the yard	Shs. 200/-
		<hr/> Shs. 62,700/-” <hr/>

In their reply and defence to counterclaim the appellants alleged, *inter alia*, that the delay in completion of the work was due to the fault of the respondent in failing to supply materials to be supplied by him as and when they were required, in making false accusations of theft against the workmen employed on the work, and in requiring the appellants to carry out the additional work mentioned in the plaint.

As regards the sums claimed in the plaint, the learned trial judge held:

- (1) that the claim for Shs. 13,000/-, the balance of the tenth instalment, was premature as the cause of action could not arise until there had been a check of the measurements;
- (2) that the work had not been properly completed in that canopies were ill-constructed at roof level, that the appellants were responsible for this bad work, and that the respondent was therefore justified in withholding payment of the retention money, that is, the sum of Shs. 7,450/- payable six months after completion; and
- (3) that additional work was in fact ordered by the respondent, that the agreed rate for this work was Shs. 3/50 per square foot, and that the amount due to the appellants in respect of this work was Shs. 3,976/-.

He accordingly gave judgment for the appellants on their claims in the plaint in the sum of Shs. 3,976/-.

As regards the respondent's counterclaim, the learned judge held:

- (1) that except for item (ix) the respondent had failed to substantiate the allegations of defective work specified in the defence and counterclaim, but that in respect of item (ix), the alleged defective canopies, the respondent's claim for Shs. 3,000/- as damages was justified and should be allowed;
- (2) that the appellants had failed to substantiate their allegation that delay in completion was due to the respondent's failure to supply materials or to his making false accusations of theft; that the appellants should not be allowed more than a maximum of eight weeks for the additional work ordered by the respondent; but that by reason of the fact that certain of the additional work, which would take three weeks to complete, was ordered on May 10, 1956, the completion date under the original contract was impliedly extended to May 31, 1956; and that the respondent was entitled to damages for non-completion at the rate of Shs. 8,000/- per month for the period of two months and twenty-two days from June 1 to August 22, that is to say, Shs. 21,677/50.

He accordingly gave judgment on the counterclaim in the sum of Shs. 24,677/50.

The question of costs was reserved for further argument. In the event the learned judge allowed the appellants one-seventh of their costs as taxed upon the amount of their claim, and the respondent two-fifths of his costs as taxed upon the amount of his counterclaim. Interest at the rate of 6 per cent. per annum from the date of judgment was awarded to the parties on the amounts awarded to them respectively.

The appellants have appealed to this court against the learned judge's decision in so far as the decision:

- (a) dismissed the appellants' claim for Shs. 20,450/-; and
- (b) ordered the appellants to pay to the respondent the sum of Shs. 24,677/50.

The appeal is also expressed to be against the orders in respect of costs. The appellants have not appealed against the award of Shs. 3,976/- instead of Shs. 6,786/- in respect of additional work; nor is there any cross-appeal by the respondent in respect of those parts of his counterclaim which were not allowed.

It follows that the matters in issue on the appeal are:

- (a) the dismissal of the appellants' claim for Shs. 13,000/-, being the balance claimed to be unpaid in respect of the tenth instalment payable under the contract;
- (b) the dismissal of the appellants' claim for the last instalment of Shs. 7,450/- alleged to be payable six months after completion;
- (c) the award of Shs. 3,000/- as damages against the appellants in respect of alleged defects in the concrete canopies;
- (d) the award of Shs. 21,677/50 as damages against the appellants in respect of alleged delay in the completion of the work;
- (e) costs of the proceedings in the Supreme Court.

It will be convenient to deal separately with each of these matters.

As regards the appellants' claim for Shs. 13,000/- in respect of the tenth instalment of the alleged contract price, it was alleged in para. 3 of the plaint that:

“the defendant agreed by the said contract to pay the plaintiffs for their work and labour under the said contract a total sum of Shs. 98,450/-; Shs. 91,000/- of which was to be paid by him to the plaintiffs by the time of completion of the construction work in ten instalments of several agreed amounts payable at agreed stages of the construction work during its progress, as set out in the said contract.”

As already mentioned, the respondent in his defence contended that the tenth payment was to be subject to a final check measurement. The issues on this point framed by the learned trial judge with the concurrence of counsel for the parties were:

- “4. On the true construction of the contract was the defendant under an obligation to pay to the plaintiffs a lump sum of Shs. 98,450/- as alleged in para. 3 of plaint, and not a sum to be calculated on a square footage basis?
- “5. (a) Was the final check measurement a condition precedent to payment of the tenth instalment of Shs. 15,000/- or merely a term of the contract for the determination of the actual amount payable to them?
“(b) Has not the defendant waived it (if this defence is open to the plaintiffs on the pleadings) or prevented its observance by the plaintiffs?”

The learned trial judge dealt with the matter as follows:

“The plaintiffs have by their pleadings rested their cause of action in the suit upon the sole basis that the agreement of June 25, 1955, was a contract for a lump sum, while the defendant contends that it was a contract by measurement and that until such measurement has been carried out, nothing can be held to be due to the plaintiffs by way of balance of money payable for the work done. It was contended by Mr. Budhdeo for the plaintiffs that this agreement is not in the usual terms of a contract by measurement, the normal terms of which provide for payment only after measurement at each stage of construction, whereas under the agreement in this case it is only when the tenth payment accrues that the work becomes subject to measurement, the preceding nine payments being stated lump payments. It is contended that measurement was not a condition precedent to payment but merely a term of the contract for the determination of the actual amount payable. If there is a difference between the two, it is rather too subtle for me to find any significance in it. If measurement is a term of the contract for the determination of the actual amount payable, then payment cannot be made until the amount is determined—in other words payment is conditional upon measurement, which puts us back to where we were before with no advantage derived other than an exercise in the play on words. Mr. Budhdeo appeared to rely for this flight of fancy upon the following passage in the judgment of Denning, L.J., in *Hoening v. Isaacs*, [1952] 2 All E.R. 180:

‘In determining this issue question is whether on the true construction of the contract, entire performance was a condition precedent to payment. It was a lump sum contract, but that does not mean that entire performance was a condition precedent to payment. When a contract provides for a specific sum to be paid on completion of specified work, the courts lean against a construction of the contract which would deprive the contractor of any payment at all simply because there are some defects or omissions. The proviso to complete the work is, therefore, construed as a term of the contract but not as a condition. It is not every breach of that term which absolves the employer from his promise to pay the price, but only a breach which goes to the root of the contract, such as abandonment of the work when it is only half done. Unless the breach

does go to the root of the matter, the employer cannot resist payment of the price.’

I cannot see how that case has any bearing upon the question in this case of whether the contract was a measurement or a lump sum one. There is nothing between measurement and performance. If a contract provides that the final payment will be made only after measurement, and as payment for work done is at a rate per square foot, then surely nothing can be paid as a final payment until it is ascertained if anything is due, for, indeed, it may be found on measurement that nothing more is payable.

“It is then contended for the plaintiffs that the contract is too imprecise in its terms to allow of it being interpreted as a measurement contract, and Mr. Budhdeo drew attention to the note to cl. 45, the terms of which are quoted above. He argues that the words ‘may be subject’ leave the matter of measurement optional, and that had the words been ‘shall be subject’ the intention would have been precise and unambiguous. I cannot agree with the suggested interpretation of the words contained in this note. It is quite clear to me that in their context the words ‘may be subject’ mean this—‘and in the event of the final check measurement showing that work of a less or greater amount has been done, the sum payable will be adjusted.’ In other words, the necessity or otherwise for adjustment was dependent upon the check measurement. I take the view that this is a measurement contract and was so understood and acted upon by the parties. The preamble sets out that the total area is ‘approximately’ 17,900 square feet, and that it is ‘subject to final check on completion of the building’; cl. 45 opens with the agreement of the defendant to make ‘interim’ payments; the total figure is given as ‘approximate total amount of contract’ and the words and figures are underlined twice; and finally, there is the foot-note. Those stipulations amount in my view to a clear provision for a contract by measurement.

“The plaintiffs however have laid their cause of action upon the basis of a lump sum contract, and as they are bound by their pleadings, I cannot see how I can afford them the relief asked for on those pleadings. A number of arguments were urged by Mr. Budhdeo to counter the contentions for the defendant. He contended that the onus was upon the defendant to have the final check made (a contention which in law is, I think, erroneous, the burden being upon the plaintiffs to prove compliance with the condition of measurement); that the plaintiffs were prevented by the defendant from making a final check; that there was substantial performance of the contract and occupation by the defendant, and that if the contract did make provision for measurement as a condition precedent to payment, the defendant had waived that condition by his conduct. But as I see it, none of these defences are open to the plaintiffs on their pleadings. As there has been no check measurement the plaintiffs’ claim for the sum of Shs. 13,000/–, the balance of item 10 of cl. 45, is premature, as their cause of action cannot arise on their pleadings until there has been a check of the measurements. In my view the plaintiffs’ claim for this sum must fail.”

Before us Mr. Nazareth for the appellants argued that on a true construction of the contract measurement of the completed blocks was not a condition precedent to payment of the tenth instalment; that the learned judge discussed “measurement contracts” without defining what he meant by the phrase, and that the phrase does not cover any recognised class of contract; that the broad distinction in building contracts is between contracts “entire” and contracts “not entire”; that this was an entire contract subject to a right of adjustment on the basis of area; that the work to be done was fixed work on an approved

plan of known approximate area on which the price was worked out; that there had never been any request for measurement put forward by the respondent in correspondence prior to the filing of the plaint; that it was open to the respondent to measure out the work himself and offer less payment if that was justified; that it was never suggested that less work had been done than was set out in the plan; that therefore the minimum amount payable under instalment ten was Shs. 15,000/-; and that if measurement was a condition precedent it had been waived by the respondent.

I agree that in building contracts an important distinction is between contracts which are entire and those which are not entire, but I do not think the question arises in this case. The contract here is clearly an “entire” contract in that the appellants were under an obligation to construct the whole of the work specified in the contract (see Halsbury’s Laws of England (3rd Edn.) Vol. 3, p. 437). There are, however, varieties of entire contracts, these being described on the same page of Halsbury’s Laws of England. For the purposes of this case the relevant varieties in my view are those numbered (1) and (4) at p. 437 of Halsbury, which are there described as follows:

- “(1) a contract to construct the whole building or works in consideration of the payment of a fixed sum of money: contracts of this class are often called ‘lump sum contracts’;
-
- (4) a contract to construct the building or works for a price to be subsequently ascertained on some fixed basis, for example, by a schedule of prices.”

Mr. Nazareth argued that the instant contract fell in class (1), subject to a right of adjustment on the basis of area. With respect, I am unable to agree. In my view the contract clearly falls within class (4), that is, a contract in which the price is one to be ascertained subsequently on a fixed basis, the basis here being a fixed payment per square foot of the actual area of the completed building. This, in effect, is the learned judge’s finding on the construction of the contract, and I respectfully agree with him. When he speaks of “measurement contracts” he is clearly using the term to describe a contract in which the price is to be ascertained by measurement as contrasted with a “lump sum contract”. In my view it is impossible to construe the instant contract as a lump sum contract. It must, I think, follow from this that the action is not maintainable until the price has been ascertained by measurement of the building. No doubt if it could be shown that the respondent had accepted the figure of 17,900 square feet as correct, or had prevented the appellants from making the necessary measurement, the appellants would have been entitled to rely on that figure. But the appellants have neither pleaded nor established any such matter. The onus is on the plaintiffs to establish the amount to which they are entitled under the contract, and this they have failed to do. I agree with the learned trial judge that the appellants’ claim in respect of instalment 10 of the contract price is premature and must fail.

The second matter in issue on the appeal, as set out above, is the dismissal of the appellants’ claim for the last instalment payable six months after completion, but it is convenient to deal first with the third issue, that is to say, the award to the respondent of Shs. 3,000/- damages in respect of alleged defects in the concrete canopies, since the decision on this is relevant to the consideration of the second issue.

The learned trial judge found that the canopies were in fact defective. There was evidence to support this finding, and it is not challenged. The appellants contend, however, that they were not responsible for the defects in the canopies, but that these were due to defects in shuttering provided by the respondent

under the terms of the contract for the purpose of the construction of the canopies.

The learned trial judge deals with the matter as follows:

“Mr. Son-di, among other qualifications, an associate member of the Society of Engineers in London and practising here as a consultant engineer since 1950, stated that if the shuttering was not level, any unevenness in the canopies would be the fault of the carpenter, but that if the shuttering was level, the unevenness would be the mason’s fault.

“Unfortunately Mr. Son-di was not examined more closely on this statement, nor was Mr. Beresford asked his opinion as to the extent of a mason’s responsibility in the construction of the canopies where the shuttering was provided by the owner of the building on which he was working. The onus is upon the plaintiffs to satisfy me that the condition of the canopies was not their responsibility. It seems to me that the dictates of common sense must be that the plaintiffs, or shall we say the builders, must accept the final responsibility that the shuttering is so fixed as to allow them to carry out their part of the work to the satisfaction of the owner. According to the plaintiffs, it was the responsibility of the defendant’s carpenters to construct and fit the shutters, and theirs (the plaintiffs) only to fill with concrete. Indeed, it would appear to be their contention that even if the shuttering was clearly, obviously and even ridiculously at fault and out of true, they would have no responsibility in the matter other than to fill with concrete, knowing that the result would be quite contrary to specifications but absolving themselves on the grounds that the responsibility for true levels rested with the carpenters. That is an attitude which I cannot accept. It is my undoubted view that the ultimate responsibility for ensuring that the shutters are laid or fixed level and properly is the builder’s. The construction of them was certainly the defendant’s responsibility, but to enable the builder to construct proper canopies, it is for the builder to check their fitting and, if not satisfied, to complain and take such action as is necessary to remedy the matter. As I have said, the ultimate responsibility is the builder’s and was the plaintiffs in this case. There is no evidence of any complaint by the plaintiffs as to the manner in which the shuttering was constructed and fixed, and, indeed, both the second and third plaintiffs, who were in charge of the construction, are, as I have already said, emphatic to this day that there is nothing wrong with the canopies—an attitude which is quite false having regard to the clear evidence of Mr. Beresford which I unhesitatingly accept as being true.

.....

In view of my findings and of the evidence of Mr. Beresford as to the cost of remedying the defects, I think that the defendant’s claim for Shs. 3,000/- as damages is justified, and I allow it.”

I am not prepared to go quite as far as the learned judge in the passage cited. It seems to me that it would be reasonable to draw a distinction between patent defects in the carpentry work, as to which I would agree that the obligation is on the builder to see that they are corrected, and latent defects which the builder cannot be expected to ascertain by reasonable inspection, but which eventually result in defective concrete work. However, I do not think the distinction is of any importance in this case. There is in fact no evidence to indicate whether the defects in the canopies were due to patent or latent defects in the shuttering, or, for that matter, that the defects were due to bad shuttering. As remarked by the learned judge, the appellants’ case was that the canopies were not defective. In the absence of evidence to establish definitely what

was the cause of the defects in the canopies, it seems to me that the matter is really one of onus of proof. The respondent pleaded that the canopies were defective, and the onus was upon him to establish that plea. This he did. Upon this being established, it seems to me that the onus then shifted to the appellants to show that the defective work was no fault of theirs. *Prima facie*, I think the responsibility for defects in the concrete work rested with the appellants, though, in the view I take, it was open to them to show that the responsibility was not theirs. Accordingly I respectfully agree with the learned judge when he says

“The onus is upon the plaintiffs to satisfy me that the condition of the canopies was not their responsibility.”

The appellants did not discharge that onus, their case being that there were no defects in the canopies. I therefore agree with the learned judge that the respondent is entitled to damages for the defects.

There was some suggestion that the damages awarded in respect of the defective canopies ought to have been Shs. 2,500/- and not Shs. 3,000/- as claimed. Mr. Beresford, on whose evidence the learned judge relied, stated that to remedy certain of the defects in the canopies would cost about Shs. 2,500/-, but he made it clear that this was limited to ensuring a proper discharge of rainwater from the canopies. Defects in the levels would remain, making the canopies unsightly. In the circumstances I think the learned judge was justified in allowing the whole sum of Shs. 3,000/- claimed as damages, as it seems a reasonable inference that the unsightly state of the canopies would result in some reduction in the value of the building. I think therefore that the learned judge’s award to the respondent of Shs. 3,000/- damages in respect of defects in the canopies is to be supported.

I return now to the dismissal of the appellants’ claim for the last instalment of the contract price. As to this, the learned judge says:

“I think the plaintiffs’ claim for the retention money of Shs. 7,450/- may be treated differently and as distinct from the question whether the agreement is a measurement contract or a lump sum contract. It was the tenth payment of Shs. 15,000/- which was to be subject to final check, and while adjustment of that sum would affect the total sum payable to the plaintiffs, it would not affect the amount of the retention money. The defence to the claim for this money is that the building was not completed to the satisfaction of the defendant in contravention of the stipulation contained in the written agreement. The onus is upon the plaintiffs to prove that the defendant was satisfied with the work, or that he has acted capriciously or dishonestly and could not, as a reasonable man, have been dissatisfied.”

The learned judge then considers the question of the defective canopies and continues:

“The evidence, then, goes to show that the defendant had a genuine and substantial complaint as regards the ill-constructed canopies at roof level. The plaintiffs have quite failed to prove that he has been unreasonable or capricious in expressing his dissatisfaction with the work, and in my view he must be held to have been justified in withholding the payment of the retention money, and the plaintiffs’ claim in this regard must fail.”

The relevant parts of the contract read as follows:

“...Whereas the contractor has agreed to build the said block of flats, garages and boys’ W.C.s completely and entirely in accordance with the plans and specifications referred to above and to the satisfaction of the

owner and the Municipal Board of Mombasa and whereas in consideration thereof the owner agrees to pay to the contractor the sum of shillings five and cents fifty per square foot (Shs. 5/50) of building on the following terms and conditions:

“45. *Payments.* The owner agrees during the following progress of the buildings to make interim advance payments to the contractor.

“11. On completion of six months maintenance period Shs. 7,450.00.”

It was contended that the first parts of the above extract from the contract are mere recitals, but I do not think there is any merit in this argument. Although framed as if they were recitals it is clear from the contract as a whole that they are intended to be terms of the contract.

Considerable argument was addressed to us on the question whether or not the approval of the respondent was a condition precedent to payment. The learned trial judge has not treated such approval as an absolute condition precedent, but has held that the approval cannot be unreasonably withheld. I see no reason to differ from the view taken by the learned judge. In *Hudson on Building Contracts* (7th Edn.) at p. 247, the learned author says:

“Where work has to be done to the approval of the building owner, such approval cannot, generally speaking, be withheld by him unreasonably.”

And in *Halsbury’s Laws of England* (3rd Edn.) at p. 455, it is said:

“Where a building contract provides that the work shall be done to the satisfaction of the building owner, and there is no express condition making his approval a condition precedent to payment, the maxim that ‘no man shall be judge in his own cause’ raises a presumption against any implied contract that such approval is a condition precedent. In the absence of any express condition to the contrary, such approval must not be unreasonably withheld.”

I accept these statements of the law, and I see nothing in the contract to suggest in this case that the respondent could unreasonably withhold approval and thereby avoid having to make payment.

The learned judge, however, has held that the burden of proving that the respondent:

“was satisfied with the work, or that he has acted capriciously or dishonestly and could not, as a reasonable man, have been dissatisfied”

was on the appellants. I incline to the view that this is a misdirection, but I do not think that the question of onus of proof really enters into the matter here. The work was undoubtedly completed and handed over, an occupation certificate having been duly obtained. The only defective work the existence of which was established was in the defective canopies. I think the only question for the learned judge to consider was whether the existence of the defects in the canopies was such as would justify the withholding of approval of the buildings as a whole, and he does not appear to have considered the matter in this light. It is, I think, well established that where a lump sum contract (and for this purpose I think the instant contract is analogous to a lump sum contract) is substantially completed, liability cannot be repudiated on the ground that the work, though substantially performed, is in some respects not in accordance with the contract: *H. Dakin & Co. Ltd. v. Lee* (1), [1916] 1 K.B. 566; *Hoening v. Isaacs* (2), [1952] 2 All E.R. 176. In *H. Dakin & Co. Ltd. v. Lee* (1) Ridley, J., said at p. 568:

“It is said, . . . that because in respect of three small matters the work was not carried out in accordance with the specification the plaintiffs are not entitled to recover any part of the contract price. The work was in my opinion substantially completed, and the defendant has had the benefit of it, for she has been living in the house ever since the repairs were finished. But it is contended that the authorities compel us to hold that the defendant, who has got the benefit of all the work that was done, is not liable to pay anything for it because in those respects the contract has not been absolutely complied with. If that were the law we should be bound to follow it, however much one might regret having to do so, for I think it would be productive of very great injustice.

“It seems to me, however, from the authorities that where a building or repairing contract has been substantially completed, although not absolutely, the person who gets the benefit of the work which has been done under the contract must pay for that benefit. On the other hand, if the builder has refused to complete his work, or if the work done is of no use to the other party, or if the work is something entirely different from what was contracted for, then the builder can recover nothing.”

It is true that in that case no question of the work having to be done to the satisfaction of the building owner arose, but I think that, on the basis of the principle there expressed, it could not be said that the withholding of approval in respect of a whole building because of defects in a minor part of the building would be reasonable. In the instant case the damages claimed and allowed in respect of the defective canopies are Shs. 3,000/-. It would seem from Mr. Beresford’s evidence that when repairs to the value of Shs. 2,500/- have been carried out the canopies will be perfectly serviceable, though to some extent unsightly. The total value of the contract as estimated is some Shs. 98,450/-. It seems to me wholly unreasonable that approval of the building as a whole should be withheld because of defects amounting in value to less than one thirty-second part of the total value of the building. In *Hoening v. Isaacs* (2) at p. 181, Denning, L.J., says:

“It is, of course, always open to the parties by express words to make entire performance a condition precedent. A familiar instance is when the contract provides for progress payments to be made as the work proceeds, but for retention money to be held until completion. Then entire performance is usually a condition precedent to payment of the retention money, but not, of course, to the progress payments. The contractor is entitled to payment pro rata as the work proceeds, less a deduction for retention money. But he is not entitled to the retention money until the work is entirely finished, without defects or omissions.”

It is to be noted in the instant case that the last instalment is not described as retention money, nor has entire performance, or completion to the satisfaction of the respondent, or even bare “completion” been made a condition precedent to its payment. As I have said, I do not think the defects established were such that the respondent could reasonably withhold approval of the building as a whole. I think that the most he would have been entitled to do was to retain out of the last instalment the value of the defects. Since, however, he has recovered damages in respect of the defects, this does not arise. I think the appellants are entitled to recover the amount of the last instalment of the contract price, that is to say, Shs. 7,450/-, from the respondent, and I would vary the learned judge’s decision to this extent.

The next matter to be considered is the award of Shs. 21,677/50 as damages against the appellants in respect of delay in completion of the work. The learned judge dealt with this matter at some length in his judgment, but I think

it is sufficient to refer to the following conclusions which he reaches, and to the latter part of the relevant passage in the judgment. The learned judge finds:

- (a) that the onus of proving that the delay was caused by the act or omission of the respondent lay upon the appellants;
- (b) that the appellants had failed to substantiate their allegations that the delay was due to the failure of the respondent to supply a concrete mixer in accordance with the terms of the contract, and to accusations of theft of material made by the respondent which were alleged to have resulted in loss of labour;
- (c) that additional work ordered by the respondent under three separate plans should not have entailed more than eight weeks additional work;
- (d) that the third plan entailing additional work, estimated to require three weeks to perform, was ordered on May 10, 1956, whereas the nine-month period provided for in the contract had expired on March 24, 1956;
- (e) that the ordering of these alterations constituted an implied agreement that the time for completion was extended, at least to the date by which such work should have been completed; that is, to May 31, 1956;
- (f) that additional work ordered involving the increase in height of a parapet wall and the removal of steel doors and their replacement by wooden doors had not been proved to have caused delay.

The learned judge then continues in his judgment as follows:

“It follows, therefore that of the alleged factors causing delay, only the following may be considered; the work involved in the three plans, exhibits 3, 4 and 5, and that involved in raising the height of the parapet walls. I have already stated that I consider the defendant responsible for delay until May 31, 1956, in respect of the work involved in the plan, exhibit 5, and it remains only to consider whether any additional time should be allowed for the other work. I have allocated three weeks out of the eight I am allowing as extra time for the third plan. The plaintiffs have stated they would in normal circumstances have been able to complete the whole contract within seven months. They were in fact allowed nine months. Thus, the extra two months more than covered the five weeks necessary to carry out the work involved in plans 3 and 4 and the further time necessary for the parapet wall. Indeed, there were more than two months. The period from March 24 to May 10 was also available to the plaintiffs—some seven weeks, so that it is manifest on the evidence that the plaintiffs were amply compensated in time available for the delays which have been held to have been caused by the act of the defendant. The plaintiffs have thus established only that the defendant is responsible for delay in completion until May 10, 1956. It is contended for the plaintiffs that time was not of the essence of the contract and that a reasonable time for completion should be allowed. But on the plaintiffs’ own showing nine months was more than reasonable time, while I have allowed further time to May 31, 1956—another two months. In any event the defendant has proved that he has suffered damages and he is entitled to such. (3 Halsbury, 443, para. 840). I accept his evidence that he could have let all the flats in the building at a total rental of Shs. 8,000/- per month. The defendant will, therefore, have damages under item (i) of his claim for the sum of Shs. 21,677/50 calculated at Shs. 8,000/- per month for two months and twenty-two days.”

I accept the statement of the law set out at p. 378 of Hudson on Building Contracts (7th Edn.), where it is said:

“Where there is no power to extend the time (or such power as there is is inapplicable to the delay which has been caused by the employer), but there is power, e.g., to order extras, and extras are ordered, then (as was said by Lord Esher, M.R., referring to *Westwood v. Secretary of State for India* (1861), 11 W.R. 261, in *Dodd v. Churton*, [1897] 1 Q.B., at p. 567) the building owner has rendered it impossible to complete the work by the specified date, and has deprived himself of the right to claim the liquidated damages mentioned in the contract.”

See also Halsbury’s Laws of England (3rd Edn.) Vol. 3, p. 490, para. 962. In *Dodd v. Churton* (3), [1897] 1 Q.B. 562 at p. 566, Lord Esher, M.R., says:

“The contract provided for the performance by a certain date of works described in a specification in consideration of the payment of a fixed sum as the price of the works specified. It is admitted that extra work was ordered, and that the necessary result of the builder’s having to do that work was that it took him more time to complete the works than if he had only had to do the work originally specified. It was, no doubt, part of the original contract that the building owner should have a right to call upon the builder to do that extra work, and, if he did give an order for it, the builder could not refuse to do it. The principle is laid down in Comyns’ Digest, condition L (6), that, where one party to a contract is prevented from performing it by the act of the other, he is not liable in law for that default; and, accordingly, a well recognised rule has been established in cases of this kind, beginning with *Holme v. Guppy*, 3 M. & W. 387, to the effect that, if the building owner has ordered extra work beyond that specified by the original contract which has necessarily increased the time requisite for finishing the work, he is thereby disentitled to claim the penalties for non-completion provided for by the contract. The reason for that rule is that otherwise a most unreasonable burden would be imposed on the contractor. Then this further complication arose. Contracts were entered into by which the builder agreed to do any extra work which the building owner or his architect might order. It was urged in such cases, as, for instance, in *Westwood v. Secretary of State for India*, 11 W.R. 261; 7 L.T. 736, that the fact that the builder had contracted to do any extra work that might be ordered prevented the application of the rule which I have mentioned. But it was held that that was not so. Then there came another case which was said to be an exception from the rule, namely, that which existed in *Jones v. St. John’s College*, L.R. 6 Q.B. 115. There it was alleged on the pleadings that there was an agreement by which the builder agreed that, if any extra work was ordered, then, whatever that work might be, he would undertake nevertheless to complete the works within the time originally specified by the contract; and it was thereupon held that, if the builder was foolish enough to make such an agreement, he was bound by it and must take the consequences. The whole question here is whether on the construction of this contract, by which undoubtedly the builder has undertaken to perform any extra work that may be ordered, he has agreed to take upon himself the burden which the builder had taken upon himself in *Jones v. St. John’s College*; in which case, however foolish and unreasonable such an agreement may be, he must stand by it. One rule of construction with regard to contracts is that, where the terms of a contract are ambiguous, and one construction would lead to an unreasonable result, the court will be unwilling to adopt that construction. In *Jones v. St. John’s College* the court had no opportunity of construing the contract really made. The demurrer admitted the

statement on the pleadings that the builder had entered into the unreasonable agreement alleged. I cannot construe the contract in this case as containing such an agreement by the builder. I think the words in the contract relied upon by the defendant are capable of another construction which would be perfectly reasonable. It seems to me therefore that the case is not brought within the authority of *Jones v. St. John's College*, but falls within the class of cases, of which *Westwood v. Secretary of State for India* is an example, where it has been held that, although the building owner was entitled to give orders for extras, if, by so doing, he has rendered it impossible to complete the work by the specified date, he has deprived himself of the right to claim the liquidated damages mentioned in the contract."

It seems to me that the instant case clearly falls within the rule in *Dodd v. Churton* (3), with the exception that in this contract there is no provision for liquidated damages, and the respondents' claim was for unliquidated damages. As to this, in Halsbury's Laws of England (3rd Edn.) Vol. 3 at p. 492 it is said:

"*Recovery of unliquidated damages.* Where the time fixed by the contract has ceased to be applicable in consequence of some delay by the employer, and consequently his right to liquidated damages has gone, he can have no claim for unliquidated damages provided the builder completes within a reasonable time. Cf. *Tyers v. Rosedale and Ferryhill Iron Co.* (1875), L.R. 10 Exch. 195; *Ford v. Cotesworth* (1870), L.R. 5 Q.B. 544."

I have no doubt that the effect of the ordering of the additional work in this case was to set the time at large, but I think the appellants were still under an obligation to complete the work within a reasonable time. The learned judge did not base his decision on completion within a reasonable time, but he did consider what would be a reasonable time for completion, and I see no reason to differ from his conclusion in this respect. With respect, I do not agree with his argument that, because the appellants stated that in normal circumstances they would have been able to complete the contract in seven months, the nine months allowed in the contract would more than cover the time required to complete the extra work involved in plans 3 and 4. The appellants contracted to be allowed nine months to complete the work provided for in the contract, and they were entitled to take that time for that work. The appellants' statement, however, does indicate that the nine months provided for in the contract was a reasonable time within which the appellants ought to have completed the original work. The learned judge has found that a reasonable time for completion of the extra works ordered would be eight weeks, and, as I have said, I see no reason to disagree with this conclusion. By reason of the order for the last item of extra work not having been placed till May 10, the learned judge has fixed the reasonable completion date as May 31 in view of his assessment of three weeks as the reasonable time involved in completion of the last item of extra work. As he points out, the additional period to May 31 amply covers the time required for completion of the other items of additional work.

Mr. Nazareth argued that there had been a waiver of the completion date fixed by the contract, and relied on s. 63 of the Indian Contract Act, which applies in Kenya. In the circumstances of this case I do not think that s. 63 of the Contract Act really enters into the matter, nor does the question of waiver arise. The ordering of the additional work set the time for completion at large, but the appellants were still under the obligation to complete within a reasonable time. The learned trial judge has held that the reasonable time for completion was May 31, 1956. I am not prepared to differ from that

conclusion. The other alleged causes of delay were not seriously relied on at the hearing of the appeal, nor was the measure of damages challenged in argument, though it is raised in the memorandum of appeal. It is sufficient to say that I see no reason to disturb the learned judge's decision in relation to these matters. I therefore think the learned judge's award of Shs. 21,677/50 damages to the respondent in respect of the delay in completion is to be supported.

In the result I think the learned trial judge's decision should be varied to the extent that judgment should be entered for the appellants on the plaint in the sum of Shs. 11,426/-, instead of Shs. 3,976/- allowed by the learned judge, but that the learned judge's award of Shs. 24,677/50 as damages to the respondent on the counterclaim should be affirmed. In view of this conclusion I think the order for costs in the court below should be varied to the extent of allowing the appellants one-half of their costs as taxed on the amount of their claim; the order as to costs on the counterclaim should stand.

As regards costs of the appeal the appellants have succeeded on one only of the issues raised in the appeal. I would allow them one-third of the costs of the appeal as taxed.

Gould JA: I agree with the conclusions of the learned vice-president and that the appeal should be allowed to the extent indicated in his judgment. I agree also with the proposed order for costs.

Windham JA: I also agree.

Appeal allowed in part.

For the appellants:

JM Nazareth QC and EP Nowrojee

EP Nowrojee, Nairobi

For the respondent:

RP Cleasby

Atkinson, Cleasby & Co, Mombasa

Ahamed Mahamoud v R
[1959] 1 EA 1087 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	6 October 1959
Case Number:	701/1959
Before:	Rudd Ag CJ and Mayers J
Sourced by:	LawAfrica

[1] *Criminal law – Sentence – Compensation payable out of fine – When court may properly order payment of compensation – Criminal Procedure Code (Cap. 27), s. 175 (1) (b) (K.).*

Editor's Summary

The appellant was convicted of assault causing actual bodily harm and was sentenced to pay a fine of Shs. 6,000/- or in default six months' imprisonment. The magistrate ordered that if the fine was paid, Shs. 4,500/- thereof was to be paid to the complainant as compensation. It was common ground that pursuant to an order of the elders of the Somali sections to which the appellant and the complainant respectively belonged Shs. 4,500/- had been paid by the appellant's section to the elders of the complainant's section in respect of the assault by the appellant. On appeal against sentence only the appellant's chief objection to the sentence was to the order for payment of compensation out of the fine.

Held –

- (i) there should not have been an order for payment of compensation out of the fine in addition to the payment to the elders of the complainant's section and the parties should have been left to their civil remedies.
- (ii) s. 175 (1) (b) of the Criminal Procedure Code should only be invoked when the right of compensation in a civil suit is clearly established and this was not so in the instant case.

Sentence reduced and order for payment of compensation set aside.

No Cases referred to in judgment in judgment

Judgment

Rudd Ag CJ: read the following judgment of the court: The appellant appeals from sentence imposed upon him by the first class magistrate, Isiolo, in respect of a conviction of assault causing actual bodily harm contrary to s. 246 of the Penal Code.

He was sentenced to pay a fine of Shs. 6,000/- or in default of payment to undergo six months' imprisonment. It was ordered that if the fine be paid, Shs. 4,500/- thereof was to be paid to the complainant as compensation. This sentence was pronounced on April 24, 1959. On September 1, 1959, an application for leave to appeal out of time against the sentence was received by this court. This application was supported by an affidavit sworn by the appellant in which he stated that two days after his conviction he had intimated to the officer-in-charge of the prison at Isiolo his intention to appeal. There is nothing to indicate that this averment is untrue so that it would appear that for some reason or other the proper steps in order that the appellant might be enabled to appeal were not taken at the proper time by the authorities at Isiolo prison. In the circumstances the appellant was granted leave to appeal out of time.

The facts are that there was a long-standing personal feud between the appellant and the complainant who belonged to different sections of Somalis. In July, 1958, the complainant was convicted and sentenced to nine months' imprisonment for assault upon the appellant. He was released from Nairobi

prison on March 6 and arrived at Isiolo on March 11 on which date he was attacked by the appellant who drew a knife and in the course of a fight inflicted a knife wound in the complainant's neck.

The present appeal is against sentence only and the appellant's chief objection to the sentence is the order for compensation to be paid out of the fine. At the time of sentence in the lower court the appellant stated that he had been ordered by elders to pay Shs. 4,500/- compensation to the complainant and he asked that this money should be returned to him upon sentence in the case.

When the appeal first came before this court we asked for information to be obtained regarding the alleged order of compensation made by the elders and the hearing was adjourned pending enquiry into that. We have now been informed that the elders of the respective sections to which the appellant and the complainant belong ordered that Shs. 4,500/- be paid by the appellant's section to the elders of the complainant's section in respect of the assault committed by the appellant and that Shs. 2,000/- was ordered to be paid by the complainant's section to the appellant's section in respect of the assault committed by the complainant upon the appellant in 1958. We are informed that the sum of Shs. 4,500/- has accordingly been paid by the elders of his section to the elders of the complainant's section. We are further informed that the complainant received no part of this sum of Shs. 4,500/- which, it is said, has been paid for the benefit of his section and not for the benefit of the complainant. It appears to us that the complainant must in all probability, as a member of his section, have benefited from this payment. It also appears to be probable that a great part of this sum may well have been provided out of the appellant's property. He said that he had been ordered to pay the whole of it. In the circumstances we are quite satisfied that there should not have been an order for compensation to be paid out of the fine in this case in addition to the payment to the elders of the complainant's section.

The legal basis upon which compensation was payable as between the several sections is not clear to us. We presume that it was on the basis of established tribal law and custom but in that case there is nothing to show that personal compensation as between the individuals concerned is legally payable in addition to the sectional compensation. We think it may very well be the case that if the payment as between the sections was in accordance with the law then the complainant's right to compensation would be to be paid out of that sectional compensation. As it is, if the order for compensation stands, it would seem that double compensation would be paid. The magistrate, when he imposed the sentence was informed that the question of compensation in respect of the assault committed by the appellant was before the elders and that Shs. 4,500/- has been ordered to be paid.

Section 175, sub-s. (1) (b) of the Criminal Procedure Code which authorises compensation to be paid out of proceeds of a fine should only be invoked in the clearest cases. That is to say there should be no such order unless the right of compensation in a civil suit is clearly established. We do not consider that that was so in the instant case. In the circumstances we are quite satisfied that an order for payment of compensation out of the fine should not have been made and the parties should have been left to their civil remedies.

The position is now complicated by the fact that the sum of Shs. 3,500/- has been paid or levied in respect of the fine that was imposed, upon the appellant and that Shs. 2,000/- of this appears to have been paid to the complainant. It may be difficult to recover this sum of Shs. 2,000/-, but we do not think that this court should take that matter into account.

In deciding the order that should now be made we take into account the fact that the appellant will have served a term of imprisonment in respect of the unpaid portion of the fine and that Shs. 3,500/- has

been recovered from him in respect of part of the fine.

We reduce the sentence to a fine of Shs. 2,000/- in addition to the term of imprisonment which he has already served in default. We set aside the order for payment of compensation out of the fine. And we order the refund to the appellant of the amount of the fine in excess of Shs. 2,000/- which has been paid or recovered from him.

Sentence reduced and order for payment of compensation set aside.

The appellant did not appear and was not represented.

For the respondent:

AP Jack (Deputy Public Prosecutor, Kenya)

The Attorney-General, Kenya

M'Mikunga s/o Migara v R
[1959] 1 EA 1089 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	6 October 1959
Case Number:	698/1959
Before:	Rudd Ag CJ and Mayers J
Sourced by:	LawAfrica

[1] Street traffic – Practice – Written plea of guilty – Charge of drinking intoxicating liquor when in charge of public service vehicle – Proceedings commenced by notice instead of summons – Whether written plea of guilty permissible for offence charged – Traffic Ordinance, 1953, s. 44 (1), s. 113 (K.).

[2] Street traffic – Practice – Charge of drinking intoxicating liquor when in charge of public service vehicle – Particulars of charge defective – Whether any offence alleged – Traffic Ordinance, 1953, s. 44 (1) (K.).

Editor's Summary

The appellant was convicted under s. 44 (1) of the Traffic Ordinance, 1953, upon a written plea of guilty to a charge of drinking intoxicating liquor when in charge of a public service vehicle. The proceedings were instituted by a notice under s. 113 of the Traffic Ordinance which authorises the entry of written pleas of guilty in relation only to offences which are punishable by a fine or by a fine and imprisonment not exceeding six months but s. 44 (1) of the Traffic Ordinance prescribes a fine not exceeding Shs. 4,000/- or imprisonment of twelve months or both. The particulars of the offence alleged that the appellant had been found driving a specified public service vehicle “when you had been drinking intoxicating liquor”. On appeal

Held – the offence with which the appellant was charged was one to which s. 113 of the Traffic Ordinance had no application and the particulars of the charge did not disclose any offence as they merely alleged that the appellant was found driving a public service vehicle when he had been drinking intoxicating liquor.

Appeal allowed.

No Cases referred to in judgment in judgment

Judgment

Rudd Ag CJ: read the following judgment of the court: This appellant was convicted upon a written plea of guilty upon a charge of drinking intoxicating liquor when in charge of a public service vehicle contrary to s. 44 (1) of the Traffic Ordinance, 1953.

The particulars of the offence alleged that the appellant had on February 1, 1959, been found driving a specified public service vehicle “when you had been drinking intoxicating liquor”. The proceedings were instituted by a notice under s. 113 of the Traffic Ordinance not by summons.

Section 44 (1) of the Traffic Ordinance, 1953, is in the following terms:

- “44. (1) Any person who, when driving or in charge of, or during any period of duty in connection with the driving of a public service vehicle, drinks any intoxicating liquor, shall be liable to a fine not exceeding shillings four thousand or to imprisonment for a period not exceeding twelve months or to both such fine and imprisonment.”

Section 113 (1) of the Traffic Ordinance authorises the entry of written pleas of guilty in relation only to offences which are punishable only by a fine or by a fine and imprisonment not exceeding six months. As the offence with which the appellant was charged was one which might be punished by either a fine of 4,000/- or by imprisonment for twelve months or both, the provisions of s. 113 clearly had no application to this case. Furthermore, the particulars of the charge do not disclose any offence as they merely allege that he was found driving a vehicle when he had been drinking intoxicating liquor, not that he drank intoxicating liquor when driving or was in charge of the vehicle during any period of duty in connection with the driving of the vehicle. For all that appears from the material before us, the accused may have consumed alcoholic liquor immediately prior to commencing to drive but at a time when his period of duty in connection with the driving of the public vehicle had not already commenced.

Appeal allowed.

The appellant did not appear and was not represented.

For the respondent:

GP Nazareth (Crown Counsel, Kenya)

The Attorney-General, Kenya

Re The Inquests Ordinance [1959] 1 EA 1091 (HCT)

Division:	HM High Court of Tanganyika at Mwanza
Date of judgment:	27 November 1959
Case Number:	1/1959
Before:	Simmons J
Sourced by:	LawAfrica

[1] *Coroner – Order for issue of warrant of arrest – Verdict of accidental death at inquest – Application to set aside warrant of arrest – Whether High Court should interfere to set aside warrant of arrest – Inquests Ordinance (Cap. 24), s. 23 and s. 28 (T.).*

Editor's Summary

A vehicle driven by a police corporal hit a pedestrian who later died. After an inquest which led to a verdict of accidental death the coroner ordered that a warrant of arrest be issued against the police corporal on a charge of causing unlawful harm contrary to s. 234 of the Penal Code. The attorney-general applied to the court *ex parte* for an order setting aside the warrant of arrest pursuant to s. 28 (1) of the Inquests Ordinance which provides *inter alia* that the High Court “may quash any inquest”. It was contended that on the evidence the coroner was not justified in ordering the issue of a warrant of arrest, that an order made under s. 23 of the Inquests Ordinance is a part of the inquest, and that accordingly if the whole inquest can be quashed part of it can be quashed.

Held –

- (i) the words “quash any inquest” in s. 28 (1) of the Inquests Ordinance should be read to mean “quash any inquisition”.
- (ii) under s. 28 (1) of the Inquests Ordinance the power of the High Court to quash an inquisition includes power to quash part of an inquisition or at least that part ordering the issue of a summons or warrant.
- (iii) the coroner in ordering the issue of warrant of arrest had exercised his discretion judicially and to set aside his order would be an improper interference with his magisterial functions.

Per curiam – “Whenever it is sufficiently certain that an accused person will appear or subsequently be apprehended if he does not appear, and that he is not likely to commit a further offence, a summons should be issued, rather than a warrant, if law and practice allow”.

Application dismissed.

Case referred to in judgment

(1) *R. v. Crossman, Ex parte Chetwynd* (1908), 98 L.T. 760.

Judgment

Simmons J: This is an *ex parte* application, made on behalf of the attorney-general arising out of an inquest, held by the learned coroner at Musoma on August 22, 1959, upon the death of Makungu s/o Buganga. The original record of the inquest is not before this court. It appears from the certified copy filed by learned Crown counsel that the verdict was one of accidental death, but arising out of that death the coroner ordered that a warrant issue for the arrest of Police Corporal Pius s/o Maragile, one of the witnesses, on a charge of unlawfully omitting to do an act which it was his duty to do and so causing harm to the deceased, contrary to s. 234 of the Penal Code (Cap. 16). There is no doubt that Corporal Pius was in charge of the police Land-Rover which accidentally struck the deceased, and it appears that the omission which the learned coroner had in mind was failing to stop to attend to the deceased and to obtain immediate medical aid.

The application lies within a narrow compass; it is simply for an order setting aside the warrant of arrest. Crown counsel put in letters exchanged between him and the coroner, showing that the latter had declined to withdraw the warrant. Crown counsel submits that the High Court would have power to set aside the warrant under s. 28 (1) of the Inquests Ordinance. This section enacts that the High Court, on application made by or under the authority of the attorney-general, may make the following among other orders:

- (c) quash the verdict . . . substituting therefore some other verdict . . .
- (d) quash any inquest, with or without ordering a new inquest to be held.

Alternatively the application is for leave to move for certiorari.

The attorney-general does not ask that the verdict should be quashed but only that the warrant be set aside. The warrant was no doubt issued pursuant to s. 23 of the Inquests Ordinance:

“If, during the course or at the close of any inquest, the coroner is of opinion that sufficient grounds are disclosed for making a charge against any person in connection with the death, he may issue a summons or warrant to secure the attendance of such person before any subordinate court having jurisdiction, and may bind over any witness who has been examined by or before him on a recognisance with or without surety to appear and give evidence before such court.”

Crown counsel submits that an order made under this section is part of the inquest, and that if the whole inquest can be quashed part of it can be quashed.

Now, quashing an inquest is not at first sight the same as quashing an inquisition. An inquisition is the formal document embodying the results of the inquest (see Form E, Schedule I of the Inquests Ordinance). The quashing of the verdict, with or without the substitution of another verdict, is separately provided for. But the difficulty is that the expression “quash any inquest” is, to me, novel and not clear. The High Court in England has common law and statutory powers to quash and amend inquisitions, and to order new inquests; but how can one quash an inquest? Am I to read this section as though for the word “inquest” were substituted the word “inquisition”, assimilating the powers of the High Courts of Tanganyika and England, or am I to read it as it is written? To talk of quashing an inquest is rather like talking of quashing a trial. One can quash a conviction and order a new trial, and one can quash an inquisition and order a new inquest; but how can one quash a trial or quash an inquest? I do not see how it can be done. I think the statute must be read to mean “quash any inquisition”.

The next step is to decide whether power to quash an inquisition includes power to quash part of an inquisition other than the verdict, and, if so, whether power to quash includes power to set aside a warrant issued under s. 23. I do not find this problem easy of solution, but where, as here, the liberty of the subject is in issue I think the Ordinance must be construed liberally. Paragraph (c) already provides for amendment of the inquisition by substituting a new verdict, and while I shall not go so far as to say that power to quash part of an inquisition includes power to replace that part by something else, I agree that power to quash the whole includes power to quash a part, or at least that part ordering the issue of a summons or warrant, which is all I am now concerned with.

Having decided that I have power to set aside the warrant under s. 28 (1) of the Inquests Ordinance it is unnecessary to consider the prerogative writs under s. 349 (1) of the Criminal Procedure Code (Cap. 20), although mandamus

lies to compel justices to withdraw a warrant where on the admitted facts no criminal offence has been committed: *R. v. Crossman Ex parte Chetwynd* (1) (1908), 98 L.T. 760. I have to decide whether I ought to do as I am asked. It is necessary to look at the evidence, although as there may be further proceedings I shall refer to it as little as possible and emphasize that I am making no attempt to find facts or to pronounce on issues.

To decide whether a warrant (or summons) is justified it is rarely desirable to look further than the facts alleged by the complainant. At that stage the defence is virtually left out of account. The evidence of Manota s/o Mponeja at the inquest was that the Land-Rover, after hitting the deceased, drove straight on without stopping. The medical evidence was that if the deceased had received treatment within an hour or so after the accident he might have survived, but "It required an immediate major operation". That is stating the facts at their blackest. The corporal admitted he knew the vehicle had struck someone but testified that there were good reasons for his not stopping, and Crown counsel asked me to infer that even if the corporal had stopped death would have occurred. This is a matter of weighing and interpreting the evidence which I cannot do; but if at a trial the evidence of Manota were believed, and if certain inferences which could be drawn were drawn from the medical evidence, could the corporal be convicted of the offence with which the coroner thought he should be charged? It would have to be proved that his omission was the unlawful omission of an act which it was his duty to do, which omission caused harm to the deceased. Learned Crown counsel argued ably that duty meant a legal duty, not a moral duty, and that while there would have been a moral duty to stop and take the deceased to the nearest hospital, doctor or dispensary there was no legal duty to do so. He conceded that there was a duty laid upon the corporal by the Traffic Ordinance (Cap. 168) to stop and give his name and address if required, but urged that failure to do so could not have caused the harm contemplated by the coroner.

This argument is a cogent one, may be right and might prevail at a trial, but I do not think that an application of this kind is the right occasion to express an opinion on it. I have only heard the argument for the defence, and although it came from a quarter usually associated with arguments for the prosecution there might be something to be said by an equally skilled advocate on the other side. I am expected to rule either that "duty" means exclusively "legal duty" or that a police constable has no legal duty to stop and render assistance to a dying man. These are important questions of construction to be answered, if at all, at a trial and perhaps on appeal. The learned coroner in his discretion decided that the corporal ought to stand his trial. He may have expressed himself rather more strongly than was desirable, though no one is surprised by his indignation. (Having heard evidence and having so expressed himself I do not suppose he would wish to adjudicate at the trial, if there is a trial). However, on the bare question of whether he ought to have ordered the issue of a summons or warrant, he had jurisdiction to do so and he exercised his discretion judicially on evidence. I think that to set aside his order would be an improper interference with his magisterial functions. Unfortunately there is in the library no report of the case of *Ex parte Chetwynd* (1), to which I have referred, but it appears from 33 English and Empire Digest, 424, that where a magistrate has exercised a judicial discretion in issuing a warrant the court will not compel him to withdraw it, and this is as I should have expected. The application is refused.

I will add an observation. Whenever it is sufficiently certain that an accused person will appear or can subsequently be apprehended if he does not appear, and that he is not likely to commit a further offence, a summons should be issued, rather than a warrant, if law and practice allow. It may be that the

learned coroner has power, and would think it right in this case, to withdraw his warrant and issue a summons instead.

Application dismissed.

For the applicant:

MGK Konstam (Crown Counsel, Tanganyika)

The Attorney-General, Tanganyika

R v Bubu (Dumb Man)
[1959] 1 EA 1094 (HCT)

Division:	HM High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	16 October 1959
Case Number:	309/1959
Before:	Spry Ag J
Sourced by:	LawAfrica

[1] *Criminal law – Trial – Plea – Deaf mute – Criminal Procedure Code, s. 169 (T).*

Editor's Summary

The accused, a deaf mute, was convicted of stealing. The magistrate having found that the accused understood and denied the charge and having also expressed the belief that the accused knew what was happening in court ordered that the accused should be detained as a remand prisoner during the Governor's pleasure pursuant to s. 169 (1) of the Criminal Procedure Code. The attorney-general asked the court to consider the case in revision before an order was made under s. 169 (2).

Held –

- (i) where an accused person is a deaf mute, the magistrate should first arrive at a finding whether the accused can be made to understand substantially the whole of the proceedings; when the accused can be made to understand the proceedings the trial should take its normal course with the interpretation of the proceedings to the accused; where the accused cannot be made to understand the proceedings, the trial should proceed in accordance with s. 169 of the Criminal Procedure Code.
- (ii) although the accused understood the charge and general nature of the proceedings, the magistrate could properly have made a finding that the accused, though not insane, could not be made to understand substantially the whole of the proceedings.
- (iii) a person sentenced to be detained under s. 169 (1) of the Criminal Procedure Code becomes a

convicted criminal prisoner within the meaning of the Prisons Ordinance pending the order of the Governor under s. 169 (2).

Sentence varied.

No Cases referred to in judgment in judgment

Judgment

Spry Ag J: In this case, the accused who is a deaf mute was charged with the offence of stealing from the person of another, contrary to s. 265 and s. 269 (a) of the Penal Code and after trial was ordered to be detained during the Governor's pleasure in accordance with the provisions of s. 169 (1) (a) of the Criminal Procedure Code.

In view of certain problems arising out of the record, the learned attorney-general has asked that the case be considered by this court in exercise of its revisional powers, before an order is made under s. 169 (2).

The accused was charged on two occasions before different magistrates. Each appears to have been satisfied that the accused understood the nature of the charge and denied it and accordingly a plea of "not guilty" was entered on

both occasions. On the first occasion, communication is said to have been by signs but the record does not disclose who interpreted the signs. On the second occasion, it appears to have been the magistrate himself who illustrated the charge by miming.

The trial continued, and after the first witness had given his evidence, the magistrate recorded:

“I fear cross-examination is out of the question since accused is both deaf and dumb. Nevertheless I believe he knows what is happening in court.”

At the end of the case for the prosecution, the magistrate recorded:

“Again by various actings I have been able to remind accused of the charge. He obviously hotly denies the charge but cannot really conduct a proper defence.”

The question is, whether the magistrate, having found that the accused understood the charge and having expressed the belief that he knew what was happening in court, was justified in sentencing him to be detained during the Governor’s pleasure. I am of the opinion that the magistrate was substantially correct in the course he followed. I think it may be helpful, however, if I outline what I consider to be the proper procedure.

In the first place, as soon as a magistrate becomes aware that the accused person is a deaf mute, he should apply his mind to the question whether the accused can be made to understand the proceedings and should make a finding. Understanding the proceedings means, in my opinion, understanding substantially the whole of the proceedings: I say substantially the whole because obviously few accused will fully understand expert technical evidence but they can be made to understand its effect. A deaf mute can be made to understand the proceedings if he can read and write or if he can communicate by sign language, and for the latter purpose a relative or friend, duly sworn, may be employed to interpret. If the magistrate finds that the accused can be made to understand the proceedings, the trial will follow the usual course with all the proceedings conveyed or interpreted to the accused. If the magistrate finds that the accused can be made to understand the proceedings, the trial will proceed in accordance with s.169. So far as the present case is concerned, I think it is clear that although the accused understood the charge and the general nature of the proceedings, the magistrate could properly have made a finding that the accused, though not insane, could not be made to understand substantially the whole of the proceedings.

I should, perhaps, observe here that the law of Tanganyika differs in this respect from the law of England. Under s. 169, an initial finding that the accused cannot be made to understand the proceedings does not in any way prejudice the right of the accused to an acquittal, if the prosecution fails to prove its case, and such a finding cannot therefore prejudice the accused.

Thereafter the trial should, so far as possible, follow the usual course. If the accused is legally represented, his counsel will, of course, have the opportunity to cross-examine the prosecution witnesses, even though he may have no instructions on which to base a positive defence. If the accused is not represented, there is, of course, a particular duty on the court to bring out any facts in favour of the defence and to call any witnesses who might give evidence for the defence. I consider also that, even though the accused cannot be made to understand all the proceedings, he should be made to understand as much of the proceedings as is reasonably practicable, because it is possible that he might have the means of rebutting a particular piece of evidence.

At the conclusion of the trial, the magistrate must make a finding on the question whether the guilt of the accused has been proved. If he is not satisfied

that it has been proved, he will acquit the accused. If he is so satisfied, he will sentence the accused to be detained during the Governor's pleasure.

It is, of course, proper for the magistrate before passing sentence to admit evidence of previous convictions. In the present case, however, the magistrate accepted evidence which was not admissible of a previous offence which had not been admitted by the accused.

There is one final point. Section 169 (1) requires, in the appropriate case, a finding of guilt and a sentence. Although there is no express reference to conviction, the accused will, on sentence, become a convicted criminal prisoner within the meaning of the Prisons Ordinance, pending the order of the Governor under s. 169 (2). In the present case the magistrate wrongly ordered the accused to be detained as a remand prisoner.

I accordingly vary the sentence imposed by the magistrate by deleting therefrom the words "as a Remand Prisoner" but subject thereto I confirm it.

Sentence varied.

Chief Nehemia Gotonga v Stephen Kinyanjui [1959] 1 EA 1096 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	30 November 1959
Case Number:	34/1959
Before:	Forbes V-P, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya—Templeton, J

[1] Audience – Crown counsel – Crown counsel appearing for African chief sued in personal capacity – Whether Crown counsel has right of audience – Whether attorney-general can represent private litigant – Civil Procedure (Revised) Rules, 1948, O. III, r. 1 (K.) – Advocates Ordinance, 1949, s. 2 and s. 3 (K.) – Eastern African Court of Appeal Rules, 1954, r. 2 (1), r. 16 (1), r. 16 (6), r. 54 (3) and r. 72 – Eastern African Court of Appeal Order-in-Council, 1950, s. 18 (2) – Eastern African Court of Appeal (Amendment) Rules, 1956, r. 7.

Editor's Summary

The respondent sued the appellant, a Kikuyu chief, in respect of the use by the chief of the respondent's lorry on four occasions during the emergency. The respondent alleged that the appellant obtained the use of the lorry by threatening him with detention whereas the appellant's case was that the lorry was lent to him gratuitously pursuant to an arrangement made with certain lorry owners to provide the chief with

transport for his duties during the emergency. The trial judge rejected the evidence of the appellant and his witnesses and found for the respondent whereupon notice of appeal was given and the appeal was later filed on behalf of the appellant by Crown counsel. At the hearing of the appeal a preliminary objection was taken by counsel for the respondent that the notice of appeal was invalid, and even if the notice were held to be in order, Crown counsel was not entitled to conduct the appeal since he was neither an advocate on the roll nor in this civil appeal appearing in a cause or matter within the scope of his official duties. On the merits the appellant sought to challenge the findings of the trial judge on the evidence and submitted that the judge had not submitted the evidence to the necessary critical examination.

Held –

- (i) Crown counsel has a right of audience pursuant to s. 3 (1) and s. 3(2) of the Advocates Ordinance, 1949, and r. 16 of the Eastern African Court of Appeal Rules, 1954.
- (ii) it is within the administrative discretion of the attorney-general to decide whether it is in the interest of the Crown that a particular litigant should be provided with legal representation and once the decision had been taken to provide the appellant with counsel it was within the scope of Crown counsel's official duties to appear on his behalf.
- (iii) there was nothing in the judgment nor in the criticisms thereof made for the appellant to convince the Appellate Court that it would be justified in reversing the findings of fact of the trial judge.

Appeal dismissed. Case remitted to trial judge for assessment of damages.

Cases referred to in judgment

- (1) *R. v. Archbishop of Canterbury*, [1903] 1 K.B. 289.
- (2) *Attorney-General v. Bastow*, [1957] 1 All E.R. 497.
- (3) *Attorney-General v. Harris*, [1959] 3 W.L.R. 205.
- (4) *Yuill v. Yuill*, [1945] P. 15; [1945] 1 All E.R. 183.

November 30. The following judgments were read:

Judgment

Gould JA: The appellant is the chief of the Chania Location appointed (this was common ground between counsel) with effect from December 1, 1955, as published in the Kenya Official *Gazette* of December 6, 1955, as Government Notice No. 1678/55. By virtue of s. 5 of the Native Authority Ordinance (Cap. 97) it is the duty of every chief to maintain order in the area in respect of which he is appointed and for such purpose he is invested with certain powers by subsequent section of the same Ordinance. The action from which this appeal is brought and in which judgment was given against the appellant as defendant, related to the use by the appellant of a motor truck belonging to the respondent on four occasions within the period commencing on November 27, 1955, and terminating on September 26, 1956. The appellant's case was that the truck was lent to him gratuitously pursuant to an arrangement made with a number of truck drivers, in order to provide him with transport for his duties as chief and for use in certain matters related to the emergency; the respondent's case was that he did not agree to lend his lorry free of charge but did so under threat of incarceration in a detention camp.

It is expedient, before I examine the matter in any detail, to deal with a preliminary objection taken by Mr. Nowrojee, counsel for the respondent. He claimed that the notice of appeal was invalid as it was signed simply "J. S. Rumbold, Crown Counsel", and further that if the notice were deemed to be in order, Mr. Rumbold, who appeared for the appellant, was not competent to conduct the appeal on his behalf. It will be well to deal first with the matter of Mr. Rumbold's status. There is no challenge to the fact that he is a duly appointed Crown counsel of this Colony. Our attention was drawn to O. III, r. 1 of the Civil Procedure (Revised) Rules, 1948, which is as follows:

- "1. Any application to or appearance or act in any court required or authorised by the law to be made or

done by a party in such court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognised agent, or by an advocate duly appointed to act on his behalf:

“Provided that any such appearance shall, if the court so directs, be made by the party in person:

“Provided further that where the party by whom any such application, appearance or act is required or authorised to be made or done is the attorney-general or an officer authorised by law to make or to do such application, appearance or act for and on behalf of His Majesty or the Government of the Colony, the attorney-general or such officer, as the case may be, may by writing under his hand depute an officer in the public service to make or to do any such application, appearance or act.”

It does not appear that the second proviso to this rule has any application in the circumstances of the case; neither is it claimed that Mr. Rumbold is a “recognised agent”, which phrase is defined by r. 2 of the same order. Mr. Nowrojee submitted therefore that unless Mr. Rumbold is an advocate for the purposes of the case he has no right of audience. By s. 2 of the Advocates Ordinance, 1949, an advocate means for the purposes of the Ordinance, “any person whose name is duly entered as an advocate upon the roll” which is kept under the provisions of the Ordinance; we were informed from the bar that Mr. Rumbold was not on the roll but he plainly falls within the ambit of s. 3, sub-s. (1) and (2) which are, so far as relevant, as follows:

“3.(1) Every officer to whom this section applies shall, in connection with the duties of his office, be entitled to practise in any court in the Colony, and shall not, except as in this Ordinance expressly provided, be subject to the provisions of this Ordinance.

“(2) The officers to whom this section applies are:

(a) the attorney-general, the solicitor-general and Crown counsel, and any person duly qualified as a barrister or solicitor holding office in the attorney-general’s department;”

This legislation does not create Crown counsel an advocate though it entitles him to practice “in connection with the duties of his office” in any court.

The right of audience before this court is governed, not by the Civil Procedure (Revised) Rules, 1948, but by the Eastern African Court of Appeal Rules, 1954, which, by virtue of para. 18 (2) of the Eastern African Court of Appeal Order-in-Council, 1950, have effect as if contained in that order. Such portions of the rules as are relevant in the present case are:

“16. (1) In all proceedings in the court a party may appear in person or by any advocate who is entitled for the time being to practise before the Superior Court of any Territory:

“2. (1) Advocate’ includes any person having under these rules the right of audience on behalf of another person in the court;

“16. (6) Her Majesty’s attorney-general and solicitor-general for each of the territories and the legal secretary and deputy legal secretary of the East Africa High Commission shall have the right of audience and shall take precedence over all other advocates. Other legal officers of the Governments of the territories or of the East Africa High Commission having a professional legal qualification shall have the right of audience in all causes and matters within the scope of their official duties . . .”

Sub-rule 16 (6) was added by r. 7 of the Eastern African Court of Appeal (Amendment) Rules, 1956, and, having regard to the specific officers referred to in the first sentence of the sub-rule it is, in my opinion, plain that those who hold the office of Crown counsel are included among the “other legal officers”

referred to in the second sentence. It follows that, provided this case is a cause or matter within the scope of his official duties, Mr. Rumbold has the right of audience and is within the definition of “advocate” for the purposes of the rules.

In arguing that this case was not one which was “in connection with the duties” of Crown counsel’s office, or “a cause or matter within the scope of” his official duties, Mr. Nowrojee pointed out that the appellant was sued personally and not as an officer of Government. I am unable to attach any weight to this circumstance. In *R. v. Archbishop of Canterbury* (1), [1903] 1 K.B. 289 the position of the treasury solicitor in appearing for the defendant was called in question and the Court of Appeal held, as indicated by the headnote at p. 289:

“that the treasury solicitor is entitled to act, by direction of the Crown, for a subject, in any matter in which the Crown has an interest, and that the defendant was therefore represented by a duly qualified solicitor, and was entitled to recover his costs from the prosecutor.”

In his judgment, at p. 293, the Master of the Rolls said:

“Thus it is provided as to these persons, who otherwise might not be solicitors, that they are on behalf of His Majesty to exercise the rights of solicitors in all courts. Then it is said that if the exercise of these rights in this case was on behalf of the Crown, it cannot be on behalf of any other litigant. It is on behalf of the Crown, because the Crown thinks that it is for the public advantage that it should intervene by appointing the solicitor of the treasury to be solicitor for the archbishop; and I have shown that he is as qualified to act in that capacity as any other solicitor. It is true that he takes the mandate from the Crown, which has appointed him solicitor of the treasury for certain purposes; but one of the purposes is that in any given case, if it is in the interest of the Crown that he shall appear for a litigant, he shall do so, and the only way in which this can be done is by his appearing as solicitor on the record.”

Romer, L.J., said (at p. 295 and p. 296):

“It appears to me that where the Crown for good and sufficient reasons thinks it is for its interests that the defence of an individual, in an action or proceeding against him, should be undertaken, and the treasury solicitor is delegated by the treasury authorities to act as solicitor for that individual, that is within the rights of the Crown, and is within the purview of the ordinary duties of the solicitor.”

The position of the treasury solicitor in England is, of course governed by different legislation but that does not alter the fact that it is open to the Crown to decide that it is in its interests to undertake the defence of any individual. If the Crown so decides it is not for this court, at least in any circumstances that readily spring to the mind (and certainly not in the present case which is one in which the Crown might well be expected to deem itself interested) to query that decision; I would fully accept Mr. Rumbold’s statement that he was deputed to come to court and conduct the appeal by the attorney-general who had, through another Crown counsel, entered the original appearance in the action on behalf of the respondent. There is some analogy to be drawn from the position of the attorney-general in bringing a relator action though in that case it is the infringement of a public right which is alleged. In *Attorney-General v. Bastow* (2), [1957] 1 All E.R. 497 at 500 Devlin, J., said:

“It is plain that this court is not concerned with the reasons which have seemed good to the attorney-general in causing him to bring this action.”

It does not follow that in such an action the attorney-general is necessarily entitled to the relief claimed (see *Attorney-General v. Harris* (3), [1959] 3 W.L.R. 205) but his right to bring the action cannot be challenged. Similarly, in my opinion, it is entirely within the administrative discretion of the attorney-general to decide whether it is in the interest of the Crown that it should provide legal representation for a particular litigant. That decision having been taken and Mr. Rumbold instructed to appear, he is clearly acting in a cause or matter within the scope of his official duties and has the right of audience.

I turn now to the objection taken to the manner in which the notice of appeal was signed. The appropriate form is set out in the first schedule to the rules of this court and r. 54(3) provides that a notice of appeal shall be “substantially” in that form. A space is provided for the signature of the “(advocate for the) appellant”. As has been observed, Mr. Rumbold is, by virtue of r. 2 and r. 16 (6), for the purposes of this cause, an advocate. He could also rely, if necessary, upon the right to practise in connection with the duties of his office conferred by s. 3 of the Advocates Ordinance, 1949. There is no doubt therefore that he was fully empowered to sign the notice of appeal, and though he did not sign specifically as “advocate for the appellant” the wording of the notice as a whole makes it clear that he signed it on behalf of the appellant. This is a formality which could if necessary be cured by amendment under r. 72. In my opinion the preliminary objection fails and the appeal falls to be decided upon its merits.

The basis upon which judgment was given in favour of the respondent in the action was that the appellant had had the use of the respondent’s motor lorry in circumstances bringing the case within the terms of s. 70 of the Indian Contract Act, which is as follows:

“70. Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.”

The case for the appellant in the court below was that, at a meeting of headmen and lorry owners held on a date late in the year 1955 and at which the respondent was present, all the lorry owners agreed to make their lorries available for the use of the chief in turn for periods of a week at a time and that the lorries were to be lent gratuitously. The learned trial judge held (and it has not been challenged before this court) that the meeting in question took place on December 12, 1955. The respondent denied his presence at any such meeting and whether he was there or not was the main factual issue at the trial. The respondent gave evidence on his own behalf but the two other witnesses he called were not present at the meeting and gave no evidence relative to it. In addition to his own evidence the appellant called seven witnesses who stated that they were present at the meeting and of them six stated that the respondent was present and one that he was unable to remember. The learned judge held:

“In any event I am quite satisfied that the plaintiff did not attend that meeting and it follows that he did not agree at that meeting to lend his lorry.”

In considering the evidence the learned judge said:

“Six other witnesses gave evidence about the meeting but I was not favourably impressed with their recollection of events. Although they said all the lorry owners were present they were unable in cross-examination to give the names of any except themselves and the plaintiff. When for the first time mention was made by Julius Iraki of a third baraza most

of the witnesses who followed appeared willing to agree that there had been three although this had been denied by the defendant, and I was left with the impression that they had been discussing the evidence they would give. They were extremely vague about what took place at the final meeting on September 29, 1956, and their evidence is at variance with the contents of exhibit A which purports to contain the minutes of that baraza.”

Later in the judgment is the following passage:

“The defendant throughout his evidence, and particularly in his cross-examination, was evasive and contradicted himself on numerous occasions. The other witnesses who gave evidence about the meetings did not impress me favourably and I consider there is a very strong probability that the meeting of December 12, 1955, was a meeting of headmen at which some lorry owners may or may not have been present.”

As his main ground of appeal counsel for the appellant challenged this finding of fact by the learned judge, conceding, as he must, that he faced a difficult task in seeking to displace a factual decision of the judge who had seen and heard the witnesses, before an Appellate Court. Counsel submitted that the finding of the learned judge had been based to a considerable extent upon the opinion he had formed from the demeanour of the various witnesses. He relied upon the words of the Master of the Rolls in *Yuill v. Yuill* (4), [1945] P. 15 when he said, at p. 19 to p. 20:

“The most experienced judge may, albeit rarely, be deceived by a clever liar, or led to form an unfavourable opinion of an honest witness, and may express his view that his demeanour was excellent or bad as the case may be. Most experienced counsel can, I have no doubt, recall at least one case where this has happened to their knowledge. I may further point out that an impression as to the demeanour of a witness ought not to be adopted by a trial judge without testing it against the whole of the evidence of the witness in question. If it can be demonstrated to conviction that a witness in question. If it can be demonstrated to conviction that a witness whose demeanour has been praised by the trial judge has on some collateral matter deliberately given an untrue answer, the favourable view formed by the judge as to his demeanour must necessarily lose its value.”

In the judgment under consideration the specific word “demeanour” is not in fact used though the learned judge did say that the appellant was evasive and contradicted himself, and that the other witnesses for the appellant did not impress him favourably. Counsel submitted however that the learned judge could not have submitted the evidence to the necessary critical examination; he called attention to the statement in one of the passages above quoted that

“they were unable in cross-examination to give the names of any except themselves and the plaintiff.”

The word “themselves” relates, we were informed from the bar, to the eight names given in a list of further particulars dated April 15, 1957, and signed by counsel for the appellant, as those of persons who had agreed to lend their lorries. Most of these persons gave evidence. Examination of the record of evidence shows that the learned judge was not quite accurate in his statement, in that two names (and possibly a third) were given by one or other of the witnesses in addition to those on the list of particulars.

Counsel next submitted with reference to the same passage in the judgment that no significance should have been attached to the fact that some witnesses referred to two meetings and later witnesses to three. There was room for misunderstanding, as the earliest of the meetings referred to was merely a

gathering at which lorry owners gave the registration numbers of their lorries one by one. There were, he submitted, only two meetings in the proper sense of the term. I am not at all satisfied that the learned judge could have been under any misapprehension on this matter, and I think the matter of the significance to be attached to the impression which he received was essentially one for him. Witnesses only too frequently discuss their evidence or the facts of the case between themselves but such discussions do not necessarily have any influence upon their evidence when actually given. I think the implication of what the learned judge has said here is that the impression he received was that the witnesses had agreed to tell the same story; that appears to me to be a matter in his particular province.

Counsel criticised the statement that the witnesses were vague about what took place at the final meeting on September 29, 1956. All I propose to say concerning this submission is that I have examined the record of the evidence of the particular witnesses touching the meeting in question and, having regard to what is recorded in the minutes (which were put in evidence) I am unable to regard the learned judge's criticism as unjustified. Furthermore his comment that their evidence is at variance with exhibit A (the minutes in question) is amply justified and has, in my opinion, great significance. In no case would any of the witnesses in question admit having heard the respondent say what he is clearly recorded in the minutes as having said—namely that he was completely unwilling that his lorry should be used by anyone. Some of the witnesses went further and denied that he said it. This unwillingness to admit something which was in the respondent's favour may justifiably have influenced the learned judge in estimating their credibility on the matter of the respondent's presence at the meeting of December 12, 1955.

In the third of the passages from the judgment quoted above the reference to the appellant having contradicted himself is clearly supported by the record and counsel did not challenge this. He criticised, however, the passage “at which some lorry owners may or may not have been present”. He pointed out that of the witnesses concerned Wameru, Julius Iraki and Samuel Mwaura (D.W.'s 3, 4 and 12) had said they were lorry owners, Gachau, Wilfred Munyambu and Paulo Wathiko (D.W.'s 5, 6 and 8) had said they were lorry owners but not headmen and that Joram Njoroge (D.W. 10) was both lorry owner and headman. Though counsel for the respondent referred the court to passages in the evidence of the appellant in which he had referred to the agreement as being between himself and the headmen it remains difficult to understand why the learned judge had any doubt about the presence of lorry drivers at the meeting in question.

On this main factual issue therefore I find that counsel has some basis for his criticism upon the matter last discussed and can point to an inaccuracy (not in my view a major one) in the judgment in the reference to the witnesses being unable to give the names of any present at the meeting except themselves and the respondent. Even if the matter had fallen to be decided with reference only to the evidence of the particular witnesses who spoke as to the meeting of December 12, 1955, the case would not be one in which, in my opinion, interference by this court would be justifiable. In *Yuill v. Yuill* (4) at p. 19, it was said:

“It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest considerations, that it would be justified in finding that the trial judge had formed a wrong opinion.”

I do not find those plain considerations to be present here and the less so when it is considered that there were matters other than those discussed above which influenced the learned judge. For example he found that the date of the first

use of the respondent's lorry by the appellant was prior to the meeting of December 12, 1955, at which it is alleged that the gratuitous "lending" arrangement was made. He found also that the respondent's lorry had been used, to some extent, for the appellant's private purposes. The minutes of the meeting of September 29, 1956, (which was called because the respondent had protested through an advocate) are important not only as tending to discredit the witnesses who spoke as to that meeting, but as indicating the attitude of the respondent and of one other person who denied an agreement to supply lorries free of charge—according to him a small payment was to have been made. The production of these minutes also points the failure of the appellant to produce the minutes of the meeting of December 12, 1955, which he recorded and sent to the district officer. In all these circumstances and in spite of the number of witnesses called by the appellant I am of opinion that it would be wrong and a departure from well established principle, for this court to reverse the findings of fact of the learned trial judge; I consider that this ground of appeal fails.

The second ground of appeal was that the learned judge erred in holding that the Public Officers Protection Ordinance (Cap. 63) afforded no defence. It was conceded that the defence, if available at all, applied only to the earliest occasion (November 27, 1955, to December 4, 1955), upon which the lorry was used. The relevant portion of s. 2 of the Ordinance is:

- "2. Where any action, prosecution or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any Ordinance or other law or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Ordinance, duty or authority, the following provisions shall have effect—
- (a) the action, prosecution or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect or default complained of, or in the case of a continuance of injury or damage, within three months next after the ceasing thereof."

The learned judge did not consider that the evidence provided proof of user of the lorry in pursuance or execution or intended execution of any Ordinance or other law or of any public duty or authority. This question was not argued in any detail before this court but I do not think that the defence could in any event be available in view of the finding of fact, with which on the evidence I find no grounds for interfering, that the appellant obtained the use of the lorry by threats—in other words by unlawful means. That is the act in respect of which he was sued and it cannot, I think, be said to have been done in pursuance of any of the laws, duties or authorities mentioned in the Ordinance. The finding that the lorry was first handed over on November 27, 1955, four days before the appellant's appointment as chief became effective, also appears to negative this defence.

The third ground of appeal related to the effect of the Indemnity Ordinance, 1956, s. 3 (1) of which is as follows:

- "3.(1) No action, suit or other legal proceedings whatsoever, whether civil or criminal, shall be instituted in any court, and no claim to compensation or indemnity shall be entertained by any court, board or tribunal established by or under any law for the time being in force, for or on account of or in respect of any act, matter or thing done within the Kikuyu Native Land Unit during the emergency before the commencement of this Ordinance, if done in good faith, and done or purported to be done in the execution of his duty or in the interests of public safety or for the maintenance of public order, or otherwise in the public interest, by a public officer or by a member of Her Majesty's Forces or by any person acting under the authority of a public officer or of such a member."

The learned judge rejected this section as a defence upon a number of grounds but I understood Mr. Rumbold virtually to abandon it in view of s. 3 (3) (b) of the Ordinance which reads:

- “3.(3) Notwithstanding the provisions of sub-s. (1) or sub-s. (2) of this section, this section shall not prevent:
- (b) the institution or prosecution of proceedings in respect of any rights under, or alleged breaches of, contract, if the proceedings are instituted within one year from the commencement of this Ordinance or the date when the cause of action arose, whichever may be the later;”

The finding of the learned judge that the respondent was entitled to compensation was based upon s. 70 of the Indian Contract Act which is, of course, in force in Kenya. Though the matter would be regarded in English law as one of quasi-contract I am of opinion that it falls within the words, “proceedings in respect of any rights under . . . contract”, in the sub-section last above quoted and, as the action was commenced within the period of one year therein mentioned, s. 3 (1) of the Ordinance is inapplicable.

There remains only the question of the amount of compensation awarded. The learned judge based his finding upon an estimate of the profits lost by the respondent. Counsel for the appellant submitted that this was incorrect as the finding of the learned judge had been based on s. 70 of the Indian Contract Act; under that section, relying on notes appended to the section in “The Indian Contract Act” by A. C. Dutt (3rd Edn.) at p. 509 counsel argued that the compensation should be in proportion to the benefit enjoyed. Those notes, and the cases upon which they are based, would appear to support the proposition; and since Mr. Nowrojee did not dispute it, I accept it without further examination of the authorities. It appears to me logical that where a vehicle has been used by a person in circumstances indicating that he should pay for it, the appropriate amount should be related to the figure which he would have had to pay had he obtained a similar vehicle in the normal way upon an agreed contract of hire. Had the learned judge’s finding been based on tort the question of duress would no doubt have had a bearing on the matter but counsel have not suggested that there should be any variation of the judgment in this respect and I propose therefore to regard the question of damages as unaffected by duress. In the result in my opinion the sum awarded should have been arrived at by estimating the normal hire of a similar lorry in the circumstances and at the time, together with the sum of Shs. 122/25 allowed for towing and repair charges.

Unfortunately, although witnesses were asked questions about the cost of hiring a lorry none of them was able to give any information, and there is no material before the court which would serve, even remotely, as a basis for estimating the appropriate amount. Counsel at the hearing of the appeal indicated that they would try to agree an appropriate figure, but they have not in the time which has now elapsed indicated that they have been able to do so. This is unfortunate for it means further costs must be incurred.

I would dismiss the appeal on all matters save that of the appropriate measure of damages and would remit the issue of the quantum of damages to the Supreme Court to be decided, after hearing evidence, in accordance with the opinion above expressed. The decree should be varied by substituting the amount so ascertained (with interest at court rate from the date of the institution of the suit until judgment) for the amount found by the learned judge; I would not vary the order for costs already incurred in the court below.

It remains to decide the question of the costs of the appeal. The appellant has succeeded only on the issue of the quantum of damages and in that only to the extent of having the question remitted for decision on a different basis.

In the court below counsel for the defendant made no submission on the principle to be applied though he described the amount claimed as “wildly exaggerated”. In the circumstances I think that the appellant should pay four fifths of the respondent’s costs of the appeal. The appeal concerned a comparatively small sum and was not unduly complicated—I would not therefore certify for two counsels. The costs of the issue still to be tried in the court below, the necessity for which is occasioned by the failure of the respondent as plaintiff to lead the necessary evidence at the trial, should be paid by the respondent in any event.

Forbes V-P: I agree and have nothing to add. An order will be made in the terms suggested by the learned Justice of Appeal.

Windham JA: I also agree.

Appeal dismissed. Case remitted to trial judge for assessment of damages.

For the appellant:

JS Rumbold (Crown Counsel, Kenya)

The Attorney-General, Kenya

For the respondent:

EP Nowrojee and DJ Ganatra

Bali-Sharma & Co, Nairobi